

ORGANIZED CRIME OUTLAWS:  
AN EVALUATION OF CRIMINAL ORGANIZATION LEGISLATION IN  
CANADA

by

Carol Leanne Fleischhaker

Submitted in partial fulfilment of the requirements  
for the degree of Doctor in the Science of Law

at

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DALHOUSIE UNIVERSITY

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Dated: August 1, 2012

External Examiner: \_\_\_\_\_

Research Supervisor: \_\_\_\_\_

Examining Committee: \_\_\_\_\_

\_\_\_\_\_

Departmental Representative: \_\_\_\_\_

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AUTHOR: Carol Leanne Fleischhaker

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This thesis is for my Dad...  
...who taught me how to argue.

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## ABSTRACT

This thesis explains how some organized crime outlaws, such as anti-Prohibitionists, the North American Mafia or La Cosa Nostra, outlaw motorcycle gangs, and Aboriginal street gangs, come to exist and thrive in Canadian society. It sets forth the historical development and nature of criminal organization laws in Canada, and compares the definition of “criminal organization” in the *Criminal Code* with other criminal law concepts, such as corporate criminals and white-collar criminals; conventional criminality or garden-variety predatory crime; terrorists; and criminal conspirators, parties, and accessories. It uses various concepts and assertions within criminological, sociological and psychological theories to explain the formation and perpetuation of the identity of individuals who engage in organized crime and who are members of organized crime groups. Aspects of social constructionism, social control and bond theory, differential association in the context of subcultures of violence, deviance and labelling, and social psychology theories are discussed to explain why some individuals, or some individuals who are criminals, become organized crime outlaws. Some of these reasons or explanations overlap and some complement one another. From these theoretical reasons or explanations, this thesis extracts a list of requisites that anti-organized crime measures should address in order to effectively combat organized crime. The conflicts among some of these requisites are set forth and reconciled, and the requisites are used to evaluate the present Canadian criminal organization provisions in the *Criminal Code* and to suggest non-criminal law as well as non-legal ways to effectively combat organized crime. After the application and discussion of each requisite, this thesis makes recommendations as to what anti-organized crime measures should include and how they should approach the problems posed by organized crime outlaws in this country.

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## CHAPTER ONE INTRODUCTION

### 1.1 INTRODUCTION

Alphonse “Scarface” Capone. Salvatore “Charlie Lucky” Luciano.<sup>1</sup> James Butler “Wild Bill” Hickok. Ralph Hubert “Sonny” Barger. Robin Hood. Some of these old villains have morphed into heroes. Others continue to conjure images of violence and feelings of fear. Some do both. All of these outlaws capture our attention largely due to the mystique of the activities within their underworld, and the devilish threat that they pose to societal order. This thesis delves into the past as well as the present to see how society, with its ability to shape an individual’s identity and affect his future non-criminal and criminal behaviour, creates outlaws generally, and specifically, how society creates some organized crime outlaws. It uses the results of this search to determine whether present criminal laws will effectively combat contemporary outlawry in the form of organized crime.

Various concepts and assertions within criminological, sociological and psychological theories explain the formation and perpetuation of organized crime outlaws and outlawry. This thesis does not intend to explain why *all* individuals become *criminals*, but rather, it tries to explain why some individuals, or some individuals who are criminals, become *organized crime outlaws*.<sup>2</sup> There does not exist any one or any group of causes or reasons for all organized crime outlaws. However, there are similar reasons for some organized crime outlaws, different reasons for others, and sometimes overlapping reasons. This thesis uses theoretical explanations or reasons as a means to evaluate whether organized crime legislation in Canada effectively responds to the societal states or factors that form and perpetuate organized crime identities and outlawry. In order to understand and provide an effective solution to organized crime in society, one must analyse the roots of the organized crime problem.

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<sup>1</sup> David Critchley, *The Origin of Organized Crime in America: The New York City Mafia, 1891-1931* (New York: Routledge, 2009) at 199. Luciano’s real name was Salvatore Lucania.

<sup>2</sup> This term will be defined later in this Chapter in section three “Organized Crime Outlaws: Who They Are and Who They Are Not.”

Chapter One of this thesis sets forth the historical development and nature of criminal organization laws in Canada. It reviews the definition of “criminal organization” in the *Criminal Code*,<sup>3</sup> and discusses the various provisions that directly pertain to organized crime. It defines “organized crime outlaw” and “organized crime outlaw group” for the purposes of this thesis, and distinguishes these entities from corporate criminals and white-collar criminals; conventional criminality or garden-variety predatory crime; terrorists; and criminal conspirators, parties, and accessories.

Chapter Two describes various organized crime outlaws and their outlawry. While many types of outlaws have existed and continue to exist in contemporary society, only a few remain instructive in an evaluation of criminal organization legislation – namely, those outlaws who have adopted a criminal identity; who have become members of organized crime outlaw groups; and who have perpetuated the reputation of their outlaw group. Anti-Prohibitionists, the North American Mafia or La Cosa Nostra, outlaw motorcycle gangs, and Aboriginal street gangs exemplify some of these outlaws. Each of these outlaw groups contribute to explaining the historical development of outlawry generally; the formation and maintenance of organized crime outlaw identities based on reputations for violence and intimidation; and the problems of organized crime outlawry in Canada.

Chapter Three sets forth the essential and relevant concepts of various criminological and sociological theories that explain, or contribute to an explanation for, the development and maintenance of organized crime outlaws and organized crime outlaw groups. Concepts from social constructionism, social control and bond theory, differential association or social learning within subcultures, deviance and labelling theory, and social psychology are discussed, and then applied to explain the origins and workings of Anti-Prohibitionists, the North American Mafia or La Cosa Nostra, outlaw motorcycle gangs, and Aboriginal street gangs. Some aspects of these theories are very divergent and distinct, and thus, account for many different causes of or reasons for the formation of outlaw identities. In other respects, concepts within these theories overlap and are

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<sup>3</sup> R.S.C. 1985, c. C-46 [*Criminal Code*].

compatible – particularly in relation to the creation and maintenance of identities within society, and internal cohesion within societal groups. This compatibility and divergence of these theoretical concepts reveal insights as to what anti-organized crime measures should do in order to prevent or remedy the formation of organized crime outlaw identities and organized crime outlaw groups. Essentially, these theoretical insights – thirteen in number – form a rubric for evaluating anti-organized crime legislation in Canada.

Just as some of the theories in Chapter Three overlap to some degree, so do the thirteen insights regarding outlaw identities revealed by these theories. Chapter Four synthesizes these insights into seven basic requisites for anti-organized crime measures. Then, each section of Chapter Four examines one of these requisites, and analyses whether and how criminal law measures, civil law measures, and non-law measures can be used to give effect to that requisite. In so doing, amendments to, or the repeal of, some laws in Canada are proposed in order to obtain the goals of a particular requisite. Some references to legislative provisions from other countries, such as the United States, the United Kingdom, and Italy, are made in order to critique and inform laws that target organized crime in Canada. Notably, conflict exists among some of the seven requisites for anti-organized crime measures as well as with some concepts within the *Canadian Charter of Rights and Freedoms*,<sup>4</sup> and may lead to different and incompatible conclusions as to how to address organized crime. In addition, conflict exists as to whether the nature of organized crime necessitates the employment of criminal laws that specifically target criminal organizations, or whether criminal laws that existed prior to the introduction of criminal organization provisions in the *Criminal Code* in 1997 are effective in combating organized crime. These conflicts are discussed. At the end of each section in Chapter Four, this thesis makes recommendations for anti-organized crime measures based on the examination of the requisite in that section.

Chapter Five contains conclusions. It determines whether present measures can adequately and effectively address the causes and reasons for organized crime outlaws

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<sup>4</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11.

and outlawry according to the requisites synthesized from criminological, sociological and psychological theories. It reconciles any conflicts among requisites, or if such reconciliation cannot take place, it suggests which requisite ought to have paramountcy over another. It decides whether the criminal law, as it presently exists, can and should effectively combat organized crime.

Appendix B summarizes the recommendations made in Chapter Four.

## 1.2 THE BIRTH OF CRIMINAL ORGANIZATION LEGISLATION IN CANADA

The moral panic<sup>1</sup> that arose from the ferocious biker wars primarily in Quebec in the 1990s and early 2000s<sup>2</sup> in Canada, heightened by pressures of pending federal elections, were the impetuses for the enactment of criminal organization provisions in the *Criminal Code*<sup>3</sup> in 1997 as well as subsequent amendments in 2002. From 1994 to 2002, over 150 deaths occurred as a result of turf wars among outlaw motorcycle gangs including the Hells Angels, the Rock Machine, and the Bandidos.<sup>4</sup> Moral panic stemmed from the very real presence and significant threat of violence within society as well as against innocent societal members – as exemplified by the killing of 11-year-old Daniel Desrochers in 1995 and two prison guards in 1997. On the eve of a federal election,<sup>5</sup> the Canadian

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<sup>1</sup> Stanley Cohen, *Folk Devils and Moral Panics: The Creation of the Mods and Rockers* (London: MacGibbon and Kee, 1972) [*Folk Devils and Moral Panics: The Creation of the Mods and Rockers*] at 9. Cohen defines “moral panic” in this way:

Societies appear to be subject, every now and then, to periods of moral panic. A condition, episode, person or group of persons emerges to become defined as a threat to societal values and interests; its nature is presented in a stylized and stereotypical fashion by the mass media; the moral barricades are manned by editors, bishops, politicians and other right-thinking people; socially accredited experts pronounce their diagnoses and solutions; ways of coping are evolved or (more often) resorted to; the condition then disappears, submerges or deteriorates and becomes more visible. Sometimes the object of the panic is quite novel and at other times it is something which has been in existence long enough, but suddenly appears in the limelight. Sometimes the panic passes over and is forgotten, except in folklore and collective memory; at other times it has more serious and long-lasting repercussions and might produce such changes as those in legal and social policy or even in the way the society conceives itself.

<sup>2</sup> Stephen Schneider, *Iced: The Story of Organized Crime in Canada* (Mississauga: John Wiley & Sons Canada, 2009) [*Iced: The Story of Organized Crime in Canada*] at 422; and Don Stuart, “Time to Recodify Criminal Law And Rise Above Law and Order Expediency: Lessons from the Manitoba Warriors Prosecution” (2000) 28 Man. L.J. 89 [“Time to Recodify Criminal Law And Rise Above Law and Order Expediency: Lessons from the Manitoba Warriors Prosecution”] at para. 3. Schneider asserts that between July 1994 and March 2001 in Quebec, 17 innocent victims among 157 people were killed; 167 attempted murders were committed, 16 disappearances occurred; 140 arson cases took place, and 190 bombings happened.

<sup>3</sup> R.S.C. 1985, c. C-46 [*Criminal Code*].

<sup>4</sup> U.S. Department of Justice, “Hells Angels Motorcycle Club” in National Drug Intelligence Center, *Drugs and Crime: Outlaw Motorcycle Gang Profile* (October 2002) [“Hells Angels Motorcycle Club”] at 7. Between 1994 and 2000, the Hells Angels and Rock Machine participated in numerous acts of violence against one another in Canada, and this violence continued even after the Rock Machine patched over to become part of the Bandidos in 2000.

<sup>5</sup> “Time to Recodify Criminal Law And Rise Above Law and Order Expediency: Lessons from the Manitoba Warriors Prosecution”, *supra* note 2 at para. 3. Before the federal election, the government perceived a need to respond to the Quebec Attorney-General and Quebec mayors who sought measures to address the deadly war between the Hell’s Angels and the Rock Machine.

government responded by creating “a new category of crime”<sup>6</sup> in order to target outlaw motorcycle gangs as well as other organized crime groups in Canada. Further violence, including the shooting of a journalist in 2000,<sup>7</sup> as well as the eve of another federal election, fuelled subsequent amendments to the 1997 legislation in 2002.<sup>8</sup>

With respect to the 1997 provisions, then Minister of Justice and Attorney General of Canada, Allan Rock, asserted on behalf of the government that the purposes behind the legislation were to deprive criminal organizations and their members of the proceeds of crime and their means to conduct criminal activities; to deter criminal organizations and their members from using violence to further their criminal aims; and to provide law enforcement officials with effective investigative, prosecutorial and forfeiture measures to prevent and deter the commission of criminal activity by criminal organizations and their members.<sup>9</sup> All of the new provisions were meant to be consistent with the constitutional principles and rights in the *Canadian Charter of Rights and Freedoms*.<sup>10</sup> The legislation came close to outright criminalization of membership in organized crime groups, but did not explicitly do so. It did not intend to do so.<sup>11</sup> It also did not ban certain organized crime groups. Instead, it took a circuitous and convoluted route to targeting organized crime.

The first criminal organization provisions of May 2, 1997 criminalized “participation in” or “contribution to” a criminal organization. Section 467.1(1) in 1997 stated:

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<sup>6</sup> Canada, Parliament, House of Commons, *Debates*, No. 160 (21 April 1997) [*House of Commons Debates*, April 21, 1997] at 10013 (Hon. Allan Rock).

<sup>7</sup> CBC News Online, “Canada’s Anti-Gang Law” (10 April 2006), online: CBC News <<http://www.cbc.ca/news/background/bikergangs/antiganglaw.html>>. Notably, the shooting of Montreal journalist Michel Auger occurred in 2000, and fuelled the subsequent amendments to the original 1997 criminal organization legislation in Canada.

<sup>8</sup> “Time to Recodify Criminal Law And Rise Above Law and Order Expediency: Lessons from the Manitoba Warriors Prosecution”, *supra* note 2 at paras 34-36. A Quebec minister, Serge Menard, sought new and clearer organized crime provisions that would prohibit membership in organized crime groups, such as outlaw motorcycle gangs the Hells Angels and the Rock Machine, and he advocated the use of the notwithstanding clause to override the freedom of association in the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 [*Charter*].

<sup>9</sup> *House of Commons Debates*, April 21, 1997, *supra* note 6 at 10013 and 10014 (Hon. Allan Rock); and *R. v. Beauchamp* (2009), 68 C.R. (6<sup>th</sup>) 293, [2009] O.J. No. 3006 (Q.L.) (Ont. S.C.J.) [*R. v. Beauchamp*] at para. 13.

<sup>10</sup> *R. v. Beauchamp*, *supra* note 9 at para. 13.

<sup>11</sup> *House of Commons Debates*, April 21, 1997, *supra* note 6 at 10013 (Hon. Allan Rock).

Every one who:

- a) participates in or substantially contributes to the activities of a criminal organization knowing that any or all of the members of the organization engage in or have, within the preceding five years, engaged in the commission of a series of indictable offences under this or any other Act of Parliament for each of which the maximum punishment is imprisonment of five years or more, and
- b) is a party to the commission of an indictable offence for the benefit of, at the direction of or in association with the criminal organization for which the maximum punishment is imprisonment of five years or more is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.<sup>12</sup>

The wording of these provisions amounts to proscription of being in a criminal organization,<sup>13</sup> or at the very least, come close to proscription, since any person who is a member of a criminal organization would most likely, if not be obliged to, participate in or contribute to that organization. Proscription would have simplified the means to effect the aims of Parliament. Instead, proof of participation or contribution required prosecutors to additionally prove the accused's knowledge of members' criminal history.

Further, the provisions set forth this broad, convoluted, and complex definition of organized crime, and cast a social control net too widely – that is to say, the provisions captured more groups than were likely intended. They empowered law enforcement against organized crime by increasing powers of search through the interception of private communications;<sup>14</sup> expanding preventative judicial restraint measures by allowing courts to impose recognizances for individuals who may commit a criminal organization offence;<sup>15</sup> criminalizing activities in connection with organized crime;<sup>16</sup> bolstering

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<sup>12</sup> *Criminal Code*, *supra* note 3 at s. 467.1 as it existed in 1997.

<sup>13</sup> "Time to Recodify Criminal Law And Rise Above Law and Order Expediency: Lessons from the Manitoba Warriors Prosecution", *supra* note 2 at para. 15.

<sup>14</sup> *Criminal Code*, *supra* note 3 at ss. 185(1.1), 186(1.1) and 196. Pursuant to sections 185(1.1) and 186(1.1), applications for judicial authorization need not demonstrate investigative necessity; and pursuant to section 196, an authorizing judge may extend the time that that the Attorney General or Minister for Public Safety and Emergency Preparedness must give notice to the persons intercepted pursuant to an authorization made in relation to criminal organization investigations, to a period not exceeding three years rather than the usual 90 days.

<sup>15</sup> *Ibid.* at s. 810.01(1)-(3) and (4). Section 810.01 of the Canadian *Criminal Code* allows a provincial court judge to impose a peace bond or recognizance on an individual for a 12-month period if there are reasonable grounds to fear that the person will commit a criminal organization offence. Section 2 of the *Criminal Code* defines "criminal organization offence":

"criminal organization offence" means

proceeds of crime legislation in relation to organized crime;<sup>17</sup> creating a reverse onus in relation to bail hearings for individuals accused of criminal organization offences;<sup>18</sup> and augmenting sentencing laws.<sup>19</sup> However, they left to triers of fact – either judge alone or juries – the task of determining for each and every prosecution (even of the same organized crime group) whether a group constitutes a criminal organization.

Amendments to the 1997 criminal organization legislation came into force on January 7, 2002. Again, the Canadian government did not criminalize membership in a criminal organization<sup>20</sup> or proscribe criminal organization groups in order to avoid possible infringements of rights within the *Charter*, such as freedom of association in section 2(d).<sup>21</sup> Instead, the legislation responded to concerns expressed by police and prosecutors that the definition of “criminal organization” was “too complex and too narrow in scope” in spite of the fact that the definition had already been successfully applied in Quebec against members of the Hells Angels and Rock Machine.<sup>22</sup> The government sought to create a “more flexible definition” in section 467.1, and to create three clear offences<sup>23</sup> of participation in or facilitation of activities of a criminal organization in section 467.11; commission of an offence for a criminal organization in

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- (a) an offence under section 467.11, 467.12 or 467.13, or a serious offence committed for the benefit of, at the direction of, or in association with, a criminal organization, or
  - (b) a conspiracy or an attempt to commit, being an accessory after the fact in relation to, or any counselling in relation to, an offence referred to in paragraph (a); ....

<sup>16</sup> *Ibid.* at ss. 82(2). The government increased penalties for some activities that were thought to be conducted by organized crime groups, such as the possession of explosive substances. If done in connection with a criminal organization, an offender would receive a greater sentence of imprisonment.

<sup>17</sup> *Ibid.* at s. 462.37.

<sup>18</sup> *Ibid.* at ss. 515(6)(a)(ii).

<sup>19</sup> *Ibid.* at ss. 467.14 and 82(2). Pursuant to section 467.14, sentences for offences committed under sections 467.11, 467.12 and 467.13 must be served consecutively to any other sentence, even a sentence imposed in relation to the same event or series of events for which the offender is convicted. Pursuant to section 82(2), the liability to imprisonment for possession of explosive substances from five years to 14 years if possession is in connection with a criminal organization.

<sup>20</sup> *R. v. Beauchamp*, *supra* note 9 at para. 64.

<sup>21</sup> *Charter*, *supra* note 8 at s. 2(d). Section 2(d) states:

2. Everyone has the following fundamental freedoms:

...

(d) freedom of association.

<sup>22</sup> “Time to Recodify Criminal Law And Rise Above Law and Order Expediency: Lessons from the Manitoba Warriors Prosecution”, *supra* note 2 at para. 38. Stuart refers to *R. v. Leclerc*, [2001] R.J.Q. 747, [2001] Q.J. No. 426 (Q.L.) (Que. Ct. (Crim. and Pen. Div.)) in which four accused, three of whom were members of the Rock Machine outlaw motorcycle gang *ibid.* at para. 284, were convicted of criminal organization charges. One accused, *ibid.* at para. 167, had no status but was so convicted.

<sup>23</sup> *R. v. Beauchamp*, *supra* note 9 at para. 21.

section 467.12; and instructing the commission of an offence for a criminal organization in section 467.13:

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.

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

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 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.

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.

(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.

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
- (c) the accused knew the identity of all of the persons who constitute the criminal organization.<sup>24</sup>

At the time of the 2002 amendments, proscription did exist (and still does exist) within the *Criminal Code* in the anti-terrorism provisions to the extent that those provisions list “terrorist groups.”<sup>25</sup> They also created an offence for the participation in or contribution to any activity of a terrorist group that enhances its ability to carry out an activity.<sup>26</sup> Canada did not criminalize actual membership in terrorist groups due to the rights to

<sup>24</sup> *Criminal Code*, *supra* note 3 at ss. 467.1, 467.11, 467.12 and 467.13.

<sup>25</sup> *Ibid.* at ss. 83.01 and 83.05; and *Order Recommending that Each Entity Listed as of July 23, 2004, in the Regulations Establishing a List of Entities Remain a Listed Entity*, S.I./2004-155, schedule (*Criminal Code*). The schedule to this Regulation lists the entities declared to be terrorist organizations. Section 83.01 of the *Criminal Code* defines “terrorist group” as follows:

“terrorist group” means

- (a) an entity that has as one of its purposes or activities facilitating or carrying out any terrorist activity, or
- (b) a listed entity,

and includes an association of such entities.

<sup>26</sup> *Ibid.* at s. 83.18. *Ibid.* at sections 83.05 and 83.07, on the recommendation of the Minister of Public Safety and Emergency Preparedness, the Governor in Council in Canada lists terrorist organizations if the group “has knowingly carried out, attempted to carry out, or participated in or facilitated a terrorist activity”, or act on behalf of or in association with such a group. The Minister must review the validity of the list of terrorist organizations every two years.

freedom of expression in section 2(b)<sup>27</sup> and freedom of association in section 2(d)<sup>28</sup> of the *Charter*.<sup>29</sup> However, in spite of the use of proscription for other groups posing threats to the safety of the public and societal order, the Canadian government has not proscribed specific or particular organized crime groups as criminal organizations.

Since the proclamation of the first legislative provisions regarding criminal organizations, other amendments to the *Criminal Code* and related statutes have taken place to increase the power of the state in the war against organized crime. For instance, amendments have deemed a murder to be in the first degree regardless of whether it was planned and deliberate, if the killing was done in connection with a criminal organization, or if it was done while committing or attempting to commit an indictable offence in connection with a criminal organization.<sup>30</sup> In addition, the government has criminalized drive-by shootings, and has proscribed an aggravated sentence for such shootings when they are done in connection with a criminal organization.<sup>31</sup> And, the definition of “serious offence” was expanded in relation to defining what constitutes a criminal organization pursuant to section 467.1 so as to include activities usually associated with organized crime, such as prostitution and gaming.<sup>32</sup> Also, the length of judicial preventative restraints, that is to say recognizances for individuals convicted of a criminal organization offence, terrorism offence or offence involving the intimidation of a criminal justice participant or journalist, has been increased from one year to up to two years.<sup>33</sup> Further,

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<sup>27</sup> *Charter*, *supra* note 10 at s. 2(b). Section 2(b) states:

2. Everyone has the following fundamental freedoms:

...

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; ....

<sup>28</sup> *Ibid.* at s. 2(d). Section 2(d) is set forth *supra* note 21.

<sup>29</sup> Kent Roach, “A Comparison of Australian and Canadian Anti-terrorism Laws” (2007) 30 U.N.S.W. L. J. 53 at 63.

<sup>30</sup> *Criminal Code*, *supra* note 3 at s. 231.

<sup>31</sup> *Ibid.* at s. 244.2.

<sup>32</sup> *Regulations Prescribing Certain Offences to be Serious Offences*, S.O.R./2010-161 July 13, 2010, s. 1, online: Canada Gazette <<http://canadagazette.gc.ca/rp-pr/p2/2010/2010-08-04/html/sor-dors161-eng.html>>. “Serious offence” under section 467.1 will now include:

- (a) keeping a common gaming or betting house (subsection 201(1) and paragraph 201(2)(b));
- (b) betting, pool-selling and book-making (section 202);
- (c) committing offences in relation to lotteries and games of chance (section 206);
- (d) keeping a common bawdy-house (subsection 210(1) and paragraph 210(2)(c)).

<sup>33</sup> *Criminal Code*, *supra* note 3 at s. 810.01(3.1).

in 1999 parole review periods were limited for organized crime offenders.<sup>34</sup> In 2005, the burden of proof connected with forfeiture applications regarding proceeds of crime was reversed and imposed on an individual convicted of a criminal organization offence.<sup>35</sup>

The response of the Canadian government to organized crime, namely, the creation of new and unique criminal organization legislation, demonstrates a resort to the use of laws to combat a social problem. The 1997 legislation sought to "...help the police achieve their goal, which is to stop criminals."<sup>36</sup> While the government advocated a "coordinated response",<sup>37</sup> it meant coordination in the provision of resources for implementation of the laws, rather than coordination of social, political, economic and legal provisions. Then Minister of Justice and Attorney General of Canada, Allan Rock stated:

Of course, improving the legislation is only one weapon in the arsenal that we must deploy to fight violence associated with criminal organizations and organized crime. All the provinces have a major role to play, since the Constitution provides that the administration of justice comes under their jurisdiction. The provinces must allocate adequate resources, so that police officers can do their job, and so that, when people are arrested, they are prosecuted by specialized crown prosecutors expressly mandated for that purpose.

At the federal level, there is a need to co-ordinate the fight led by police forces across the country. Organized crime is a national concern which requires national measures. That is why the solicitor general agreed to table in Parliament an annual progress report on the fight against organized crime, and on the situation across the country. The solicitor general also announced that he will set up a national committee and five regional co-ordination committees to address police concerns regarding the need to co-ordinate measures to enforce the act.<sup>38</sup>

The government reacted to the social problem of violence from organized crime groups. It did not evaluate the pre-existing arsenal of civil and criminal laws that might combat

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<sup>34</sup> Dominique Valiquet, "Bill C-14: An Act to Amend the Criminal Code (Organized Crime and Protection of Justice System Participants)" (16 March 2009), online: Parliament of Canada <[http://www2.parl.gc.ca/Sites/LOP/LegislativeSummaries/Bills\\_ls.asp?lang=E&ls=c14&source=library\\_prb&Parl=40&Ses=2#c95](http://www2.parl.gc.ca/Sites/LOP/LegislativeSummaries/Bills_ls.asp?lang=E&ls=c14&source=library_prb&Parl=40&Ses=2#c95)> ["Bill C-14: An Act to Amend the Criminal Code (Organized Crime and Protection of Justice System Participants)"]. Amendments in 1999 to the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 at s. 125, prevented inmates convicted of organized crime offences from having access to accelerated parole review which some offenders may seek after service of one-sixth of their sentence.

<sup>35</sup> "Bill C-14: An Act to Amend the Criminal Code (Organized Crime and Protection of Justice System Participants)", *supra* note 34.

<sup>36</sup> *House of Commons Debates*, April 21, 1997, *supra* note 6 at 10013 (Hon. Allan Rock).

<sup>37</sup> *Ibid.* at 10014 (Hon. Allan Rock).

<sup>38</sup> *House of Commons Debates*, April 21, 1997, *supra* note 6 at 10014 (Hon. Allan Rock).

organized crime. It did not emphasize a proactive response to organized crime groups by analysing the reasons for the formation and perpetuation of organized crime outlaws. It did not aim to increase community resources to bolster pro-social controls at a grassroots level. The reactive response of the Canadian government to organized crime placed much stock in the ability of the criminal law to remedy the problem of organized crime in society – perhaps too much so.

### 1.3 ORGANIZED CRIME OUTLAWS: WHO THEY ARE AND WHO THEY ARE NOT

#### 1.3.1 Organized Crime Outlaws and Organized Crime Outlaw Groups

Outlawry has manifested itself in a variety of ways. However, common attributes or characteristics exist among outlaws. In order to analyse criminal organization legislation, this thesis must analyse what constitutes organized crime or criminal organizations. Organized crime or criminal organizations do not amount to simply another type of *criminal act* as defined in the *Criminal Code*. Rather, organized crime criminals are outlaws in society. Criminal organizations transcend ordinary criminals and ordinary crime. Their uniqueness stems from *who they are*, rather than *what* they do. “*Who they are*” also makes them unique because their identity plays a role in *how* they commit crime.

Outlaws adopt or become assigned an identity of otherness within conventional society, and their internalization of this identity leads them to reside outside society – that is to say, outside societal norms and laws. Not every individual who stands in contrast to conventional societal norms and laws is an outlaw, however. More is required, such as adopting an identity, posing a challenge to societal order, and using a reputation for violence and intimidation to effect one’s ends.

Helen Phillips, in a non-legal analysis, characterizes outlaws in relation to the political threat they pose to social order.<sup>1</sup> Indeed, Eric Hobsbawm suggests that the phenomenon of “banditry” (which this thesis asserts is synonymous with “outlawry”) cannot exist in

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<sup>1</sup> Helen Phillips, “Scott and the Outlaws” in Helen Phillips, ed., *Bandit Territories: British Outlaw Traditions* (Cardiff: University of Wales, 2008) at 120-21. *Ibid.* at 121, Phillips uses an analysis of the characters of Sir Walter Scott to illustrate the historical understanding or portrayal of the nature of outlaws. She asserts that Scott always depicted his outlaws within a state of political unrest:

... Whatever his historical setting, Scott’s outlaw reflects political anxieties threatening early nineteenth century political security: radicalism and popular unrest. Any identification with this political ‘Other’ of Scott’s own world is complex and he often approaches the outlaw through a strange double perspective, presenting him as a play-actor or character in traditional minstrelsy – thus denuded of political substance – yet also as a serious threat of political violence.

the absence of socio-economic and political orders whose powers, laws and resources can be challenged.

On mountain and in forest bands of men outside the range of law and authority (traditionally females are rare), violent and armed, impose their will by extortion, robbery or otherwise on their victims. *In doing so, banditry simultaneously challenges the economic, social and political order by challenging those who hold or lay claim to power, law and the control of resources.* That is the historic significance of banditry in societies with class divisions and states. 'Social banditry', ... is an aspect of this challenge.

*Banditry as a specific phenomenon cannot therefore exist outside socio-economic and political orders which can be so challenged.* For instance – and this, as we shall see, is important – in stateless societies where 'law' takes the form of blood-feud (or negotiated settlement between the kin of offenders and the kin of victims), those who kill are not outlaws but, as it were, belligerents. *They only become outlaws, and punishable as such, where they are judged by a criterion of public law and order which is not theirs.* [Emphasis added].<sup>2</sup>

To some degree or another, implicitly or explicitly, outlaws challenge the economic, social, political, or legal order of a government or societal rulers.

Not all outlaws are *organized crime outlaws*. Organized crime is not synonymous with outlawry, but rather, it is a subset of outlawry. Organized crime outlaws or criminal organization outlaws in this thesis are those outlaws who engage in acts which fall within the *Criminal Code* definition of "criminal organization"<sup>3</sup> in Canada. In a number of ways, and for many reasons, they become members of an organized group of individuals whose purpose is to commit crime, and they internalize their identity as part of this group. Organized crime outlaws challenge societal order by adopting norms and values within a criminal subculture of violence, and consistently engaging in criminal acts that

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<sup>2</sup> Eric J. Hobsbawm, *Bandits* (London: Weidenfeld & Nicholson, 2000) at 7-8.

<sup>3</sup> *Criminal Code*, R.S.C. 1985, c. C-46 [*Criminal Code*] at s. 467.1. Section 467.1 states:

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.

counter the efforts of the state to maintain social control and obedience to the law. Unlike some other outlaws, they do not employ political or religious ideologies to directly challenge state authority, and they do not simply commit certain types of crimes or subsist by committing crimes. Their challenge to the state may sometimes be subtle and implicit, but manifests itself not only by the participation in ongoing criminal activity, but by using the power of the outlaw group's reputation to commit crime, and in so doing, perpetuating the power of the group.

The definition of "criminal organization" in the *Criminal Code* may capture not only organized crime outlaws, but also groups who commit crime for profit and who are organized to do so. However, organized crime outlaws have attributes or characteristics that this "profit-making" definition fails to capture. In addition, they have attributes or characteristics that are not captured by pre-existing criminal categories, such as conspiracies, parties and accessories. They are groups of individuals who not only commit organized crimes, but who also identify with one another as a group, and who use and perpetuate their group reputation in effecting their criminal purposes.

Indeed, Margaret Beare notes the presence of a reputation to intimidate for some "criminal enterprises":

For some criminal enterprises, the main benefit is the ability to intimidate. In those criminal operations that require the "organizing" of hundreds of employers (as in the case of criminal-controlled corrupt unions), effective control is maintained through the ability to make "credible threats of continuing violence" against competitors or resisters (Reuter 1987, 182). To some extent this is a "reputational" capacity. However, there must be the potential capacity (tested in reality or rumour) to inflict violence or economic destruction upon an individual opponent. ...<sup>4</sup>

Beare seems to suggest that *some* "criminal enterprises" do *not* use their reputation to intimidate. However, in this thesis, organized crime outlaws, and members of criminal

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<sup>4</sup> Margaret A. Beare, *Criminal Conspiracies: Organized Crime in Canada* (Toronto: Nelson, 1998) [*Criminal Conspiracies: Organized Crime in Canada*] at 43. This benefit remains very significant to the definition of "criminal organization" in the *Criminal Code* which requires a criminal organization to receive a "material benefit" from the alleged criminal activity. This aspect of the definition will be discussed section ".....". Beare cites Peter Reuter, "Methodological and Institutional Problems in Organized Crime Research" in Herbert Edelhertz, ed., *Major Issues in Organized Crime Control* (National Institute of Justice Symposium Proceedings, 25-26 September 1987).

organizations as defined in the *Criminal Code*, do indeed adopt and use a reputation for violence and intimidation.

The adoption and use of such a reputation has been crucial to proving connections of predicate offences to criminal organizations in organized crime prosecutions, as exemplified in *R. v. Lindsay*<sup>5</sup> where the Hells Angels name and insignia proved that the extortion of a victim was committed in association with the Hells Angels criminal organization. The Honourable Madam Justice Michelle Fuerst asserted the significance of this connection:

**1085** 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.

...

**1088** Both Mr. Lindsay and Mr. Bonner were full members of the HAMC at the time. ... 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 committed extortion with the intent to do so in association with a criminal organization, the HAMC to which they belonged.<sup>6</sup>

While the significance of identity and reputation has been demonstrated in prosecutions dealing with outlaw motorcycle gangs, other organized crime outlaws that presently exist in Canada, such as La Cosa Nostra and Aboriginal street gangs, also have great internal cohesion within their groups and rely on the power of their reputations to effect their ends. Thus, the significance of group identity, and the use and perpetuation of a powerful reputation, remain important in understanding who or what is an organized

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<sup>5</sup> *R. v. Lindsay*, 2005 CanLII 24240, [2005] O.J. No. 2870 (Q.L.) (Ont. S.C.J.) [*R. v. Lindsay* trial decision].

<sup>6</sup> *Ibid.* at paras. 1085 and 1088.

crime outlaw, who and what anti-organized crime measures should target, and how they should target them.

Many different configurations of organized crime groups and operations exist due to the variance in historical, economic, social and political circumstances in which they form.<sup>7</sup> Further, motivations for participation in organized crime activity vary among organized crime members.<sup>8</sup> Such motivations are important to consider because they illuminate the reasons that individuals participate in organized crime acts, and thus, reveal the kinds of responses required to deal with it.<sup>9</sup> For these reasons, applying one legal definition to all organized crime outlaws, and unveiling evidence to prove the legal attributes or characteristics of such groups and their operations, remains problematic. However, the presence of identity and use of a powerful reputation set criminal organizations apart from other criminals and other criminal law concepts, and thus, remain important in determining whether the laws pertaining to criminal organizations will effectively combat organized crime outlawry.

In keeping with the attributes that characterize outlaws generally, and the distinctions between organized crime outlaws and other individuals or groups that commit crime, this thesis defines “organized crime outlaw”, and “organized crime outlaw group” or “criminal organization outlaw group” as follows:

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<sup>7</sup> *Criminal Conspiracies: Organized Crime in Canada*, *supra* note 4 at 15.

<sup>8</sup> E.J. Dickson-Gilmore & Chris Whitehead, “Aboriginal Organized Crime in Canada: Developing a Typology for Understanding and Strategizing Responses” (2002) 7 *Trends in Organized Crime* 3 [“Aboriginal Organized Crime in Canada: Developing a Typology for Understanding and Strategizing Responses”] at 7.

<sup>9</sup> *Ibid.* at 7. For instance, Dickson-Gilmore and Whitehead assert that much, if not all, of “Aboriginal organized crime” stems from political activism and nationalism as a conscious and unconscious response to societal oppression both historically and contemporarily. They state, *ibid.* at 8-9, that not all organized crime activities are motivated by profit as suggested by Beare in *Criminal Conspiracies: Organized Crime in Canada*, *supra* note 4 at 74. Rather, they assert, *ibid.* at 17, that profit is a rare motive. However, in Catherine Bainbridge, Katherine Cisek & CBC Newsworld, *Indian Posse: Life in Aboriginal Gang Territory* VHS (Montreal: Wild Heart Productions Inc., 1998), one youth who was tempted to join and targeted by the Indian Posse in the north end of Winnipeg asserts that money is indeed attractive. *Ibid.* at 12:49, the unemployment rate for Natives is three times higher than for non-Natives, and when asked how the gang makes money, Indian Posse member Trevor Lacasse laughs and replies, “How does anybody make money that doesn’t have a job? Drug trade....” *Ibid.* at 03:10 and 07:23, the Posse engages in prostitution and drug trades and that attracts youth. As will be discussed in later sections of this thesis dealing with theoretical explanations for the formation of outlaw identities, social factors alone, or combined with economic factors, also play significant roles.

An *organized crime outlaw* is an individual whose consensual association with an organized crime group and participation in anti-social learning of the norms and values of that group, has led to his and her adoption or internalization of the norms and values of that group to such a degree that the individual identifies with that organized crime group more than or rather than identifying with law-abiding conventional members of society. Once this individual so identifies with the organized crime group, (s)he reinforces this identity, and thus, simultaneously perpetuates and reinforces the identity of the group, by using or displaying this identity in a manner that accords with the values and norms of the group during the commission of criminal activities generally, and organized crime activities specifically.

An *organized crime outlaw group* is a group comprised of a number of individuals who have adopted or internalized the collective norms and values of the group, which norms and values include the commission of crime and the use of violence or intimidation during the commission of some of these crimes; and who use the power of this group identity (that is to say, the power of its reputation) in order to gain some personal or group benefit or advantage whether this benefit or advantage be economic, social, political, or (il)legal. The use of the power of this group identity or reputation may include committing criminal acts, or acts of violence or intimidation, with the group; or it may include committing criminal acts, or acts of violence or intimidation while displaying the group insignia or referring to the group in some way.

The identity component within these definitions of *organized crime outlaws* and *organized crime outlaw groups* distinguishes them from other types of criminals and from other ways that criminals commit criminal acts. Whether a well-organized international group has existed for decades or a small gang of young adults who have only recently banded together, organized crime outlaws have common traits and they remain distinct from other legal concepts or definitions of criminals. The following sections will compare *organized crime outlaws* and *organized crime outlaw groups*, with other types of criminals and other ways that criminals commit crime, such as corporate criminals or white-collar criminals, conventional criminality or garden-variety predatory criminals, terrorists, and criminal conspirators, parties and accessories to crime.

### 1.3.2 Corporate Criminals and White-Collar Criminals

The concept of corporate crime is often entangled with the concept of white-collar crime, and with the concept of socioeconomic class.<sup>10</sup> However, contemporary definitions of corporate crime do not include class distinctions.<sup>11</sup> The term white-collar crime seeks to distinguish monetary criminal offences from ordinary crimes; it is crime that is not “ordinarily associated with criminality.”<sup>12</sup> Corporate crime is a subset of white-collar crime,<sup>13</sup> and embodies criminal conduct that is subject to punitive sanction, rather than conduct that may result in non-punitive civil liabilities and damages. This thesis adopts the definition of corporate crime as espoused by John Braithwaite, which definition accords with Canadian laws regarding corporate responsibility and liability:

...[C]orporate crime is defined here as conduct of a corporation, or employees acting *on behalf of* a corporation, which is proscribed and punishable by law. The conduct could be punishable by imprisonment, probation, fine, revocation of licence, community service order, internal discipline order or other court-imposed penalties....<sup>14</sup> [Emphasis added].

Corporate crime is committed for organizational ends rather than individual benefits,<sup>15</sup> and the corporation via individuals who have authority to act on behalf of the corporation, may be criminally liable for offences committed in violation of the Canadian *Criminal Code*.<sup>16</sup>

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<sup>10</sup> Edwin H. Sutherland, “Crime of Corporations – 1947”, in Albert Cohen, Alfred Lindesmith & Karl Schuessler, eds., *The Sutherland Papers* (Bloomington: Indiana University Press, 1956) at 79. Edwin H. Sutherland developed the concept of white-collar crime, and defined a white-collar criminal as “...a person in the upper socioeconomic class who violates the laws designed to regulate his occupation.”

<sup>11</sup> Marshall B. Clinard, Peter C. Yeager & Ruth Blackburn Clinard, *Corporate Crime* (New York: Free Press, 1980) [*Corporate Crime*] at 18. Based on their research, David Weisburd, Stanton Wheeler, Elin Waring & Nancy Bode in *Crimes of the Middle Classes: White-Collar Offenders in the Federal Courts* (New Haven: Yale University Press, 1991) at 73, conclude that while some of the offenders in their studies “fit the image of respectability and high social status” that characterizes white-collar criminals, most offenders appeared to represent the “very broad middle of the society.”

<sup>12</sup> *Corporate Crime*, *supra* note 11 at 17.

<sup>13</sup> *Ibid.*; and Sally S. Simpson, *Corporate Crime, Law, and Social Control* (New York: Cambridge University Press, 2002) [*Corporate Crime, Law, and Social Control*] at 6.

<sup>14</sup> John Braithwaite, *Corporate Crime in the Pharmaceutical Industry* (London: Routledge & Kegan Paul, 1984) at 6. In a similar but more general vein, James Gobert and Maurice Punch in *Rethinking Corporate Crime* (Markham: LexisNexis Butterworths, 2003) at 11 define “corporate crime” as “...criminal offences which are committed by companies and other for-profit organizations and are punishable by the State.”

<sup>15</sup> *Corporate Crime, Law, and Social Control*, *supra* note 13 at 7.

<sup>16</sup> The concept of “directing mind” was set forth in *R. v. Canadian Dredge & Dock Co.*, [1985] 1 S.C.R. 662, S.C.J. No. 28 (Q.L.) at para. 29 and 43. The Court states at paragraph 29:

29 In summary, therefore, the courts in this country can be said to this date to have declined generally to apply the principle of respondeat superior in the determination of corporate criminal

Although some organized crime outlaws are members of groups or criminal organizations that have been incorporated, such as some outlaw motorcycle gang corporations,<sup>17</sup> not many organized crime outlaws are corporations. Further, even if the name of a criminal organization has corporate status, not all organized crime outlaw incorporations engage in corporate crime. In addition, the members of the outlaw group – whether incorporated or unincorporated – do not always act *on behalf of* the organization, so much as they may act in connection with the organization, or use the name of the organization to effect their criminal purposes. While some criminal acts by members may be “*at the direction*” of the criminal organization,<sup>18</sup> not all such acts will

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responsibility. Criminal responsibility in our courts thus far has been achieved in the mens rea offences by the attribution to the corporation of the acts of its employees and agents on the more limited basis of the doctrine of the directing mind or identification. Corporate responsibility in both strict and absolute liability offences has been found to arise on the direct imposition of a primary duty in the corporation in the statute in question, as construed by the court. ...

Subsequently, amendments to the *Criminal Code*, *supra* note 3, proscribed corporate responsibility in sections 22.1 and 22.2:

22.1 In respect of an offence that requires the prosecution to prove negligence, an organization is a party to the offence if

(a) acting within the scope of their authority

(i) one of its representatives is a party to the offence, or

(ii) two or more of its representatives engage in conduct, whether by act or omission,

such that, if it had been the conduct of only one representative, that representative would have been a party to the offence; and

(b) the senior officer who is responsible for the aspect of the organization's activities that is relevant to the offence departs - or the senior officers, collectively, depart - markedly from the standard of care that, in the circumstances, could reasonably be expected to prevent a representative of the organization from being a party to the offence.

22.2 In respect of an offence that requires the prosecution to prove fault - other than negligence - an organization is a party to the offence if, with the intent at least in part to benefit the organization, one of its senior officers

(a) acting within the scope of their authority, is a party to the offence;

(b) having the mental state required to be a party to the offence and acting within the scope of their authority, directs the work of other representatives of the organization so that they do the act or make the omission specified in the offence; or

(c) knowing that a representative of the organization is or is about to be a party to the offence,

does not take all reasonable measures to stop them from being a party to the offence.

<sup>17</sup> Examples of outlaw motorcycle gang incorporation include the Hells Angels Motorcycle Corporation and the Mongol Nation Motorcycle Club, Inc.

<sup>18</sup> Section 467.12 of the *Criminal Code*, *supra* note 3, allows the prosecution to prove connection of a predicate offence to a criminal organization in three ways:

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.

be “*at the direction*” of the organization. Criminal acts by members may simply be “*in association with*” or “*for the benefit of*” the criminal organization.<sup>19</sup>

Another significant difference between organized crime outlaws and corporate criminals or white-collar criminals is that organized crime outlaws identify with a group. That group may or may not be a corporation. That the organized crime outlaw group is a business or is incorporated is not a necessary component of the definition. In contrast, corporate criminals or white-collar criminals do not necessarily identify with their corporation and internalize it as a part of their identity. And, unlike organized crime outlaws, corporate criminals or white-collar criminals may follow most conventional values and norms of society except for engaging in some crime via the corporation. They may not see themselves as outlaws or individuals who do not subscribe to conventional values and norms.

This comparison demonstrates that *organized crime outlaws* do not fall squarely, and do not fall wholly, within the definition of corporate criminals nor white-collar criminals. While some organized crime outlaws may commit corporate crimes, and some may amount to white-collar criminals, not all such outlaws do. Further, corporate crime or white-collar crime does not only include organized crime outlawry, and does not include all organized crime outlawry. These differences in the essence of organized crime outlaws and corporate or white-collar criminals mean that legislation aimed at corporate or white-collar crime will not adequately capture organized crime outlaw acts.

### 1.3.3 Conventional Criminality or Garden-Variety Predatory Criminals

Conventional criminality<sup>20</sup> or garden-variety predatory crime<sup>21</sup> generally includes acts that the public has commonly or traditionally thought of as being crime. While some

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(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. [Emphasis added].

<sup>19</sup> *Ibid.*

<sup>20</sup> Howard Abadinsky, *Organized Crime*, 8<sup>th</sup> ed. (Belmont: Thomson Wadsworth, 2007) at 54.

law-abiding citizens may engage in conventional or garden-variety crimes, the predatory nature of such crime distinguishes such law-abiding citizens from conventional or garden-variety criminals<sup>22</sup> who “live by plundering others”:<sup>23</sup>

...Predators, according to the dictionary, live by plundering others. The term *garden variety* draws attention to the fact that the majority of citizens have their most frequent and most direct experiences with relatively crude larcenies, burglaries, robberies, automobile thefts, and other predatory acts. Although many citizens are actually victimized in subtle but more serious and costly ways by white-collar crime, fraud, and borderline criminal acts in the marketplace, their recognizable experiences are most frequently with garden-variety predatory crimes.

...  
In the imagery carried about in the heads of many laypersons, garden-variety predatory crimes are attributed to “criminals,” who are members of “the dangerous classes,” as opposed to law-abiding citizens.<sup>24</sup> [Emphasis original].

In spite of this imagery, predatory crimes are committed largely by amateur criminals who reside in the same areas as law-abiding citizens, and “...who are relatively uncommitted to lawbreaking or procrime sentiments....”<sup>25</sup> This latter characteristic of garden-variety predatory or conventional criminals distinguishes them from organized crime outlaws who become committed to “lawbreaking and procrime sentiments”; join groups that possess similar entrenched values and corresponding normative behaviour; come to identify themselves with the such groups; and perpetuate the identity of such groups. The internalization or adoption of a group identity by an individual, and the power that that group bestows on that individual is what sets organized crime outlaws and organized crime outlaw groups apart from convention or garden-variety criminals and even “predators.” The identity and power of the organized crime group takes the ordinary criminal to a different realm because that organized crime group requires members to behave a certain way and uphold the reputation of the group.

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<sup>21</sup> Don C. Gibbons, *Society, Crime, and Criminal Behavior*, 6<sup>th</sup> ed. (Englewood Cliffs: Prentice Hall, 1992) at 229.

<sup>22</sup> *Ibid.* at 248.

<sup>23</sup> *Ibid.* at 229. [Emphasis added].

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.*

#### 1.3.4 Terrorists

Like outlawry, terrorism has existed for centuries, if not millennia,<sup>26</sup> and is part of society. Terrorism also epitomizes what a society or nation is not or does not strive to be, and it reinforces internal cohesion of that society or nation. Terrorists may indeed fall within a broad category of “outlaws”, since the concept of “otherness” exists within the terrorist label, and since terrorism employs violence to cause fear or terror<sup>27</sup> to effect its purpose. Further, terrorists may internalize the values and norms of an unconventional or sub-cultural group, and commit acts that simultaneously perpetuate and reinforce the identity of the group. Some terrorist groups may even fall within the definition of organized crime outlaw groups in that a terrorist group may be comprised of “a number of individuals who have adopted or internalized the collective norms and values of the group, which norms and values include the commission of crime and the use of violence or intimidation during the commission of some of these crimes; and who use the power of this group identity (that is to say, the power of its reputation) in order to gain some personal or group benefit or advantage whether this benefit or advantage be economic, social, political, or (il)legal.”

Some terrorist acts indeed amount to organized crime, as declared in the *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001* or *USA Patriot Act*.<sup>28</sup> And, some terrorists may have associations with or be funded by organized crime groups. However, terrorism does not include all acts or endeavours of organized crime.<sup>29</sup>

Terrorism presents a violent challenge to the beliefs, values and norms of one nation or group which in turn denounces the “otherness” of the terrorist. Terrorism, by its general

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<sup>26</sup> Robert A. Friedlander, *Terror-Violence: Aspects of Social Control* (New York: Oceana Inc., 1983) [*Terror-Violence: Aspects of Social Control*] at 7-8; and Ikechi Mgbeoji, “The Bearded Bandit, the Outlaw Cop, and the Naked Emperor: Towards a North-south (De)construction of the Texts and Contexts of International Law’s (Dis)engagement with Terrorism” (2005) 43 *Osgoode Hall L.J.* 105 at para. 9. Mgbeoji cites Richard Clutterbuck, *Terrorism in an Unstable World* (New York: Routledge, 1994) at 3.

<sup>27</sup> Clive Walker, *Blackstone’s Guide to The Anti-Terrorism Legislation*, 2<sup>nd</sup> ed. (New York: Oxford University, 2009) [*Blackstone’s Guide to The Anti-Terrorism Legislation*] at 7.

<sup>28</sup> Pub. L. No. 107-56, 115 Stat. 272 (2001) [*USA Patriot Act*].

<sup>29</sup> *Ibid.* at s. 813.

nature and according to the Canadian *Criminal Code* and case law, may stem from political or religious motivations<sup>30</sup> and challenges the legitimacy of government and law.

[T]he essence [of terrorism] is a tripartite relationship whereby the actors (terrorists) seek to impact on a target (specific victims) with a view to influencing a political audience (typically the government or the general public).<sup>31</sup>

Unlike terrorists, organized crime outlaws do not by definition seek to influence a political audience or a government. While some organized crime outlaws, such as Mafiosi groups, do indeed exert political influence, they do so by infiltrating and affecting politics from the inside rather than from the outside like terrorists activities.<sup>32</sup> Further, terrorism may include acts of war,<sup>33</sup> assassination,<sup>34</sup> guerilla warfare and revolution,<sup>35</sup> piracy and hijacking,<sup>36</sup> and the use of violence and fear-mongering.<sup>37</sup>

Unlike organized crime outlawry, terrorism generally does not involve a group of individuals who use their identity to commit crimes for the benefit of the members of the group or for the group itself. Terrorists may act alone and not identify with a particular

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<sup>30</sup> In *R. v. Khawaja* (2006), 214 C.C.C. (3d) 399, [2006] O.J. No. 4245 (Q.L.) (Ont. S.C.J.) [*R. v. Khawaja*], the Ontario Supreme Court of Justice determined that the inclusion of religious or political motive in an element of terrorist activity constituted an unjustified violation of the right to freedom of expression, religious and association in section 2 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11. As a result, prosecutors will not be required to lead, and courts will not be required to consider, evidence of the religious and political view of an accused person to prove the terrorist activity. However, the Crown may still seek to lead, and the court may admit, evidence of political or religious motive as circumstantial evidence that proves the charge, as part of the narrative, or in order to demonstrate an association to a terrorist group, according to Kent Roach, "The Recent Decision in *R. v. Khawaja* on the Constitutionality of the Definition of Terrorism and a Variety of Terrorism Offences" (Case comment presented to the Faculty of Law, University of Toronto Constitutional Roundtable 30 January 2007) [unpublished] at 15-16. Parliament has not yet amended the *Criminal Code* definition to accord with the decision in *R. v. Khawaja* according to Kent Roach, "A Comparison of Australian and Canadian Anti-terrorism Laws" (2007) 30 U.N.S.W. L. J. 53 at 59-60. As a result of *R. v. Khawaja*, Parliament amended section 83.01(1.1) as follows:

(1.1) For greater certainty, the expression of a political, religious or ideological thought, belief or opinion does not come within paragraph (b) of the definition "terrorist activity" in subsection (1) unless it constitutes an act or omission that satisfies the criteria of that paragraph.

<sup>31</sup> *Blackstone's Guide to The Anti-Terrorism Legislation*, *supra* note 27 at 2.

<sup>32</sup> Stefano Maffei & Isabella Merzagora Betsos, "Crime and Criminal Policy in Italy: Tradition and Modernity in a Troubled Country" (2007) 4 *European J. of Criminology* 461 at 470.

<sup>33</sup> Mary Kaldor, "Strengthening Civil Society" in Leonard Weinberg, ed. *Democratic Responses to Terrorism* (New York: Routledge, 2008) at 34.

<sup>34</sup> Matthew Evangelista, *Law, Ethics, and the War on Terror* (Cambridge: Polity, 2008) [*Law, Ethics, and the War on Terror*] at 40; and *Terror-Violence: Aspects of Social Control*, *supra* note 26 at 10.

<sup>35</sup> *Terror-Violence: Aspects of Social Control*, *supra* note 26 at 14-15.

<sup>36</sup> *Ibid.* at 11 and 13.

<sup>37</sup> *Ibid.* at 156; and *Law, Ethics, and the War on Terror*, *supra* note 34 at 38.

group. Terrorists may be part of a group that has a common goal, but having a common goal that is achieved by way of an act or acts of crime differs from having a main purpose of committing crime – such as is characteristic of organized crime outlaw groups. For these reasons, and based on the above definition and descriptions, terrorism does not fall within the category of organized crime outlaws, and will only be included within the parameters of this thesis in order to critique and inform particular legislative approaches to organized crime, such as proscription.

### 1.3.5 Criminal Conspiracies, Parties, and Accessories

#### 1.3.5.1 Overview

Organized crime outlaws transcend ordinary criminality and criminal groups like conspirators, parties or accessories because they do not simply commit crimes in a group on one occasion or on many occasions. Rather, organized crime outlaws are members of an identifiable and identifying group that exists more than simply for profit or for a specific criminal operation or operations – namely, organized crime outlaw groups perpetuate and reinforce the identity of the group through the commission of violent, intimidating or criminal acts, and they use the power of the reputation of the group in order to gain some personal or group benefit or advantage that may not always be for a specific criminal act. And, they do not always commit criminal acts via conspiracy, acting as parties, or acting as accessories after the fact. The group may not involve itself in a particular conspiracy, and members of the group may not always be parties or accessories to the crimes of other members of the group. According to the *Criminal Code* definition of “criminal organization”, an organized crime group has a main purpose of committing or facilitating the commission of crime for the benefit of the group. Notably, this *Criminal Code* definition accords the non-legal definition of organized crime outlaw groups employed in this thesis because the formal legal definition requires the “criminal organization” to have as a “main purpose”, but not necessarily the only purpose, the commission or facilitation of crime for the benefit of the group. The *Criminal Code* definition also does not mandate that the criminal acts be committed by way of conspiracy, acting as parties, or acting as accessories.

### 1.3.5.2 Conspiracy Distinguished from "Organized Crime Outlaw Groups" and "Criminal Organizations"

As set forth in the *Criminal Code* definition of "criminal organization", a conspiracy can be committed in relation to a criminal organization offence:

"criminal organization offence" means

(a) an offence under section 467.11, 467.12 or 467.13, or a serious offence committed for the benefit of, at the direction of, or in association with, a criminal organization, or

(b) a conspiracy or an attempt to commit, being an accessory after the fact in relation to, or any counselling in relation to, an offence referred to in paragraph (a); ...<sup>38</sup>

However, not all conspiracies involve criminal organization offences, and not all criminal organization offences involve conspiracies. Conspiracy does not require the commission of a criminal offence, but rather "the agreement itself is the gist of the offence."<sup>39</sup> Thus, membership in a group itself does not fall within this category.

<sup>38</sup> *Criminal Code*, *supra* note 3 at s. 2.

<sup>39</sup> *Paradis v. R.*, [1934] S.C.R. 165 at 168. While conspiracy is not formally defined in the Criminal Code, common law cases, such as *United States of America v. Dynar*, [1997] 2 S.C.R. 462; S.C.J. No. 64 (Q.L.) at paras. 86-88, have set forth the elements of the offence:

(a) What is a Criminal Conspiracy?

86 In *R. v. O'Brien*, [1954] S.C.R. 666, at pp. 668-69, this Court adopted the definition of conspiracy from the English case of *Mulcahy v. The Queen* (1868), L.R. 3 H.L. 306, at p. 317:

A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties . . . punishable if for a criminal object. . . .

There must be an intention to agree, the completion of an agreement, and a common design. Taschereau J., in *O'Brien*, *supra*, at p. 668, added that:

Although it is not necessary that there should be an overt act in furtherance of the conspiracy, to complete the crime, I have no doubt that there must exist *an intention to put the common design into effect*. A common design necessarily involves an intention. Both are synonymous. The intention cannot be anything else but the will to attain the object of the agreement. [Emphasis in original.]

87 In *Papalia v. The Queen*, [1979] 2 S.C.R. 256, at p. 276, Dickson J. (as he then was) described the offence of conspiracy as "an inchoate or preliminary crime". In setting out the necessary elements of the offence, he noted at pp. 276-77 that:

The word "conspire" derives from two Latin words, "con" and "spirare", meaning "to breathe together". To conspire is to agree. The essence of criminal conspiracy is proof of agreement. On a charge of conspiracy the agreement itself is the gist of the offence: *Paradis v. R.*, [[1934] S.C.R. 165], at p. 168. The *actus reus* is the fact of agreement: *D.P.P. v. Nock*, at p. 66. The agreement reached by the co-conspirators may contemplate a number of acts or offences. Any number of persons may be privy to it. Additional persons may join the ongoing scheme while others may drop out. So long as there is a continuing overall, dominant plan there may be changes in methods of operation, personnel, or victims, without bringing the conspiracy to an end. *The important inquiry is*

Conspiracy does not include the act of being part of a group that has a main purpose of committing or facilitating the commission of crime for the benefit of the group since membership in such a group does not constitute an offence – that is to say, membership in a criminal organization is not illegal. Members of a criminal organization may engage in a conspiracy to commit an offence, but their state of being is not a conspiracy in and of itself.

Adoption of group identity, and the use and perpetuation of a powerful reputation are two attributes that distinguish organized crime outlaws from other criminal groups, such as conspirators or parties. In spite of this distinction, Margaret E. Beare incorporates the concept of conspiracy into her definition of organized crime:

Organized crime is *ongoing* activity, involving a *continuing criminal conspiracy*, with a *structure greater than any single member*, with the potential for *corruption and/or violence* to facilitate the criminal process.<sup>40</sup> [Emphasis original].

However, to incorporate the legal concept of conspiracy into the definition of criminal organization or organized crime is too limiting and not helpful. At the very least, such incorporation is problematic – particularly in relation to some Aboriginal groups that may be captured in the definition but with conspiracy would not be.<sup>41</sup> Notably, the

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*not as to the acts done in pursuance of the agreement, but whether there was, in fact, a common agreement to which the acts are referable and to which all of the alleged offenders were privy.* [Emphasis original.]

Conspiracy is in fact a more "preliminary" crime than attempt, since the offence is considered to be complete before any acts are taken that go beyond mere preparation to put the common design into effect. The Crown is simply required to prove a meeting of the minds with regard to a common design to do something unlawful, specifically the commission of an indictable offence. See s. 465(1)(c) of the *Criminal Code*.

**88** A conspiracy must involve more than one person, even though all the conspirators may not either be identified, or be capable of being convicted. See for example *O'Brien, supra*; *Guimond v. The Queen*, [1979] 1 S.C.R. 960. Further, each of the conspirators must have a genuine intention to participate in the agreement. A person cannot be a conspirator if he or she merely pretends to agree. In *O'Brien*, Rand J. held at p. 670 that

...a conspiracy requires an actual intention in both parties at the moment of exchanging the words of agreement to participate in the act proposed; mere words purporting agreement without an assenting mind to the act proposed are not sufficient.

Where one member of a so-called conspiracy is a police informant who never intends to carry out the common design, there can be no conspiracy involving that person. Nonetheless, a conspiracy can still exist between other parties to the same agreement.

<sup>40</sup> *Criminal Conspiracies: Organized Crime in Canada, supra* note 4 at 15.

<sup>41</sup> "Aboriginal Organized Crime in Canada: Developing a Typology for Understanding and Strategizing Responses", *supra* note 8 at 6-7.

Supreme Court of Canada stated in *R. v. Venneri*<sup>42</sup> that the concept and offence of conspiracy remains different from the definition of “criminal organization”:

35 The structured nature of targeted criminal organizations also sets them apart from criminal conspiracies: see *Sharifi*, [[2011] O.J. No. 3985 (QL) (S.C.J.)] at para. 39. Stripped of the features of continuity and structure, “organized crime” simply becomes all serious crime committed by a group of three or more persons for a material benefit. Parliament has already criminalized that activity through the offences of conspiracy, aiding and abetting, and the “common intention” provisions of the *Code* (see e.g. ss. 21 and 465(1)). The increased penalties and stigma associated with the organized crime regime distinguish it from these offences.<sup>43</sup>

Organized crime outlaws or criminal organization outlaws may employ conspiracy at times, but they are not only and not always co-conspirators. Not all criminal organization members form a common intention to carry out certain criminal activities which elements are necessary in a legal definition of conspiracy. Some members may be involved in one kind of drug production, others in trafficking in another kind of drug, and

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...[Some] concern coagulates around the use of the term ‘conspiracy’ in Beare’s definition, insofar as this would seem to imply a purposive knowledge on the part of individual participants not only of their role in, and contribution to, the ultimate ‘goal’ of a particular organized criminal activity. It seems likely that, especially in the arena of what has been deemed ‘aboriginal organized crime’ ..., that such uniformity of intention across participants may not characterize most organized crime. For those who are the most conspicuous and consistent participants may be expected to share common and informed intentions, as one progresses to more marginal ‘conspirators,’ participation becomes much more ad hoc and unsystematic than is implied in the term ‘conspiracy’. For example, while it is unquestioned that there would not be a cigarette trade in the absence of customers for ‘smuggled smokes,’ can we say that those who enter aboriginal reserves to purchase tax-free cigarettes are willing and conscious conspirators? Similarly, those peripheral participants, who may include aboriginal people who work briefly or on only one or two occasions running cigarettes, may not share in an implied common goal at all. Indeed, such agreement may be quite absent in the core of the ‘conspiracy’ as well, where the goals may be similar, but far from commonly held – each individual may be pursuing not only idiosyncratic aims, but ones which both diverge from, and may even conflict with, those held by their putative ‘co-conspirators’.

Conspiracy also obscures the degree of formalization which characterizes the social and other relationships which are taken together to comprise most organized crime activities. While there can be little doubt that, at the centre of most organized crime activities there is a relatively high degree of formalization of relationships, as one moves outside this core, it is likely that the relationships are far from formal. Indeed, there is an argument to be made that some types of organized crime are less organized than coincident – that is, those who move liquor or cigarettes across the border to evade taxes and duties may all be participating in the same general activity, but this may not mean that they are coordinated and integrated in that pursuit. Rather, they are all engaging in same basic process for possibly quite variant reasons and goals, and their success in this category of activities implies both competition and some degree of complicity which may be more or less overt. ...

<sup>42</sup> 2012 SCC 33, [2012] S.C.J. No. 33 (Q.L.) [*R. v. Venneri*].

<sup>43</sup> *Ibid.* at para. 35.

others still in prostitution or bawdy-house offences. All criminal organization members may indeed agree to use and maintain the reputation for violence and intimidation in their criminal activities, but they may not all collectively or even in small groups engage in the same criminal activities.

Indictments that allege criminal organizations to be simply a group of individuals who have on one or more occasions joined forces to effect criminal activities, such as drug production or trafficking, fail to strike at the heart of organized crime groups – namely, the adoption of a group identity and the use and perpetuation of a reputation for violence and intimidation. While great difficulties may sometimes exist in successfully proving that an organized crime outlaw group is a “criminal organization” pursuant to the *Criminal Code*, these difficulties demonstrate failures with the definitional provisions of the legislation rather than the true essence of what a criminal organization is.

#### 1.3.5.3 Parties To An Offence and Accessories After the Fact Distinguished from “Organized Crime Outlaw Groups” and “Criminal Organizations”

To be a party to an offence, an individual must commit the offence, or aid, or abet a person who commits the offence; and that individual must intend to do so in conjunction with one or more other persons.<sup>44</sup> To be an accessory after the fact, an individual must assist a person whom he knows has committed a criminal offence.<sup>45</sup> Not all members within an organized crime outlaw group will be parties or accessories after the fact to offences committed by other members. The possibility exists that in some instances,

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<sup>44</sup> *Criminal Code*, *supra* note 3 at s. 21. Section 21 states:

21. (1) Every one is a party to an offence who

(a) actually commits it;

(b) does or omits to do anything for the purpose of aiding any person to commit it; or

(c) abets any person in committing it.

(2) Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence.

<sup>45</sup> *Ibid.* at s. 23. Section 23 states:

23. (1) An accessory after the fact to an offence is one who, knowing that a person has been a party to the offence, receives, comforts or assists that person for the purpose of enabling that person to escape.

there are no parties – that is to say, only one member may commit a criminal organization offence or offences that are connected to the criminal organization, but to which other members were not privy or in which other members had no involvement. Indeed, the non-legal definition of organized crime outlaw group employed in this thesis emphasizes that the group must have a common identity and perpetuate that identity, rather than simply decide to assist one another on a single or more given occasion with a criminal act.

The difference between organized crime outlaws and parties or accessories is exemplified by the case of *R. v. Lindsay*,<sup>46</sup> where full-patch members of the Hells Angels Steven Patrick Lindsay or Raymond Lawrence Bonner first attended the home of their extortion victim,<sup>47</sup> they were wearing Hells Angels paraphernalia – they were wearing their full colours.<sup>48</sup> At a subsequent meeting with the complainant, Lindsay and Bonner wore Hells Angels paraphernalia, but the victim may not have seen it.<sup>49</sup> The Ontario Superior Court of Justice held that the extortion was committed in association with a criminal organization, the Hells Angels Motorcycle Club as it existed in Canada,<sup>50</sup> contrary to section 467.12 of the *Criminal Code* because the accused knew the Hells Angel's reputation for violence and intimidation and deliberately used their membership to instill fear in their victim.<sup>51</sup> No evidence existed that the Hells Angels Woodbridge Chapter as a whole or its executive members specifically knew of their attendance and extortion. Further, if either Lindsay or Bonner had acted separately, the offence of extortion would likely still have been in connection with the Hells Angels criminal organization. Because the legal possibility exists that members of a criminal organization do not assist other members before, during or after the commission of an offence, criminal organization outlaws remain distinct and separate from parties to offences or accessories after the fact.

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<sup>46</sup> 2009 ONCA 532, (2009) 245 C.C.C. (3d) 301, aff'g 2005 CanLII 24240, [2005] O.J. No. 2870 (Q.L.) (Ont. S.C.J.), leave to appeal to S.C.C. refused 2009 S.C.C.A. No. 540 [*R. v. Lindsay*].

<sup>47</sup> *R. v. Lindsay* trial decision, *supra* note 5 at paras. 30-31.

<sup>48</sup> *Ibid.* at paras. 38-41.

<sup>49</sup> *Ibid.* at para. 89.

<sup>50</sup> *Ibid.* at para. 1090.

<sup>51</sup> *Ibid.* at paras. 1088-89.

This case also demonstrates the identity component within the non-legal definition of organized crime outlaw” employed in this thesis. That is to say, the accused Lindsay and Bonner demonstrated that they identified with an organized crime group, the Hells Angels, and they reinforced this identity, and thus, simultaneously perpetuated and reinforced the identity of the Hells Angels, by using or displaying their group identity in a manner that accords with the values and norms of the group during the commission of the extortion. The concept of parties and accessories ignores this aspect of organized crime outlaws.

### 1.3.6 Summary

The criminal organization provisions, like categories of corporate or white-collar crime, conventional or garden-variety crime; terrorism; as well as conspirators, parties and accessories all attempt to hold individuals accountable for acts performed by a group. Safety in numbers does not, or is not meant to, protect individuals from committing or participating in illegal acts. The criminal organization provisions are another attempt by the state to capture the workings of a group that commits crime.

While organized crime outlaws may bear resemblance to other outlaw groups, such as terrorists and white-collar criminals, they remain distinct by their nature and the means to effect their ends. Organized crime or criminal organization acts may employ or embody pre-existing legal concepts and illegal means to conduct their outlawry, such as in a conspiracy, as parties, or as accessories. However, these concepts and means cannot adequately capture and define organized crime or criminal organizations because these concepts and means seek to define the *act* of a unique *group*, without reference to the unique and distinct qualities or characteristics of the group. They seek to create a criminal offence to capture the nature of this group, without criminalizing the group itself. However, it is the nature of the group itself that remains unique and distinct from other criminals and groups, not necessarily their *acts*. That is to say, their *acts* or the offences they commit are not always unique or distinct. Organized crime outlaw individuals and organized crime outlaw groups may commit any kind of crime. What remain unique and distinct is *who they are* and *how this identity* plays a role in the

commission of their crimes. Because the state fails to incorporate or target these unique elements of organized crime outlaw groups into anti-organized crime laws, the statutory definition of organized crime may not succeed in holding individuals who are organized crime outlaws accountable for their actions or acts performed in connection with their organized crime outlaw group.

## CHAPTER TWO ORGANIZED CRIME OUTLAWS

### 2.1 INTRODUCTION

Who organized crime outlaws are and how their identity plays a role in the commission of their crimes will be illustrated in this Chapter by examining four of the most significant organized crime outlaw groups in Canada, both historically and contemporarily: Anti-Prohibitionists, La Cosa Nostra, outlaw motorcycle gangs, and Aboriginal street gangs. Each group exemplifies the unique nature of organized crime outlaws, and the difficulty in using pre-existing concepts and legal means to combat them. Their similarities and differences reveal the ways in which a number of organized crime outlaw groups and their identities form. Further, examples of policing and prosecutorial efforts to dismantle these outlaw groups suggest some of the merits and demerits of the law as an effective anti-organized crime measure.

Organized crime first infiltrated Canada through bootlegging during Prohibition.<sup>1</sup> Prohibition refers to the movement in North America in the late 19<sup>th</sup> and early 20<sup>th</sup> centuries during which the production, sale, and distribution of alcoholic beverages was regulated and at times prohibited by various governmental laws. Prohibition had sought to reduce social ills and unrefined behaviour, but ironically, it created a set of circumstances in which outlaw bootleggers thrived as they satisfied the social vices of a large segment of society. While anti-Prohibitionists took many different forms, the presence of Prohibition in Canada and the United States allowed organized crime outlaws who had existed prior to Prohibition laws to enter into and eventually seize control of the illegal liquor trade as well as its enormous profits. Prohibition significantly tightened the “umbilical economic relationship”<sup>2</sup> between Canada and the United States, and enabled anti-Prohibitionist outlaws to expand their territories and their power. The failures in the law and its enforcement during this time allowed for all anti-Prohibitionist bootleggers –

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<sup>1</sup> C.W. Hunt, *Booze, Boats and Billions: Smuggling Liquid Gold!* (Toronto: McClelland and Stewart, 1988) at xi.

<sup>2</sup> Stephen Schneider, *Iced: The Story of Organized Crime in Canada* (Mississauga: John Wiley & Sons Canada, 2009) at 554.

the pre-existing organized crime groups as well as the independent less powerful groups – to manufacture and smuggle liquor without, for the most part, significant legal sanction.

The North American Mafia, which came to be known as La Cosa Nostra, began in cities with large immigrant populations in the eastern American States, such as New York and Chicago, and migrated to the eastern part of Canada. It seized control of a number of businesses and enterprises – both legitimate and illegitimate. The development of La Cosa Nostra in the United States and Canada in the late 19<sup>th</sup> and early 20<sup>th</sup> centuries spurred the war against organized crime by the American government and influenced the implementation of its innumerable statutes and law enforcement initiatives.<sup>3</sup> While enforcement efforts targeting Mafiosi groups occurred in Canada as well, these efforts were largely ineffective, and unlike the United States, the Canadian government did not pass specific legislation in a timely fashion to attempt to address these organized crime outlaws. This late and ineffectual effort at combating La Cosa Nostra in Canada allowed the outlaw organization to cement its power within the criminal milieu and within conventional society. Its continued presence today in North America makes it relevant to an analysis of criminal organization legislation in Canada.

Outlaw motorcycle gangs developed in America in the mid-20<sup>th</sup> century. They infiltrated Canada in the 1970s and 1980s, and cemented themselves within the criminal milieu ever since. Although a number of significant law enforcement and prosecutorial efforts have occurred in the last two decades, outlaw motorcycle gangs remain an economically and socially powerful force to be reckoned with.

Aboriginal street gangs are uniquely Canadian. They comprise one-fifth of all known gang members in Canada.<sup>4</sup> The largest Aboriginal street gangs, the Indian Pösse; the Manitoba, Saskatchewan and Alberta Warriors; the Native Syndicate; and the Redd

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<sup>3</sup> *Ibid.* at 227.

<sup>4</sup> Mark Totten, “Aboriginal Youth and Violent Gang Involvement in Canada” (2009) 3 Institute for the Prevention of Crime Review 135 at 136. In Canada, about 22 per cent of known gang members are Aboriginal. The Prairie provinces have 800 to 1000 Aboriginal gang members.

Alert,<sup>5</sup> originated in the late 1980s and early to mid-1990s, and continue to persist in primarily the Prairie provinces of Canada.<sup>6</sup> Law enforcement in Canada during the 1980s and 1990s did not directly and adequately target gangs or organized crime outlaw groups, and this failure allowed Aboriginal street gangs to become powerfully entrenched within the criminal milieu.<sup>7</sup> This thesis recognizes that Aboriginal peoples in Canada have great cultural diversity<sup>8</sup> and generalizations about their cultures and experiences further negative stereotypes relating not only to Aboriginal organized crime members, but to all Aboriginal peoples. In addition, analysis of Aboriginal organized crime or crime groups should focus on the crime and not the cultural group with which it has come to be associated.<sup>9</sup> Commonalities among Aboriginal street gangs within Western Canada suggest some of the underlying causes for the formation of these organized crime

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<sup>5</sup> “A Snapshot of Prison Gangs and Youth Gangs in Canada: Well-Known Gangs, Membership, Offences, Risk, and Reconviction” (2006) online: Insideprison.com <<http://www.insideprison.com/prison-gangs-canada.asp>>.

<sup>6</sup> “Indian Posse: Prison Gang Profile” (2006) online: Insideprison.com <[http://www.insideprison.com/prison\\_gang\\_profile\\_IP.asp](http://www.insideprison.com/prison_gang_profile_IP.asp)>; “Manitoba Warriors: Prison Gang Profile” (2006) online: Insideprison.com <[http://www.insideprison.com/PRISON\\_GANG\\_PROFILE\\_MW.ASP](http://www.insideprison.com/PRISON_GANG_PROFILE_MW.ASP)>; “Alberta Warriors: Prison Gang Profile” (2006) online: Insideprison.com <[http://www.insideprison.com/PRISON\\_GANG\\_PROFILE\\_AW.ASP](http://www.insideprison.com/PRISON_GANG_PROFILE_AW.ASP)>; “Native Syndicate: Prison Gang Profile” (2006) online: Insideprison.com <[http://www.insideprison.com/PRISON\\_GANG\\_PROFILE\\_NS.ASP](http://www.insideprison.com/PRISON_GANG_PROFILE_NS.ASP)>; and “Redd Alert: Prison Gang Profile” (2006) online: Insideprison.com <[http://www.insideprison.com/PRISON\\_GANG\\_PROFILE\\_RA.ASP](http://www.insideprison.com/PRISON_GANG_PROFILE_RA.ASP)>. For instance, although the Indian Posse began in 1988 in a prison in the Prairies, and extended to street gangs in the Prairie provinces, this Aboriginal street gang now exists in Alberta, Saskatchewan, Manitoba, Ontario, British Columbia and Texas. The Manitoba Warriors began in 1992, and now exists on the street in Alberta, Saskatchewan, and Manitoba. The Alberta Warriors began in 1997, and have been reported in Alberta. The Native Syndicate likely formed in the 1980s or early 1990s, and now exists in Alberta, Saskatchewan, and Manitoba. Redd Alert began in either the mid-1990s in Edmonton, or in 2000 in Regina, and now exists in Alberta, Saskatchewan, Manitoba, British Columbia, Colorado, Texas, and California.

<sup>7</sup> Notably, the first charges utilizing the criminal organization provisions targeted the Manitoba Warriors: *R. v. Pangman*, 2001 MBCA 64, [2001] M.J. No. 217 (Q.L.); and Manitoba Court of Queen’s Bench decisions in *R. v. Pangman*, (1999), 143 Man. R. (2d) 161, [1999] M.J. No. 396 (Q.L.); (1999), 141 Man. R. (2d) 143, [1999] M.J. No. 475 (Q.L.); (2000), 141 Man. R. (2d) 200, [2000] M.J. No. 5; [2000] M.J. No. 31 (Q.L.), (2000), 45 W.C.B. (2d) 155; [2000] M.J. No. 51 (Q.L.), (2000), 45 W.C.B. (2d) 56; (2000), 144 Man. R. (2d) 144, [2000] M.J. No. 60 (Q.L.); (2000), 144 Man. R. (2d) 192, [2000] M.J. No. 123 (Q.L.); (2000), 32 C.R. (5<sup>th</sup>) 272, [2000] M.J. No. 125 (Q.L.); 2000 MBQB 47, [2001] M.J. No. 235 (Q.L.); 2000 MBQB 85, [2000] M.J. No. 300 (Q.L.). This case dealt with the criminal organization provisions as they existed in 1997 prior to the amendments in 2001.

<sup>8</sup> E.J. Dickson-Gilmore & Chris Whitehead, “Aboriginal Organized Crime in Canada: Developing a Typology for Understanding and Strategizing Responses” (2002) 7 Trends in Organized Crime 3 at 18. Dickson-Gilmore and Whitehead assert that no homogenous “Canadian Indian” or “Indian offender” exists, and that Aboriginal people and offenders come from various backgrounds and cultures. In Canada, there are 50 Aboriginal languages, 52 cultural groups, and six major cultural regions – the Woodland, Iroquoian, Plains, Plateau, Pacific Coast, and Mackenzie and Yukon River basins.

<sup>9</sup> *Ibid.* at 18. Dickson-Gilmore and Whitehead warn against ascribing an ethnic basis to organized crime.

outlaws.<sup>10</sup> This thesis will analyse Aboriginal street gangs as an outlaw crime group, rather than an ethnic group, in order to reveal what organized crime measures should address.

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<sup>10</sup> *Ibid.* at 18. Dickson-Gilmore and Whitehead assert that their study on “Aboriginal organized crime” should focus on the crime and not the cultural group. However, the label that they have assigned to their study itself targets demonstrates that consideration of a cultural aspect of “Aboriginal organized crime”, the same as “Aboriginal street gangs” remains inevitable.

## 2.2 ANTI-PROHIBITIONIST BOOTLEGGERS

### 2.2.1 Overview

Anti-Prohibitionists as an outlaw group demonstrates the fine line between individuals who are organized crime outlaws, and individuals who violate a law that a large segment of the public perceives as unfair, unjust, or unwanted. Sometimes, members of the latter group developed into the former. Both groups are more akin to anti-Prohibitionist outlaws rather than white-collar criminals or garden-variety criminals because they collectively shared significant disrespect for Prohibition laws. Though, some anti-Prohibitionists, such as presidents and owners of distilleries and breweries, may also fall within the category of white-collar criminal to some degree.

Overall, anti-Prohibitionists who were or who became organized crime outlaws were not simply opportunistic “criminals” who violated the law during Prohibition. Anti-Prohibitionist organized crime outlaws were those individuals who identified with the criminal subculture and were part of a group that continued to engage in criminal outlawry in one form or another after Prohibition laws were repealed. The existence of two types of anti-Prohibitionists – organized crime outlaw anti-Prohibitionists and conventional societal members who violated Prohibition laws – stems from the history of the Prohibition movement, the divisive nature of the concept of Prohibition, the lack of cohesive, just, enforced laws, and the lucrative appeal of violating these laws.

The movement towards Prohibition began in the latter part of the 1800s in both Canada<sup>1</sup> and the United States.<sup>2</sup> In Canada, Prohibitionists were primarily from the middle and upper classes<sup>3</sup> and sought to convince the public that drinking alcohol was a social scourge of less-refined individuals<sup>4</sup> and those who were “un-British” and “un-

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<sup>1</sup> Gerald Hallowell, “Prohibition” *The Canadian Encyclopedia* (2010), online: The Canadian Encyclopedia <<http://www.thecanadianencyclopedia.com/index.cfm?PgNm=TCE&Params=A1ARTA0006515#ArticleContents>> [“Prohibition”] at 1.

<sup>2</sup> Howard Abadinsky, *Organized Crime*, 8<sup>th</sup> ed. (Belmont: Thomson Wadsworth, 2007) [*Organized Crime*] at 52.

<sup>3</sup> Craig Heron, *Booze: A Distilled History* (Toronto: Between the Lines, 2003) [*Booze: A Distilled History*] at 165.

<sup>4</sup> *Ibid.* at 131-32.

Canadian.”<sup>5</sup> After little success in spite of extensive propaganda campaigns,<sup>6</sup> Prohibitionists politicized the issue as they sought to mobilize governments to enact laws to address the problem.<sup>7</sup> In spite of the passage in 1878 of the *Canada Temperance Act*<sup>8</sup> which allowed municipalities to impose Prohibition by plebiscite, the movement made little progress until World War I<sup>9</sup> when Prohibition began to be seen as “...a patriotic duty and a sacrifice to help win the war....”<sup>10</sup>

The unsavoury nature of saloons had a great deal to do with the growth of prohibitionist sentiment. But it was the Great War of 1914-18 that finally led to the passage of the Ontario Temperance Act. The cream of Canada’s youth was being massacred on the battlefields of Europe. If abstaining from alcohol would help bring the lads home, surely that was a small sacrifice for the civilian population to pay, especially when compared to the sacrifices and horrors being endured by the boys overseas. Prohibition would lead to a more efficient work force – less absenteeism – which would mean more arms and ammunition for the war effort. Prohibition would also mean more money in people’s pockets which could be diverted into war bonds. In short, Prohibition would lead to a quicker end to the war and, most importantly, to the return home of Canada’s young soldiers.<sup>11</sup>

Federal Prohibition in Canada occurred in 1918, and ended in 1919. Provincial measures slowly ended in years thereafter.

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<sup>5</sup> *Ibid.* at 178.

<sup>6</sup> *Ibid.* at 149. In the late 1800s, the temperance movement distributed news-sheets, pamphlets, poster, songbooks, poetry, playlets and recitations with their message.

<sup>7</sup> *Ibid.* at 131 and 150-51. Heron describes the efforts of Prohibitionists in the political arena in this way, *ibid.* at 150-51:

...They positioned themselves as a morally superior grouping of concerned citizens capable of shaping public opinion and bringing it to bear on politicians. They were open and uncompromising, using their organizations to broadcast compelling arguments through speeches and lectures, newsletters, and pamphlets, to demonstrate the numerical strength of their support through large public meetings, mass demonstrations, and voluminous petitions, and to marshal large delegations to meet with politicians, especially premiers and their cabinet members.

<sup>8</sup> 1878, 41 Vict. c. 16 [*Canadian Temperance Act*] also known as the *Scott Act* after proponent Sir Richard William Scott.

<sup>9</sup> *Booze: A Distilled History*, *supra* note 3 at 176-77 and 376-77; and Philip P. Mason, *Rumrunning and the Roaring Twenties: Prohibition on the Michigan-Ontario Waterway* (Detroit: Wayne State University Press, 1995) [*Rumrunning and the Roaring Twenties: Prohibition on the Michigan-Ontario Waterway*] at 15.

<sup>10</sup> “Prohibition”, *supra* note 1 at 1.

<sup>11</sup> C.W. Hunt, *Booze, Boats and Billions: Smuggling Liquid Gold!* (Toronto: McClelland and Stewart, 1988) [*Booze, Boats and Billions: Smuggling Liquid Gold!*] at 36. Further, grain could be used for food rather than for alcoholic beverages.

In the United States, the Eighteenth Amendment to the Constitution<sup>12</sup> in 1919 declared Prohibition for the nation. Its passage was a large part of the reason for and longevity of bootlegging in Canada. Even after the creation or declaration of drinking alcohol as a socio-economic problem in Canada and the United States, public support for Prohibition remained mixed. As a result, the law did not receive respect from a great number of Canadian and American subjects some of whom became bootleggers during Prohibition, and some of those bootleggers continued to be organized crime outlaws thereafter. "...[T]he thirst for alcohol did not disappear, and new channels of commerce soon opened up to supply the demand."<sup>13</sup>

The presence of American Prohibition increased the market for Canadian bootlegged liquor.<sup>14</sup> With demand came supply. Bootlegging in Canada and the United States began within hours after American Prohibition laws in the *Volstead Act* came into effect on January 17, 1920,<sup>15</sup> and quickly established smuggling routes,<sup>16</sup> such as along the Atlantic coast, across Lakes Ontario and Erie predominantly via the "Detroit-Windsor Funnel" along the Detroit River,<sup>17</sup> and along the Pacific coast<sup>18</sup> but to a lesser extent.<sup>19</sup>

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<sup>12</sup> *Organized Crime*, *supra* note 2 at 52-53; and U.S. Const. amend. XVII as repealed by amend. XXI. The Eighteenth Amendment states:

1. After one year from the ratification of this article the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.
2. The Congress and the several States have concurrent power to enforce this article by appropriate legislation.
3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

Notably, this last paragraph asserts a sunset clause for the Amendment.

<sup>13</sup> *Booze: A Distilled History*, *supra* note 3 at 236.

<sup>14</sup> *Booze, Boats and Billions: Smuggling Liquid Gold!*, *supra* note 11 at xi.

<sup>15</sup> *Rumrunning and the Roaring Twenties: Prohibition on the Michigan-Ontario Waterway*, *supra* note 9 at 41; and *Booze, Boats and Billions: Smuggling Liquid Gold!*, *supra* note 11 at 21. Mason asserts that smuggling occurred within hours after the *Volstead Act* came into effect, while Hunt states that it occurred within the first two weeks.

<sup>16</sup> *Booze, Boats and Billions: Smuggling Liquid Gold!*, *supra* note 11 at 21.

<sup>17</sup> *Ibid.* at 49; and *Booze: A Distilled History*, *supra* note 3 at 248. Hunt asserts that in the 1920s, smugglers used the Detroit River to transport approximately 80 per cent of the Canadian beer and 60 per cent of the Canadian whisky that went into the United States. Heron asserts that four-fifths of smuggled liquor entered the United States via the "Detroit-Windsor Funnel."

<sup>18</sup> Marion Parker & Robert Tyrrell, *Rumrunner: The Life and Times of Johnny Schnarr* (Victoria: Orca Book Publishers Ltd., 1988) [*Rumrunner: The Life and Times of Johnny Schnarr*] at 4. From 1920 until two days before the end of Prohibition on April 4, 1933, *ibid.* at 217, Schnarr made over 400 liquor runs

Within years, it became prolific,<sup>20</sup> and American bootleggers distilled alcohol to transport back into Canada as well.<sup>21</sup> While some liquor entered the United States from Europe during Prohibition,<sup>22</sup> legal loopholes,<sup>23</sup> the long undefended border, coupled with law enforcement difficulties and disdain, rendered smuggling between these two countries easy and inexpensive<sup>24</sup> in comparison to the lucrative financial rewards.<sup>25</sup> The rapid growth of the Canadian liquor industry during Canadian and American Prohibition made it one of the largest liquor industries in the world, and made liquor one of the most significant exports of this country.<sup>26</sup>

### 2.2.2 Lack of Respect for Prohibition Laws Encouraged Anti-Prohibitionism

The piecemeal and inconsistent approach to Prohibition laws made them unfair and resoundingly unpopular, and only encouraged criminals and law-abiding citizens alike to violate them. In Canada, private enterprises, although provincially licenced, had historically produced and supplied liquor.<sup>27</sup> After the federal government passed the *Canada Temperance Act*<sup>28</sup> which focused on the making and trading of liquor,<sup>29</sup>

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between 1920 and 1930 to almost 40 different locations along the Washington coast in the Strait of Juan de Fuca and down into Puget Sound, as well as to California and Mexico. He estimates transporting over 60 000 cases of liquor to the United States, and bringing over \$4 000 000 into Canada, *ibid.* at 219.

<sup>19</sup> Daniel Okrent, *Last Call: The Rise and Fall of Prohibition* (New York: Scribner, 2010) [*Last Call: The Rise and Fall of Prohibition*] at 284. Okrent asserts that “rum row” did not develop as much on the Pacific Coast due to the lesser populated West in comparison to the East, and due to domestic production of wine in California.

<sup>20</sup> *Booze, Boats and Billions: Smuggling Liquid Gold!*, *supra* note 11 at 22. Hunt cites an estimate that in 1926, at least 100 000 individuals smuggled liquor into the United States.

<sup>21</sup> *Ibid.* at 163.

<sup>22</sup> *Ibid.* at 22.

<sup>23</sup> *Rumrunner: The Life and Times of Johnny Schnarr*, *supra* note 18 at 63. Schnarr asserts that rumrunners only had to register with the customs office in Canada and provide a location to which it was legal to ship liquor. Proof of docking and delivery of the shipment were not required. In the early days of Prohibition, the Canadian government did not prohibit exportation of liquor to the United States, *ibid.* at 66.

<sup>24</sup> *Booze, Boats and Billions: Smuggling Liquid Gold!*, *supra* note 11 at 22.

<sup>25</sup> *Ibid.* at 25. Hunt states that along Lake Ontario, a smuggler using a speedboat could earn more money in a week than a fisherman could earn during an eight-month season. Hunt asserts, *ibid.* at 51-52, that in one run, bootleggers transported 2 544 quart bottles of whisky which had a \$20 000 street value – equivalent to about \$250 000 by 1988.

<sup>26</sup> *Ibid.* at xi. Hunt states that liquor is Canada’s sixth largest export.

<sup>27</sup> *Ibid.* at 35.

<sup>28</sup> *Canadian Temperance Act*, *supra* note 8.

<sup>29</sup> *Ibid.* at s. 99-100; and “Prohibition”, *supra* note 1. Prohibition of the sale and trade of alcohol in Canada began in the early 1900s until approximately 1930. Prince Edward Island first enacted laws prohibited

municipalities could vote to adopt Prohibition in their area.<sup>30</sup> However, although some municipalities enacted Prohibition laws, others did not, and although all provinces had implemented some form of regulation of alcohol consumption by 1913,<sup>31</sup> some provinces remained predominantly “wet.”<sup>32</sup> Such jurisdictional issues only muddied the waters.

The provinces had the power to outlaw, and many did outlaw, the consumption of liquor in drinking establishments and prohibited the sale of liquor other than through government stores in “wet” municipalities.<sup>33</sup> However, only the federal government had the power to regulate the manufacture of liquor, and it did not prohibit liquor production<sup>34</sup> including brewing beer for home consumption.<sup>35</sup> Thus, breweries and distilleries could legally manufacture alcoholic beverages and legally export it to the United States.<sup>36</sup> In Ontario, the purchase of liquor in the province was illegal, but the consumption of liquor in a private residence remained legal and ordering liquor from outside Ontario remained legal.<sup>37</sup> Thus, distilleries and breweries produced liquor in Ontario, shipped it to established warehouses in Quebec which had rejected Prohibition in 1898,<sup>38</sup> and then sold it through the mail to Ontario residents.<sup>39</sup> Prohibition in Canada remained far from straightforward, and the piecemeal and inconsistent application of

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alcohol in 1901, and continued to do so until 1948. Other Canadian provinces, the Yukon and Newfoundland began prohibition during World War I, but by 1930, had de-criminalized it. For the most part, provincial temperance legislation closed legal drinking establishments and prohibited the sale of alcoholic beverages except in a private dwelling. Licenced distillers and brewers could sell outside the provinces.

<sup>30</sup> *Booze: A Distilled History*, *supra* note 3 at 160.

<sup>31</sup> *Ibid.* at 175.

<sup>32</sup> *Ibid.* at 160. For instance, although Fredericton, New Brunswick voted itself “dry” in 1879, other municipalities took twenty more years to enact Prohibition legislation. By 1900, two-thirds of the Maritime municipalities and 70 per cent of the area’s population, had become “dry.”

<sup>33</sup> *Ibid.* at 179-81. For instance, Prince Edward Island stopped liquor retailing in 1901. Saskatchewan closed all drinking establishments and allowed the sale of liquor through government stores in 1915. Alberta and Manitoba followed also in 1915. British Columbia, then Ontario, then Nova Scotia and New Brunswick, and then the Dominion of Newfoundland, did so at varying points in 1916. Quebec reluctantly abolished retail alcohol sales in 1919, and even then, allowed light beer, cider and wine to continue to be sold.

<sup>34</sup> *Booze, Boats and Billions: Smuggling Liquid Gold!*, *supra* note 11 at 22-23.

<sup>35</sup> *Booze: A Distilled History*, *supra* note 3 at 240.

<sup>36</sup> *Booze, Boats and Billions: Smuggling Liquid Gold!*, *supra* note 11 at 23.

<sup>37</sup> *Ibid.* at 32. *Ibid.* at 35, the *Temperance Act* of Ontario came into effect in 1916.

<sup>38</sup> *Ibid.* at 38.

<sup>39</sup> *Ibid.* at 32-33.

Prohibition laws fostered disrespect for the law. Further, bootleggers took advantage of some legal loopholes, and blatantly disregarded other legal provisions.

At a critical period during World War I in the spring of 1918, Prohibition in Canada expanded to completely prohibit all activities – that is to say, the manufacture, import and export of liquor.<sup>40</sup> However, until 1930, smugglers could export liquor to countries other than the United States, and thus, they would leave Canada on the pretext of exporting liquor to these countries, but then actually export it to the United States or reroute it back into Canada.<sup>41</sup> The federal government intended the measures of 1918 to be temporary, and placed an expiration date on them: one year after the end of the War – one year after November 11, 1918.<sup>42</sup> The measures lasted until the end of the year 1919.<sup>43</sup> However, some provincial regulations still remained in force, and augmented Prohibition laws, such as the Ontario plebiscite of 1921 which ended the importation of liquor into the province but not its manufacture and export,<sup>44</sup> and then the *Sandy Act* which mandated export via governmental licence only.<sup>45</sup>

The inconsistency in breadth and length of Prohibition in Canada only enabled bootleggers in their schemes to smuggle to the United States, and furthered disrespect for the law. Illicit stills, “moonshine”, illegal drinking establishments, bootlegging, and smuggling, increased dramatically.<sup>46</sup> Federal prohibition of the manufacture, sale and consumption of alcoholic beverages was ratified by January 1919 in the United States.<sup>47</sup> The jurisdictional inconsistency and piecemeal, uncoordinated application of Prohibition laws in America mirrored the situation in Canada, although the severity of Prohibition laws in the United States exceeded those in Canada. The sale of alcoholic beverages

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<sup>40</sup> *Ibid.* at 37; and *Booze: A Distilled History*, *supra* note 3 at 237.

<sup>41</sup> *Booze: A Distilled History*, *supra* note 3 at 246-47; and *Rumrunning and the Roaring Twenties: Prohibition on the Michigan-Ontario Waterway*, *supra* note 9 at 38.

<sup>42</sup> *Booze, Boats and Billions: Smuggling Liquid Gold!*, *supra* note 11 at 37; and *Last Call: The Rise and Fall of Prohibition*, *supra* note 19 at 342 and 344. The Canadian *Export Act* of 1930 outlawed the export of liquor to the United States, but was quickly and easily circumvented by bootleggers.

<sup>43</sup> *Booze, Boats and Billions: Smuggling Liquid Gold!*, *supra* note 11 at 37.

<sup>44</sup> *Ibid.* at 41.

<sup>45</sup> *Ibid.* at 42.

<sup>46</sup> “Prohibition”, *supra* note 1 at 1.

<sup>47</sup> *Rumrunning and the Roaring Twenties: Prohibition on the Michigan-Ontario Waterway*, *supra* note 9 at 35.

with an alcoholic content of more than 0.5 per cent were prohibited, unless accompanied by a medical prescription, and distilleries could not produce for interprovincial export.<sup>48</sup> Further, the *Volstead Act* of 1920 prohibited the importation of Canadian liquor.<sup>49</sup> The stringent prohibitions on manufacturing and importation spawned the creation of illegal distilleries by organized crime groups.<sup>50</sup> These distilleries were unsanitary, and their products contained toxic chemicals and lethal alcohol.<sup>51</sup>

The fine lines, and oscillating moral and legal boundaries surrounding the definitions of criminal<sup>52</sup> liquor-related activities contributed to a lack of support for Prohibition from a significant segment of the Canadian population. Further, the law was not seen as lasting, nor bootlegging as criminal in comparison to drug smuggling.<sup>53</sup> Rumrunner Johnny Schnarr explains his involvement:

I couldn't see anything wrong with hauling liquor. It seemed like everyone knew that the law would be changed eventually. And the rumrunning seemed like a much smarter idea than moonshining.<sup>54</sup>

Schnarr exemplified a conventional societal member who violated Prohibition laws rather than an organized crime anti-Prohibitionist. Temporary measures that do not have overwhelming support of society may indeed generate a lack respect for the law.

This lack of respect is further demonstrated by public support of many bootleggers and the involvement of conventional societal members in facilitation of bootlegging activities. Seemingly law-abiding fishermen and their families provided free food and

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<sup>48</sup> *Booze, Boats and Billions: Smuggling Liquid Gold!*, *supra* note 11 at 90; and *Booze: A Distilled History*, *supra* note 3 at 180.

<sup>49</sup> *Booze, Boats and Billions: Smuggling Liquid Gold!*, *supra* note 11 at 77-78.

<sup>50</sup> *Ibid.* at 90-91.

<sup>51</sup> *Ibid.*

<sup>52</sup> Although infractions of Prohibition laws were met with bail hearings, trials in criminal courts, and punitive sanctions such as fines and imprisonment, the criminal nature of the offences was unclear to at least one coroner and the Ontario Ministry of Attorney General in relation to the death of smuggler John Gogo in 1923. This coroner and Crown office opined that the breach of the *Ontario Temperance Act* as a provincial statute was not a criminal offence, as per *Booze, Boats and Billions: Smuggling Liquid Gold!*, *supra* note 11 at 56.

<sup>53</sup> *Rumrunner: The Life and Times of Johnny Schnarr*, *supra* note 18 at 218. Schnarr says that he declined offers of \$25 000 to transport drugs into the United States because he did not view drug smuggling as the same as liquor smuggling at all.

<sup>54</sup> *Ibid.* at 47.

lodging for bootleggers,<sup>55</sup> or operated small businesses to feed and house them during their smuggling runs.<sup>56</sup> In New Brunswick, neighbours would fire warning shots in order to alert bootleggers running illegal stills of potential law enforcement searches, and in one instance, an angry mob and their dogs attacked police.<sup>57</sup> Further, the middle classes facilitated bootlegging by purchasing liquor from bootleggers when the federal and then Ontario government terminated mail orders from Quebec.<sup>58</sup> The power of bootleggers to satisfy the vices of segments of society during Prohibition provided these outlaws – whether temporary outlaws or permanent outlaws who would be organized crime outlaws – with social status.<sup>59</sup> Further, societal conceptions of criminals at the time of Prohibition focused on the useless scourges of society, and did not include individuals who could amass wealth and influence.<sup>60</sup>

### 2.2.3 The Attributes and Means of Anti-Prohibitionist Bootleggers

Anti-Prohibitionists came from a variety of backgrounds, but most likely had some means of transport and skills to employ when they entered this criminal arena. The diversity of anti-Prohibitionists highlights the fact that both criminal outlaws and law-abiding citizens engaged in and *could* engage in anti-Prohibitionist activities. This aspect of anti-Prohibitionists differs from other organized crime outlaws who are “invited” into or who become part of an organized crime outlaw group by agreement of the group.

Anti-Prohibitionists included farmers in the Prairies and rural Quebec who had mechanical knowledge that assisted in the maintenance of vehicles during long smuggling runs.<sup>61</sup> Sailors and fishermen had various vessels and the skill to operate them to transport liquor products along the Pacific coast<sup>62</sup> as well as on along the

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<sup>55</sup> *Booze, Boats and Billions: Smuggling Liquid Gold!*, *supra* note 11 at 25. Hunt asserts that fishermen on Main Duck Island on Lake Ontario would provide food and lodging for smugglers who would in turn provide illegal drink.

<sup>56</sup> *Rumrunner: The Life and Times of Johnny Schnarr*, *supra* note 18 at 69.

<sup>57</sup> *Booze: A Distilled History*, *supra* note 3 at 261.

<sup>58</sup> *Booze, Boats and Billions: Smuggling Liquid Gold!*, *supra* note 11 at 42.

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.* at 49.

<sup>61</sup> *Ibid.* at 23.

<sup>62</sup> *Rumrunner: The Life and Times of Johnny Schnarr*, *supra* note 18 at 4-5. Schnarr attributes his success in smuggling for 13 years to his skill with motors; his use of the fastest boats possible; and luck.

Maritime coast from Boston to New York City – a strip known as Rum Row.<sup>63</sup> Dockworkers and fishermen along the Detroit River in Ontario had fast motorboats, experience navigating and handling the waters, and access to government-licensed piers.<sup>64</sup> Pre-existing American organized crime groups engaged in bootlegging as well.<sup>65</sup> They had organizational experience, political connections and financial power, and took the opportunity to use their skills to make large profits. While the bootleggers of Prohibition came from a variety of occupations and social classes, and would violently compete for territory and markets, they came to share a common criminal profession at the time.<sup>66</sup>

Anti-Prohibitionists developed techniques to avoid capture of their railway and airplane cargos,<sup>67</sup> boats, and vehicles, and thus, the seizure of their product. The development and employment of elaborate evasive techniques may serve to distinguish anti-Prohibitionist outlaws from opportunistic otherwise-law-abiding citizens. On land, drops for vehicles would take place at varying locations and at night.<sup>68</sup> The vehicles would have their back seats removed,<sup>69</sup> secret compartments underneath the floor boards,<sup>70</sup> extra heavy springs or shocks in the rear in order to absorb the weight,<sup>71</sup> and sometimes two separate tanks – one for gas and one for whiskey.<sup>72</sup> Many had thick chains attached to their rear bumpers in order to create dust on dirt roads in order to enable drivers to escape from law enforcement.<sup>73</sup> On water, some used cardboard cases with holes to transport lead-wrapped liquor bottles so that smugglers could sink the load if caught by

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<sup>63</sup> *Booze, Boats and Billions: Smuggling Liquid Gold!*, *supra* note 11 at 23.

<sup>64</sup> *Ibid.* at 23-24.

<sup>65</sup> *Rumrunning and the Roaring Twenties: Prohibition on the Michigan-Ontario Waterway*, *supra* note 9 at 17.

<sup>66</sup> *Booze, Boats and Billions: Smuggling Liquid Gold!*, *supra* note 11 at 25.

<sup>67</sup> *Rumrunning and the Roaring Twenties: Prohibition on the Michigan-Ontario Waterway*, *supra* note 9 at 44. Mason asserts that smugglers used airplanes in the late 1920s, and transported liquor via thousands of railroad cars.

<sup>68</sup> *Last Call: The Rise and Fall of Prohibition*, *supra* note 19 at 150.

<sup>69</sup> *Ibid.* at 150.

<sup>70</sup> *Rumrunning and the Roaring Twenties: Prohibition on the Michigan-Ontario Waterway*, *supra* note 9 at 17.

<sup>71</sup> *Rumrunner: The Life and Times of Johnny Schnarr*, *supra* note 18 at 73.

<sup>72</sup> *Rumrunning and the Roaring Twenties: Prohibition on the Michigan-Ontario Waterway*, *supra* note 9 at 17.

<sup>73</sup> *Last Call: The Rise and Fall of Prohibition*, *supra* note 19 at 150.

the coast guard.<sup>74</sup> Fish boats were painted a dull grey or black to render them almost invisible at night, and would turn off their running lights in American waters.<sup>75</sup> Some boats had devices that diverted exhaust under the water in order to muffle engine noise.<sup>76</sup> Others were particularly fast to outrun the coast guard.<sup>77</sup> Indeed, powerboats allowed rumrunners on the Detroit River to rush across all day and all night long.<sup>78</sup> One rumrunner preferred to run in weather that no other seaman would dare operate.<sup>79</sup> An electrically controlled torpedo was even used to project whiskey across the Detroit River.<sup>80</sup> In winter, convoys of vehicles would pull sleds of liquor across the ice of the Detroit River in order to distribute the weight over a greater surface area.<sup>81</sup> Adaptation of criminal techniques, and sometimes luck, allowed the best anti-Prohibitionist bootleggers to evade capture and become prolific. These anti-Prohibitionist outlaws learned to live outside of the law, and their ability to evade enforcement may have further engendered disrespect for the law.

One of the most successful bootlegging groups, Harry and Herb Hatch of the Gooderham and Worts distillery, loaded liquor bottles into fishing nets that were slung in the water on either side of extremely powerful fast boats in order to reduce the weight of the load.<sup>82</sup> Skippers could quickly cut the nets should the boat be captured by the coast guard.<sup>83</sup> The loads were subsequently retrieved by using buoys that later floated to the surface only after the salt lick they were attached to had sufficiently dissolved.<sup>84</sup> Like the Hatch group, American organized crime groups implemented more sophisticated smuggling techniques than independent or loosely organized anti-Prohibitionists,<sup>85</sup> and had local,

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<sup>74</sup> *Booze, Boats and Billions: Smuggling Liquid Gold!*, *supra* note 11 at 98-99.

<sup>75</sup> *Ibid.* at 99; and *Rumrunner: The Life and Times of Johnny Schnarr*, *supra* note 18 at 69.

<sup>76</sup> *Booze, Boats and Billions: Smuggling Liquid Gold!*, *supra* note 11 at 99.

<sup>77</sup> *Rumrunner: The Life and Times of Johnny Schnarr*, *supra* note 18 at 4, 108, 163 and 178.

<sup>78</sup> *Rumrunning and the Roaring Twenties: Prohibition on the Michigan-Ontario Waterway*, *supra* note 9 at 41.

<sup>79</sup> *Rumrunner: The Life and Times of Johnny Schnarr*, *supra* note 18 at 123.

<sup>80</sup> *Rumrunning and the Roaring Twenties: Prohibition on the Michigan-Ontario Waterway*, *supra* note 9 at 43.

<sup>81</sup> *Ibid.* at 42.

<sup>82</sup> *Booze, Boats and Billions: Smuggling Liquid Gold!*, *supra* note 11 at 141-42.

<sup>83</sup> *Ibid.* at 142.

<sup>84</sup> *Ibid.* at 142.

<sup>85</sup> *Rumrunning and the Roaring Twenties: Prohibition on the Michigan-Ontario Waterway*, *supra* note 9 at 17.

state and federal law enforcement and public officials on their payrolls.<sup>86</sup> Eventually, these pre-existing organized crime anti-Prohibitionists and newly organized powerful bootlegging groups, such as the Hatch group, would seize a greater share of the bootlegging market. The development of these powerful bootlegging groups over time is what distinguishes organized crime outlaw anti-Prohibitionists from conventional societal members who violated Prohibition laws for a period of time.

#### 2.2.4 Unsuccessful Efforts to Enforce Prohibition Laws

The participation in anti-Prohibitionist activities by outlaws and law-abiding citizens alike resulted in part from, or was encouraged by, the lack of adequate enforcement of the law. The law, that is to say law enforcement agencies, prosecutors, the courts, and political administrators, failed to effectively enforce and sometimes even abide by Prohibition laws, and in so doing, generated a lack of respect for the law, and facilitated and entrenched bootlegging in Canada. Law enforcement agencies – police, customs and the coast guard – turned a blind eye to bootleggers or had their own hands greased. Officers often had “little enthusiasm” for upholding Prohibition laws because many of them imbibed themselves.<sup>87</sup> Bootlegging operations often depended on the assistance of corrupt public officials.<sup>88</sup> A number of American coast guard employees<sup>89</sup> and American customs officers at the seaside docks would accept bribes from Canadian smugglers.<sup>90</sup> Canadian customs and excise officers had also been in collusion with smugglers, and had personally benefitted from the illegal liquor trade.<sup>91</sup> Local and state police forces often

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<sup>86</sup> *Ibid.* at 42.

<sup>87</sup> *Booze: A Distilled History*, *supra* note 3 at 256.

<sup>88</sup> *Booze, Boats and Billions: Smuggling Liquid Gold!*, *supra* note 11 at 101; and *Rumrunner: The Life and Times of Johnny Schnarr*, *supra* note 18 at 82.

<sup>89</sup> *Rumrunning and the Roaring Twenties: Prohibition on the Michigan-Ontario Waterway*, *supra* note 9 at 107. Mason asserts that between 1920 and 1926, 750 coast guard employees were dismissed of “misconduct and delinquency” in relation to smuggling, and in following two year, 550 more were charged with “extortion, bribery, solicitation of money, illegal disposition of liquor, and making false reports of theft.”

<sup>90</sup> *Booze, Boats and Billions: Smuggling Liquid Gold!*, *supra* note 11 at 100. Hunt records a story of Joe Largo who advised that in 1927 the bootlegging group of which he was a part, repeatedly smuggled liquor by giving \$20 to the customs officer at the guardhouse in order for the officer to leave his post and “get a haircut.” The officer would switch on the guardhouse light which only faced directly toward the sea, to signal the smugglers to bring the shipment in to an awaiting truck.

<sup>91</sup> *Ibid.* at 202-03.

protected illegal drinking establishments also known as “speakeasies” or “blind-pigs”,<sup>92</sup> or advised bootleggers in advance of raids by Prohibition agencies.<sup>93</sup> Prohibition, after all, remained within the jurisdiction of the federal government.<sup>94</sup> However, federal agencies lacked adequate resources on the East coast,<sup>95</sup> and the West coast.<sup>96</sup>

In addition to a lack of cooperation among law enforcement agencies due to jurisdictional issues,<sup>97</sup> such agencies in Canada and the United States, particularly during the first few years of Prohibition, did not have sufficient manpower<sup>98</sup> or effective weapons to combat bootlegging. The coast guard stations of New York State had few boats, and the boats that they had lacked power.<sup>99</sup> The coast guard on the Pacific coast also did not have sufficient resources.<sup>100</sup> Law enforcement posed no serious threat in smaller centres, such as Oswego, New York where illegal drinking establishments thrived for all of the 14 years of American Prohibition.<sup>101</sup> Indeed, hijacking posed a greater threat in some areas than apprehension by the coast guard, and weeded out the serious smugglers from the non-serious or faint at heart.<sup>102</sup>

In April of 1924, the tides turned in favour of law enforcement when the United States Congress significantly increased funding for the coast guard, and as a result significantly increased the number and types of boats in the Atlantic and the Great Lakes used to intercept bootleggers.<sup>103</sup> By the late 1920s, the coast guard and the federal government

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<sup>92</sup> *Ibid.* at 21. Hunt refers to incidences across Lakes Ontario and Erie in New York State.

<sup>93</sup> *Rumrunner: The Life and Times of Johnny Schnarr*, *supra* note 18 at 79.

<sup>94</sup> *Booze, Boats and Billions: Smuggling Liquid Gold!*, *supra* note 11 at 21.

<sup>95</sup> *Ibid.* at 95.

<sup>96</sup> *Rumrunner: The Life and Times of Johnny Schnarr*, *supra* note 18 at 68.

<sup>97</sup> *Booze: A Distilled History*, *supra* note 3 at 255.

<sup>98</sup> *Booze, Boats and Billions: Smuggling Liquid Gold!*, *supra* note 11 at 21; and *Booze: A Distilled History*, *supra* note 3 at 258. Hunt states that only 200 federal prohibition agents existed to patrol New York State, and thus, primarily focused on major cities.

<sup>99</sup> *Booze, Boats and Billions: Smuggling Liquid Gold!*, *supra* note 11 at 95. For instance, near the Coast Guard for Oswego, New York had only a few surfboats and one motor lifeboat for the first five years of Prohibition.

<sup>100</sup> *Rumrunner: The Life and Times of Johnny Schnarr*, *supra* note 18 at 68.

<sup>101</sup> *Booze, Boats and Billions: Smuggling Liquid Gold!*, *supra* note 11 at 21-22.

<sup>102</sup> *Rumrunner: The Life and Times of Johnny Schnarr*, *supra* note 18 at 70. Schnarr asserts that too many people eventually went in to smuggling, and the threat of violence allowed serious smugglers to benefit economically.

<sup>103</sup> *Booze, Boats and Billions: Smuggling Liquid Gold!*, *supra* note 11 at 128-29.

had also increased enforcement on the Pacific coast.<sup>104</sup> In addition, the United States and Britain signed a treaty in 1924 to increase the distance of the international waters limit from shore in order to provide law enforcement with more time to catch a bootlegging boat.<sup>105</sup> Further, the Navy provided destroyers and mine sweepers to assist the coast guard.<sup>106</sup> The early to mid-1920s in Canada also saw an increase in law enforcement resources. For instance, in 1923, the Alberta Provincial Police obtained six new motorcycles equipped with machine guns or submachine guns.<sup>107</sup> In 1925, the Ontario Provincial Police also augmented law enforcement and increased the number of charges and fines by using criminal intelligence; increasing the number of liquor licence inspectors; modernizing methods of dealing with criminal records and fingerprints; establishing a motorcycle squad for highways; and creating a policing radio network.<sup>108</sup>

At times, particularly during the first few years of Prohibition, when law enforcement did succeed in capturing smugglers, prosecutions failed, and on at least one occasion even resulted in charges being laid against officers using firearms to apprehend bootleggers.<sup>109</sup> In 1925, the United States Department of Justice stopped prosecuting offenders using the *Volstead Act* which declared smuggling to be a misdemeanor, and began prosecuting smugglers under the *Tariff Act* which declared the activity to be an indictable offence with sentences of lengthy imprisonment or fines up to \$5 000.<sup>110</sup> The American federal government had much greater success in prosecuting violations of Prohibition laws, but local prosecutions paled in comparison.<sup>111</sup> However, generally speaking, the criminal justice system overall did not favour the enforcement of Prohibition laws.

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<sup>104</sup> *Rumrunner: The Life and Times of Johnny Schnarr*, *supra* note 18 at 132.

<sup>105</sup> *Booze, Boats and Billions: Smuggling Liquid Gold!*, *supra* note 11 at 129.

<sup>106</sup> *Ibid.*

<sup>107</sup> *Booze: A Distilled History*, *supra* note 3 at 178.

<sup>108</sup> *Booze, Boats and Billions: Smuggling Liquid Gold!*, *supra* note 11 at 169.

<sup>109</sup> *Ibid.* at 55-56. After police officers apprehended four bootleggers, including renowned Rocco Perri, four police officers showered the smugglers' boat with bullets and killed one of the occupants, John Gogo. The coroner and the Crown opined that the smugglers' acts were not criminal offences, and thus, these officers had committed manslaughter. The trial resulted in a hung jury.

<sup>110</sup> *Booze, Boats and Billions: Smuggling Liquid Gold!*, *supra* note 11 at 133.

<sup>111</sup> *Rumrunning and the Roaring Twenties: Prohibition on the Michigan-Ontario Waterway*, *supra* note 9 at 112. Mason states that in 1928, federal prosecutors obtained 48 820 convictions out of more than 50 000 prosecutions. Between 1918 to 1928, the city of Detroit succeeded in obtaining convictions in relation to only about 25 per cent of their prosecutions. However, one must consider that enforcement in the early parts of Prohibition was more problematic, and thus, may skew this data against local prosecution results.

In spite of increased law enforcement and increased prosecutions for more serious offences, courts continued to impose sentences and fines so minimal as to not deter or affect business operations. Many judges remained unsympathetic to Prohibition laws.<sup>112</sup> Usually, they released offenders, and did so on easily achievable monetary sureties.<sup>113</sup> Further, year-long delays in matters coming to trial<sup>114</sup> meant that bootleggers were free to continue their criminal activities. Judges expanded the common law to accommodate defences to Prohibition statutes, and in so doing, discouraged law enforcement efforts.<sup>115</sup> They rarely imposed imprisonment, and if they did, the sentences were not lengthy.<sup>116</sup> They imposed fines that became simply a cost of doing business<sup>117</sup> if any fines were imposed at all.<sup>118</sup> At least one rumrunner pled guilty to violating Prohibition laws, and incurred a fine not because he had no defence to the charge, but just to return to work.<sup>119</sup> The proper administration of justice suffered. In the latter part of Prohibition, although an increasing number of bootleggers were apprehended and some jailed, the demand for illegal liquor did not decrease, and did not deter other bootleggers from continuing the trade.<sup>120</sup>

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<sup>112</sup> *Booze, Boats and Billions: Smuggling Liquid Gold!*, *supra* note 11 at 148 and 188. Hunt asserts, *ibid.* at 151, that Judge Cooper of the Northern District Court of New York "...harboured doubts as to the wisdom of the Volstead Act...", but that he increased fines and jail terms in relation to Prohibition offences due to the open and blatant disdain of bootleggers for the law.

<sup>113</sup> *Ibid.* at 106 and 260.

<sup>114</sup> *Ibid.* at 148.

<sup>115</sup> *Ibid.* at 33. Hunt refers to an Ontario Supreme Court case in which the magistrate held that a person could have more than one residence in order to house his "cellar supply" – the liquor received through mail order and housed in one's residence. Notably, this defence later became invalid.

<sup>116</sup> *Ibid.* at 259.

<sup>117</sup> *Ibid.* at 106, 148 and 259; and *Booze: A Distilled History*, *supra* note 3 at 259.

<sup>118</sup> *Rumrunning and the Roaring Twenties: Prohibition on the Michigan-Ontario Waterway*, *supra* note 9 at 19. Mason asserts that 90 per cent of smugglers convicted easily paid their fines which were about \$20, and many smugglers did not even receive a fine.

<sup>119</sup> *Rumrunner: The Life and Times of Johnny Schnarr*, *supra* note 18 at 83. After the impoundment of his boat by customs after it had been shot by law enforcement during a liquor run, Schnarr describes his decision:

On the evidence of that slug [head customs officer George] Norris impounded the *Moonbeam*. I argued that the bullet could have come from a .22 rifle or something that had ricocheted off the water, but old George would have none of that. I let them keep the boat for a couple of weeks because it was a period of the full moon and the nights were too bright for hauling anyway. I knew that I could beat the charge. They would never have been able to get a conviction on that little evidence, but it could have kept the boat tied up for several months at least. So, after a couple of weeks when the orders started to come in again, it was simpler just to pay the \$500 fine and go back to work.

<sup>120</sup> *Ibid.* at 100.

According to Craig Heron, mass civil disobedience of Canadians in the support of the underground economy of bootlegging,<sup>121</sup> rather than a lack of effective formal social controls, lead to the demise of Prohibition laws.

In the end, prohibition did not fail simply because the police were ineffective, incompetent, or corrupt. In essence, the rule of law broke down. Large numbers of Canadians refused to accept the legitimacy of either the idea of clamping down on alcohol consumption or the heavy-handed administration of the law, and many saw an economic opportunity in subverting the state measures.<sup>122</sup>

For bootleggers who smuggled via land, such as bootleggers in the Canadian Prairies and in Quebec, and bootleggers who smuggled off the Pacific coast, what little danger the law often posed remained insignificant in comparison to the threat of violence and death, and the theft of product and transportation by other smugglers.<sup>123</sup> In Ontario along the Detroit River, smugglers paid protection money to various officials in order to make their runs without incident.<sup>124</sup> However, lawlessness in the area led to shootings and woundings by the coast guard,<sup>125</sup> and murders and violence among bootlegger gangs and hi-jackers.<sup>126</sup> Violence only increased with the involvement of organized crime anti-Prohibitionists, such as Al Capone.<sup>127</sup>

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<sup>121</sup> *Booze: A Distilled History*, *supra* note 3 at 266.

<sup>122</sup> *Ibid.* at 261.

<sup>123</sup> *Booze, Boats and Billions: Smuggling Liquid Gold!*, *supra* note 11 at 23; and *Rumrunner: The Life and Times of Johnny Schnarr*, *supra* note 18 at 91. Schnarr states: "In the spring of 1924 hijacking probably posed more of a threat to the rum trade than did the Coast Guard."

<sup>124</sup> *Booze, Boats and Billions: Smuggling Liquid Gold!*, *supra* note 11 at 45. Hunt cites the evidence of a Windsor taxi driver who testified in 1921 that he had paid out \$96 000 in the two years prior.

<sup>125</sup> *Ibid.* at 47-48; and *Rumrunner: The Life and Times of Johnny Schnarr*, *supra* note 18 at 82-83, 90, 102, 131 and 134. Hunt states in *Booze, Boats and Billions: Smuggling Liquid Gold!*, *supra* note 11 at 48: ...On the river itself, running gun battles between rum-runners and pursuing coastguardsmen became a common place disruption of area residents' sleep. Even more disturbing to these waterfront residents were the number of stray bullets that shattered their windows or lodged in their walls.

<sup>126</sup> *Booze, Boats and Billions: Smuggling Liquid Gold!*, *supra* note 11 at 91-92.

<sup>127</sup> *Rumrunning and the Roaring Twenties: Prohibition on the Michigan-Ontario Waterway*, *supra* note 9 at 146. For example, Mason refers to the St. Valentine's Day Massacre in February 1929 in Chicago during which murders occurred in response to a hijacking of Canadian whiskey en route to Al Capone's "criminal empire" in Illinois. Violence worsened during "Bloody July" in 1930 in Detroit.

### 2.2.5 The Rise of Organized Crime Outlaws During Prohibition

Although organized criminal activities had existed prior to Prohibition, they became more centralized, more organized, and more commercialized as a result.<sup>128</sup> The complicated nature of bootlegging, the vast and interregional distribution networks,<sup>129</sup> and the involvement of many parties from distillation to delivery, meant the operations had to be, and were, elaborately organized.<sup>130</sup> Conveniently, the organizational skills and techniques of American mobsters, such as John Torrio and his young associate Al Capone, in brothel and gambling enterprises easily transferred to the illegal liquor trade,<sup>131</sup> and became more developed and became refined. "...Prohibition offered a graduate course for training in the crime industry."<sup>132</sup> Further, the association of anti-Prohibitionists in outlaw groups, and the identification with the values and norms of these groups led some anti-Prohibitionists to become organized crime outlaws.

The expansion of the coast guard in the Atlantic and on the Great Lakes, and the subsequent increase in enforcement of Prohibition laws, not only forced bootleggers to develop new smuggling techniques but also required that they sometimes to cooperate with one another.<sup>133</sup>

These [bootlegging] alliances were the first manifestations of a crime syndicate operating on a national scale. In time they became the foundation of multilateral "peace conferences," such as the 1929 meeting in the Hotel President in Atlantic City, when mobsters from Chicago, Cleveland, Philadelphia, Newark, and New York granted each other territorial exclusivity, enabling them to operated unencumbered in their respective cities. Eventually this sort of

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<sup>128</sup> *Last Call: The Rise and Fall of Prohibition*, *supra* note 19 at 272.

<sup>129</sup> *Ibid.*

<sup>130</sup> *Booze: A Distilled History*, *supra* note 3 at 249; and *Rumrunner: The Life and Times of Johnny Schnarr*, *supra* note 18 at 194. Johnny Schnarr describes the complexity of the operation that the organization Consolidated Exporters orchestrated on one occasion:

The liquor would be hauled down to a point off the mouth of the river by a purse seiner. The buyer would send a man up to Vancouver to ride down with the shipment and show us where to make the landing up the river. Somehow or other, the liquor for that deal was shipped right out of the harbour in Vancouver. How they did it, I don't know; I did not concern myself with that end of the business. All I planned for was my part in the operation, the delivery of the load.

<sup>131</sup> *Last Call: The Rise and Fall of Prohibition*, *supra* note 19 at 272.

<sup>132</sup> *Ibid.*

<sup>133</sup> *Booze, Boats and Billions: Smuggling Liquid Gold!*, *supra* note 11 at 250-51; and *Last Call: The Rise and Fall of Prohibition*, *supra* note 19 at 273. For instance, Okrent points to alliances among John Torrio and Al Capone in Chicago with Detroit's Purple Gang, and Sam Bronfman's use of Moe Dalitz's planes and boats to transport goods across Lake Erie into the hands of Ohio and Pennsylvania affiliates and Meyer Lansky's New York operation.

arrangement would harden into formal partnerships, such as the cartel established by Lansky and his fellow New Yorker Lucky Luciano, Abner “Longy” Zwillman of Newark, Charles “King” Solomon of Boston, Daniel Walsh of Providence, and a few others who together would control the entire bootleg business from Boston to Philadelphia. They fixed prices throughout their territory, struck an exclusive distribution deal with their Canadian suppliers, and rewarded John Torrio for brokering the arrangement by granting him a fungible inventory of five thousand cases of liquor a month.<sup>134</sup>

Thus, it furthered the prosperity and power of organized bootlegging groups over individual bootleggers, and led to establishment and domination of some organizations over others.

In Canada, a similar cooperation appeared among anti-Prohibitionist organized crime outlaws and anti-Prohibitionists who were usually law-abiding conventional members of society. Although small-scale bootlegging enterprises flourished before and after World War I,<sup>135</sup> the presidents and owners of larger breweries and distilleries organized complex liquor smuggling operations employing a number of individuals,<sup>136</sup> and these more powerful operators slowly suffocated many smaller enterprises in the competition for territory.<sup>137</sup> Arguably, these presidents and owners may have fallen within the category of white-collar criminals to some degree, but their disrespect for Prohibition laws ensnares them within the category of anti-Prohibition outlaw as well.

Individuals who were or became organized crime outlaws after the end of Prohibition, worked with or for presidents and owners of liquor businesses during Prohibition:

...[A]s the coast guard fleet expanded to a veritable armada, many independent operators decided the route to survival lay in joining [Harry] Hatch’s Navy. In return for protection they agreed to carry only what they were told.

One of the largest independents to come to this decision was Rocco Perri. He had moved into the liquor export business in 1921, putting his bootlegging

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<sup>134</sup> *Last Call: The Rise and Fall of Prohibition*, *supra* note 19 at 273.

<sup>135</sup> *Booze: A Distilled History*, *supra* note 3 at 241.

<sup>136</sup> *Booze, Boats and Billions: Smuggling Liquid Gold!*, *supra* note 11 at 186; and *Booze: A Distilled History*, *supra* note 3 at 243. Hunt in *Booze, Boats and Billions: Smuggling Liquid Gold!* obtains this information from the 1927 Royal Commission on Customs and Excise.

<sup>137</sup> *Last Call: The Rise and Fall of Prohibition*, *supra* note 19 at 358. Okrent states that although 1345 beer brewers operated in 1915, only 31 existed after beer was again legalized due to the fact that big breweries had produced other products to survive during Prohibition, and used their strength to then consolidate the market afterward.

operations into the capable hands of Bessi Starkman while he developed the export business. Much of Rocco's fleet of fifty fishing boats operated on Lake Erie and were used to run booze both to the States and also back into Canada. Once Rocco had put his boats under Hatch's control they were sent to the Heyden Boat Works to be refitted with Packard Motors and a mastercruiser was made available to protect them. The addition of Rocco's fleet gave Hatch's Navy domination of the lakes.

If Sam Bronfman, president of Seagrams, wanted to ship booze on the Great Lakes in large quantities, he had to rely on Hatch's Navy. The independents were simply unable to guarantee delivery of large quantities. Moreover, Sam Bronfman, despite his reputation for a terrible temper, was somewhat in awe of the tough, hard-driving Harry Hatch, who made it clear that Bronfman could not operate in Ontario without his approval. Neither man had much love for the other, but neither was capable on his own of supplying the demand from the huge American market to the south. Consequently, a certain amount of cooperation was to the advantage of both.<sup>138</sup>

These clever and economically powerful anti-Prohibitionists gained control of the bootlegging operations. Increased law enforcement acted as a double-edged sword in that it presented a great threat to individual bootleggers, but simultaneously separated the wheat from the chaff, and developed the prowess and power of bootlegging outlaws. Indeed, Philip J. Mason asserts that by 1923, organized crime gangs that had started bootlegging during Prohibition, had taken control of smuggling and the operation of distilleries and "speakeasies" in Canada and the United States along the Detroit River, and made millions of dollars as a result.<sup>139</sup> Several Italian Mafia families had also participated extensively in smuggling, and obtained controlling interest in Canadian breweries and distilleries.<sup>140</sup> The increasing and unlimited financial resources of such organized crime anti-Prohibitionists facilitated their bribery of public officials, and enabled them to take over some local American governments.<sup>141</sup>

This discussion of the increased organization of liquor distribution during Prohibition shows that anti-Prohibitionists who would become organized crime outlaws after the end of Prohibition, such as Rocci Perri, were heavily involved in distributing liquor and

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<sup>138</sup> *Booze, Boats and Billions: Smuggling Liquid Gold!*, *supra* note 11 at 143-44.

<sup>139</sup> *Rumrunning and the Roaring Twenties: Prohibition on the Michigan-Ontario Waterway*, *supra* note 9 at 109.

<sup>140</sup> *Ibid.* Mason refers to the Licavoli, Vitalie and Giannolos families.

<sup>141</sup> *Ibid.* at 110.

would continue with other organized crime activities. However, other anti-Prohibitionists who owned and operated large breweries and distilleries, seemingly did not continue to participate in organized crime groups after the repeal of Prohibition laws. This distinction demonstrates the fine line between anti-Prohibitionist organized crime outlaws and anti-Prohibitionists who were usually law-abiding (though opportunistic) conventional societal members. Some of the latter group crossed over into the organized crime group after Prohibition. However, both groups had disdain, disrespect, or even contempt for Prohibition laws.

## 2.2.6 The End and Consequences of Prohibition

Eventually, Prohibition in Canada ended in fits and starts just as it had began.<sup>142</sup> American Prohibition had lasted longer, and ended on December 5, 1933.<sup>143</sup> Whether it made Americans and Canadians generally drink less during its term and in the ensuing decades<sup>144</sup> remains arguable. However, it failed to rid society of the scourge of alcohol, and empowered, if not created, organized crime groups.<sup>145</sup> As the illegal liquor trade

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<sup>142</sup> *Booze: A Distilled History*, *supra* note 3 at 277. By 1930, government liquor stores dominated Canadian landscapes and contributed millions of dollars to state treasuries, and some provinces allowed licenced public drinking establishments. Eight of nine provinces, the Yukon and the Dominion of Newfoundland had state liquor stores which yielded over \$30 million dollars annually. Public drinking establishments would slowly continue to extend to the Maritimes, and eventually return to Nova Scotia in 1948, to New Brunswick in 1961, and to Prince Edward Island in 1964.

<sup>143</sup> *Rumrunning and the Roaring Twenties: Prohibition on the Michigan-Ontario Waterway*, *supra* note 9 at 150. However, the federal legislature did not approve the manufacture and sale of whiskey in state liquor stores until December 30, 1933.

<sup>144</sup> *Last Call: The Rise and Fall of Prohibition*, *supra* note 19 at 373. Okrent asserts that Prohibition did make Americans drink less. However, many other social and economic forces occurred during Prohibition and thereafter which may have had such an impact if any indeed took place, such as the reduction of immigration in comparison to the late 1800s and thus fewer Europeans whose attitudes more greatly favoured alcohol consumption, and the impact of the Great Depression on household incomes and the ability to purchase non-essential items.

<sup>145</sup> *Organized Crime*, *supra* note 2 at 54. Abadinsky argues:

Until Prohibition, gangsters were merely errand boys for the politicians and the gamblers; they were at the bottom of a highly stratified social milieu. The gamblers were under the politicians, who were “kings” (Katcher 1959). Prohibition changed the relationship among the politicians, vice entrepreneurs, and gang leaders. Before 1920, the political boss acted as a patron for the vice entrepreneurs and gangs: He protected them from law enforcement, and they gave him financial and electoral support. The onset of Prohibition, however, unleashed an unsurpassed level of criminal violence, and violence is the specialty of the gangs. Physical protection from rival organizations and armed robbers was suddenly more important than was protection from law enforcement. Prohibition turned gangs into empires (Logan 1970). With Prohibition “pumping money into mob pockets, power shifted from men with votes to men with money and guns” (Pietrusza 2003: 302).

declined and profits became part of state treasuries, organized crime anti-Prohibitionists turned to other illegal ventures, such as gambling, prostitution, and drugs.<sup>146</sup> However, what remains clear is that organized crime had entered Canada through illegal bootlegging.<sup>147</sup> While some bootleggers who were usually conventional law-abiding citizens took the opportunity to earn significant sums of money by violating Prohibition laws, most would return to non-criminal employment, such as Johnny Schnarr.<sup>148</sup> Other anti-Prohibitionists, such as the presidents and owners of large breweries and distilleries, would have generated a significant presence in the liquor industry, and would continue to manufacture and sell liquor. Others – the organized crime outlaws – would continue to work within the criminal milieu and in organized crime.<sup>149</sup> The refinement of criminal techniques and skills during Prohibition, as well as the creation of a national structure of mob bosses in the United States, entrenched organized crime outlawry in Canada and the United States.

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Although America had OC [organized crime] before Prohibition, it “was intimately associated with shabby local politics and corrupt police forces”; there was no organized-crime activity “in the syndicate style” (King 1969: 23). The “Great Experiment” was a catalyst that caused OC, especially violent forms, to blossom into an important force in American society. Prohibition mobilized criminal elements in an unprecedented manner. Pre-Prohibition crime, insofar as it was organized, centered around corrupt political machines, vice entrepreneurs, and, at the bottom, gangs. The competitive violence of Prohibition turned the power structure upside down. It also led to a new level of criminal organization.

<sup>146</sup> *Booze, Boats and Billions: Smuggling Liquid Gold!*, *supra* note 11 at 200. Hunt uses Ontario as an example.

<sup>147</sup> *Ibid.* at 194; and *Last Call: The Rise and Fall of Prohibition*, *supra* note 19 at 345. Okrent in *Last Call: The Rise and Fall of Prohibition* asserts that Prohibition transformed neighbourhood gangs into organized criminal corporations.

<sup>148</sup> *Rumrunner: The Life and Times of Johnny Schnarr*, *supra* note 18 at 220; and *Organized Crime*, *supra* note 2 at 55. Schnarr returned to logging and commercial fishing until he retired in 1969.

<sup>149</sup> *Booze, Boats and Billions: Smuggling Liquid Gold!*, *supra* note 11 at 200; and *Organized Crime*, *supra* note 2 at 55-56.

## 2.3 NORTH AMERICAN MAFIA OR LA COSA NOSTRA

### 2.3.1 Overview

Some social scientists, authors, police, and Italian associations in the 1960s to 1980s disputed that the Italian Mafia existed at all<sup>1</sup> or existed as an organization rather than individuals.<sup>2</sup> However, the emergence of more than 500 defecting members and evidence from judicial inquiries in the United States confirm the existence of formal organized crime Mafiosi groups.<sup>3</sup> In Canada, wiretap evidence in the 1970s proved the existence of Mafiosi groups, and their connections with Mafiosi Families in the United States, such as the Bonanno Family in New York City.<sup>4</sup>

Four main Mafia-type organized crime groups exist in Italy: the *'ndrangheta* in Calabria, the Sicilian Mafia or Cosa Nostra, the Camorra in Campania, and the Sacra Corona Unita in Puglia.<sup>5</sup> Although these organizations began as regional enterprises, they eventually spread to all of Italy and abroad.<sup>6</sup> La Cosa Nostra in the United States

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<sup>1</sup> Letizia Paoli, "Italian Organised Crime: Mafia Associations and Criminal Enterprises" (2004) 6 *Global Crime* 19 ["Italian Organised Crime: Mafia Associations and Criminal Enterprises"] at 19; and James Dubro, *Mob Rule: Inside the Canadian Mafia* (Toronto: Macmillan of Canada, 1985) [*Mob Rule: Inside the Canadian Mafia*] at 10-11. Paoli refers to assertions by Pino Arlacchi in Pino Arlacchi, *Mafia Business*, trans. by Martin Ryle (London: Verso, 1987) at 3-4 that the Mafia as a form of criminal organization, rather than a type of behaviour and power, does not exist. Giovanni Ermenegildo Schiavo in *The Truth About the Mafia and Organized Crime in America* (New York: Vigo Press, 1962) at 11 and 86 also asserts the Mafia in Italy is dead and does not exist in the United States. Dubro refers to assertions in the 1970s by an Ontario intelligence officer who opined:

... There is no 'Mafia' in Toronto, just well-connected organized criminals of Italian descent who effectively use the 'myth' of the Mafia to enhance their own positions in the criminal world.

<sup>2</sup> "Italian Organised Crime: Mafia Associations and Criminal Enterprises", *supra* note 1 at 19. Paoli refers to Henner Hess, *Mafia and Mafiosi: The Structure of Power* (Lexington: Saxon House, 1973); Anton Blok, *The Mafia of a Sicilian Village, 1860-1960: A Study of Violent Peasant Entrepreneurs* (Cambridge: Polity Press 1988); and Jane Schneider & Peter T. Schneider, *Culture and Political Economy in Western Sicily* (New York: Academic Press, 1976).

<sup>3</sup> "Italian Organised Crime: Mafia Associations and Criminal Enterprises", *supra* note 1 at 20.

<sup>4</sup> *Mob Rule: Inside the Canadian Mafia*, *supra* note 1 at 5-6. This wire tap evidence was brought to light in the Quebec Commission on Organized Crime Commission as well as the Ontario Royal Commission into Certain Sectors of the Construction Industry or Waisberg Commission; and by Canadian court cases in the mid-1970s, such as the trial of Calabrian Mafia member Francesco Caccamo who had documents outlining the bloody indoctrination rituals and formation of the Honoured Society or "Siderno group" and its use of punishment and violent death, *ibid.* at 114, and the sentencing of members of the Calabrian Honoured Society or *'ndrangheta* which revealed threats of a territorial war in Mafia, interconnections with the United States Mafia leaders, and discussions about the structure and rules of the group.

<sup>5</sup> Stefano Maffei & Isabella Merzagora Betsos, "Crime and Criminal Policy in Italy: Tradition and Modernity in a Troubled Country" (2007) 4 *European J. of Criminology* 461 ["Crime and Criminal Policy in Italy: Tradition and Modernity in a Troubled Country"] at 470.

<sup>6</sup> *Ibid.*

and Canada can trace the seeds of its origins to Italian Mafiosi groups. The rich and expansive history of these Mafiosi groups, and their influence on La Cosa Nostra necessitates a review of the four main types of Mafia.

These origins of Italian Mafiosi groups and La Cosa Nostra in North America demonstrate the importance of identity within an outlaw group, generating that identity, and maintaining that identity. Use or display of this identity to perpetuate and reinforce the power of the group was likely subtle and did not take the usual form of other organized crime outlaws who wear overt paraphernalia and insignia. Mafiosi groups and La Cosa Nostra also remain somewhat distinct from other organized crime outlaws due to the familial bonds of their members – either by blood or ritual – but these bonds evince one method of reinforcing and perpetuating their anti-social values and norms, as well as their identity. These bonds also demonstrate the exclusivity of membership. Further, these groups differ from other organized crime outlaws due to their political influence in the government and in the community.<sup>7</sup> However, the extreme violence and criminality of these groups as well as the power of their reputation and identity make them similar to other organized crime outlaws: “...[T]he Mafia’s lifeline is its ability to instill fear in people – to make victims and potential victims fear what they can do....”<sup>8</sup>

The law has largely left this power unchecked due to a lack of investigative tools, late efforts at enforcement, investigative hindrances, as well as criminal justice delays and manipulations. The power of the Mafia ebbs and flows from infighting within and among Families, and from competition posed by other organized crime outlaw groups.

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<sup>7</sup> *Ibid.* at 470; and “Italian Organised Crime: Mafia Associations and Criminal Enterprises”, *supra* note 1 at 24. Maffei and Betsos in “Crime and Criminal Policy in Italy: Tradition and Modernity in a Troubled Country” state:

Mafia-type organizations are characterized by their viciousness and the similarity of their structure, which is based on a network of secret associations of ‘men of honour’ governed by the code of silence [or Omertà]. One of the most significant features of these organizations has always been their aptitude for infiltrating public offices and exerting political influence. ....

<sup>8</sup> *Mob Rule: Inside the Canadian Mafia*, *supra* note 1 at 54. *Ibid.* at 119, an informer of the Siderno Mafia group stated the reasons for Mafia power:

...Just for fear itself. They [people] know what they [the Siderno Mafia] are capable of doing, what they have done in the past and what they can do.

However, their presence remains a significant force in contemporary society, and reveals some of the ways in which organized crime outlaws form and perpetuate.

## 2.3.2 The History of La Cosa Nostra: Italian Mafiosi Groups

### 2.3.2.1 The Sicilian Mafia or Cosa Nostra, and the Calabrian Ndrangheta

The existence and persistence of the Sicilian Mafia stems from the history of continual repressive foreign occupation in Sicily for over 2000 years,<sup>9</sup> and from the fight against these systems of perceived illegitimate and unjust foreign state action. In the 18<sup>th</sup> century, various foreign governments in Sicily used noble families to manage public affairs and collect taxes. These families were perceived as unjust by lower ranks within society, and thus, the families maintained armies called *campieri*<sup>10</sup> to “protect their fields and police the peasants.”<sup>11</sup> These armies became the Mafia, and their origins occurred much earlier than the unification of Sicily with Italy in 1860.<sup>12</sup> As the foreign invaders left, the Mafia assumed control by offering to protect the peasants, and simultaneously controlling them for the landowners.<sup>13</sup> They were an informal, unelected and powerful group of Sicilian men who remained to rule within society alongside weak governments and inadequate legal systems.<sup>14</sup>

Sicilians, who've seen their island invaded almost continuously for centuries, have nurtured a strong sense of personal worth, group loyalty, and family protection. Faced with invaders from several countries, it's only natural that any resistance will form around the most capable, the strongest, and the most

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<sup>9</sup> Gaia Servadio, *Mafioso: A History of the Mafia from its Origins to the Present Day* (New York: Stein and Day, 1976) [*Mafioso: A History of the Mafia from its Origins to the Present Day*] at 3.

<sup>10</sup> *Ibid.* at 10. The *campieri* became *uomini di rispetto* or men of respect due to their violent methods which included terror and murder.

<sup>11</sup> Antonio Nicaso & Lee Lamothe, *Angels, Mobsters & Narco-Terrorists: The Rising Menace of Global Crime Empires* (Mississauga: John Wiley & Sons Canada, 2005) [*Angels, Mobsters & Narco-Terrorists: The Rising Menace of Global Crime Empires*] at 35.

<sup>12</sup> *Mafioso: A History of the Mafia from its Origins to the Present Day*, *supra* note 9 at 17.

<sup>13</sup> *Angels, Mobsters & Narco-Terrorists: The Rising Menace of Global Crime Empires*, *supra* note 11 at 36. Nicaso and Lamothe state:

This is what's called the “excellent Mafia position”: inserting themselves and their power between opposing parties and benefiting from both sides.

<sup>14</sup> *Ibid.* at 35; and Louis I. Shelley, in “Mafia and the Italian State: The Historical Roots of the Current Crisis”, Book Reviews of *Men of Respect: A Social History of the Sicilian Mafia* by Raimondo Catanzaro, *The Sicilian Mafia: The Business of Private Protection* by Diego Gambetta, and *Mafia Issues Analyses and Proposals for Combatting the Mafia Today* by Ernesto U. Savona, ed. (1994) 9 *Sociological Forum* 661 at 667.

violent. And if those people are already committed to an organization, the perceived strength is magnified. Where government collects taxes but doesn't provide adequate law enforcement and judicial and social services, the downtrodden and slighted will turn to a mafia-like group for protection; this allows the *Mafiosi* to accumulate power, wealth, and respect.<sup>15</sup>

In spite of the establishment of a constitutional State in 1860 and an elected parliament, "...the old wine was poured into new bottles...."<sup>16</sup> These origins of the Sicilian Mafia echo the societal circumstances that gave rise to other outlaws who rebelled against the socio-economic disenfranchisement, or against the perceived legal or political injustice of a ruling authority.

*'Ndrangheta* is a Greek work meaning manliness and heroism.<sup>17</sup> The *'ndrangheta* exist in the remote villages and towns of Calabria, the southernmost province of the Italian mainland,<sup>18</sup> where government interest and power is low and strong men control the activities of citizens.<sup>19</sup> The town of San Luca is the *casa madre* or mother home of this Honoured Society of Calabria.<sup>20</sup> However, the power of the *'ndrangheta* travels much further than one Italian province. It connects itself to Colombian, Turkish, German, Dutch, Belgium, and French criminal organizations.<sup>21</sup> The cohesion within the *'ndrangheta* in comparison to other outlaws, and even some other Mafia-type groups, deserves mention:

...Virtually every city, town, and village in Calabria had a criminal clan that controlled many facets of life. Unlike the Sicilian and American mafias, the *'ndrangheta* was built upon the family nucleus of blood relatives and

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<sup>15</sup> *Angels, Mobsters & Narco-Terrorists: The Rising Menace of Global Crime Empires*, *supra* note 11 at 34-35.

<sup>16</sup> *Mafioso: A History of the Mafia from its Origins to the Present Day*, *supra* note 9 at 17.

<sup>17</sup> *Angels, Mobsters & Narco-Terrorists: The Rising Menace of Global Crime Empires*, *supra* note 11 at 9.

<sup>18</sup> Pierre de Champlain, *Mobsters, Gangsters and Men of Honour: Cracking the Mafia Code* (Toronto: HarperCollins, 2004) at 36; and *Angels, Mobsters & Narco-Terrorists: The Rising Menace of Global Crime Empires*, *supra* note 11 at 9-10. De Champlain asserts, *ibid.* at 36 and 74, that several cells of the *'ndrangheta* exist in Canada – particularly in Toronto and Hamilton – as evidenced by documents found in August 1971 in the residence of a *'ndrangheta* member, Frank Caccamo. The documents set forth the rules, regulation, procedures and induction rituals of the organization.

<sup>19</sup> *Angels, Mobsters & Narco-Terrorists: The Rising Menace of Global Crime Empires*, *supra* note 11 at 9-10.

<sup>20</sup> *Ibid.* at 10.

<sup>21</sup> *Ibid.* at 29. Nicaso and Lamothe state that in approximately 2005, the *'ndrangheta* sold more than \$45 million in drugs per day in the district of Brussels; that *'ndrangheta* members owned or controlled more than 300 pizzerias in Germany; and that in Rome the *'ndrangheta* owed real estate worth millions of euro.

intermarriages. It was, as a result, almost impenetrable; for a brother to inform on a brother would be infamy.<sup>22</sup>

This interrelation among inhabitants through blood or marriage negates the existence of informants<sup>23</sup> and thus renders impossible many of the usual law enforcement initiatives in relation to the organized crime of the *'ndrangheta*.

The Sicilian Cosa Nostra and the Calabrian *'ndrangheta* share common cultural codes, as well as authoritarian organized structures in which the most important family chiefs comprise a commission which unites the two groups.<sup>24</sup> Both organized crime outlaw groups initiate new members into the mafia *cosca* or group by requiring the individual to permanently assume a new identity – that of a “man of honour.”<sup>25</sup> This identity is not only mandatory, but has paramountcy over everything else, including the member’s life.<sup>26</sup> The ruling bodies of the Sicilian Mafia and the *'ndrangheta* have absolute power over every part of their members’ lives.<sup>27</sup> Further, members are brothers.

The ceremony of affiliation additionally creates ritual ties of brotherhood among the members of a mafia family: the ‘status contract’ is simultaneously an act of fraternization. The new recruits become ‘brothers’ to all members and share what anthropologists call a regime of generalised reciprocity: this presupposes altruistic behaviour without expecting any short-term reward. As F. Lestingi, chief prosecutor for the king, pointed out in 1884, mafia groups constitute brotherhoods whose ‘essential character’ lies in ‘mutual aid without limits and without measure, and even in crimes.’ Only thanks to the trust and solidarity created by fraternization contracts does it become possible to achieve specific goals and thus satisfy the instrumental needs of the single members.<sup>28</sup>

Further, exclusivity in membership enables the group to preserve their identity. In addition to fraternization obligations, “men of honour” are obliged to keep the composition, activities and strategies of their group a secret, and have an absolute duty to

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<sup>22</sup> *Ibid.* at 11.

<sup>23</sup> *Ibid.* at 9. Nicaso and Lamothe use the town of Platì in the Aspromonte Mountain of Calabria as an example.

<sup>24</sup> “Italian Organised Crime: Mafia Associations and Criminal Enterprises”, *supra* note 1 at 20.

<sup>25</sup> *Ibid.* at 21.

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.* at 22.

<sup>28</sup> *Ibid.* at 21.

keep silent.<sup>29</sup> In these ways, the Sicilian Mafia and the *'ndrangheta* mandate social control of members and maintain internal cohesion.

The Sicilian Mafia has suffered, but never disappeared, from the effects of law enforcement and infighting in the 1990s,<sup>30</sup> as well as government and military oppression.<sup>31</sup> The Mafia has rebuilt itself, and in its drug trafficking, money laundering, migrant smuggling and military weaponry trade, it has formed new partnerships with the *'ndrangheta* as well as other international criminal organizations in Europe, North America, the Caribbean, South America, South Africa and Eastern Europe.<sup>32</sup> However, the severe nature of their membership and their strong collective identity have prevented the Sicilian Mafia and the *'ndrangheta* from admitting members outside Sicily or Calabria, and thus, has limited entrepreneurial ties and expansion into foreign markets.<sup>33</sup> These Mafiosi groups have focused on their Italian territories, and increased their control and collusion with political officials.<sup>34</sup>

#### 2.3.2.2 The Camorra

The name “Camorra” means “fight” or “quarrel” in Spanish,<sup>35</sup> but for many outside Italian communities, it is synonymous with “crime.”<sup>36</sup> Some claim that the organization originated in the 1500s when Spain ruled Naples, and a criminal Spanish brotherhood, the *Garduna*, brought to Italy its secret ceremonies, oaths, hand and sound communication signals, a membership fund, and the requirement that prospective members must commit a murder.<sup>37</sup> Others assert that the Camorra first surfaced in 1820 in Naples and the surrounding area.<sup>38</sup>

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<sup>29</sup> *Ibid.* at 21.

<sup>30</sup> *Angels, Mobsters & Narco-Terrorists: The Rising Menace of Global Crime Empires*, *supra* note 11 at 33.

<sup>31</sup> *Angels, Mobsters & Narco-Terrorists: The Rising Menace of Global Crime Empires*, *supra* note 11 at 35.

<sup>32</sup> *Angels, Mobsters & Narco-Terrorists: The Rising Menace of Global Crime Empires*, *supra* note 11 at 33.

<sup>33</sup> “Italian Organised Crime: Mafia Associations and Criminal Enterprises”, *supra* note 1 at 23.

<sup>34</sup> *Ibid.* at 27.

<sup>35</sup> Carl Sifakis, *The Mafia Encyclopedia* (New York: Facts On File, 1987) [*The Mafia Encyclopedia*] at 58.

<sup>36</sup> *Angels, Mobsters & Narco-Terrorists: The Rising Menace of Global Crime Empires*, *supra* note 11 at 63.

<sup>37</sup> *Ibid.* Nicaso and Lamothe describe some of the communication methods:

Tens, even hundreds, of similar groups developed and became Camorra<sup>39</sup> of all types – from sophisticated businesses to street-level gangs.<sup>40</sup> Unlike the Sicilian Mafia and the Calabrian *'ndrangheta*, some Camorra groups are not political and do not interfere with governmental activities.<sup>41</sup> However, the well-established Camorra family businesses claim to exert political control over their communities and within local governments.<sup>42</sup>

Even more than the Sicilian Mafia, the Camorra had a very hierarchical structure,<sup>43</sup> and fed on the opportunity in Italian cities.<sup>44</sup> They often use century-old symbols and rituals to strengthen their internal cohesion.<sup>45</sup> However, their lack of overarching coordination of Camorra groups in Campania, unlike the organization of the Sicilian Mafia and *'ndrangheta*, has resulted in violent and murderous wars over territory and criminal markets.<sup>46</sup>

The power of the Italian Camorra was broken or weakened in the 19<sup>th</sup> century<sup>47</sup> and early 20<sup>th</sup> century, and although it resurfaced in the 1960s as a result of the expansion of drug and tobacco smuggling, it did not re-establish or stabilize itself like the Sicilian Mafia and *'ndrangheta* have.<sup>48</sup> The Camorra in North America suffered as well after wars with

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...When a policeman would arrive they mewed like cats; a rooster-like crowing meant that a victim was in the area. A sigh meant “be silent,” that there was someone nearby, listening.

<sup>38</sup> *The Mafia Encyclopedia*, *supra* note 35 at 58.

<sup>39</sup> *Angels, Mobsters & Narco-Terrorists: The Rising Menace of Global Crime Empires*, *supra* note 11 at 63.

<sup>40</sup> *Angels, Mobsters & Narco-Terrorists: The Rising Menace of Global Crime Empires*, *supra* note 11 at 64; and “Italian Organised Crime: Mafia Associations and Criminal Enterprises”, *supra* note 1 at 24.

<sup>41</sup> *Ibid.* and *ibid.*

<sup>42</sup> “Italian Organised Crime: Mafia Associations and Criminal Enterprises”, *supra* note 1 at 24.

<sup>43</sup> *The Mafia Encyclopedia*, *supra* note 35 at 58.

<sup>44</sup> *Angels, Mobsters & Narco-Terrorists: The Rising Menace of Global Crime Empires*, *supra* note 11 at 64.

<sup>45</sup> “Italian Organised Crime: Mafia Associations and Criminal Enterprises”, *supra* note 1 at 24.

<sup>46</sup> *Ibid.* at 24-25. Paoli states, *ibid.* at 24, that the lack of stability and coordination has caused Campania to have the highest murder rate and violent crime rate in Italy for over a decade.

<sup>47</sup> *The Mafia Encyclopedia*, *supra* note 35 at 59. Sifakis asserts that the power of the Camorra in Italy has either been broken or been weakened after the murder convictions of 35 Camorra leaders, including the Grand Master, in 1911, and efforts by Mussolini to eliminate the group in the 1920s.

<sup>48</sup> “Italian Organised Crime: Mafia Associations and Criminal Enterprises”, *supra* note 1 at 24.

the Mafia in American cities such as New Orleans and New York. Most North American Camorristas had joined Mafia groups by 1920.<sup>49</sup>

### 2.3.2.3 The Sacra Corona Unita

The Sacra Corona Unita, or United Sacred Crown, of the Apulian region was borne out of a quest for profit.<sup>50</sup> Mafia and Camorra groups developed in the Apulian region during the 1970s when the region was a major import location for smuggled cigarettes.<sup>51</sup> In subsequent years, crime groups and gangs from the Apulian area formed.<sup>52</sup> Sacra Corona Unita was one of those groups. It was founded in 1983, and was a coalition of ten to fifteen criminal groups and gangs from Southern Apulia.<sup>53</sup>

The Sacra Corona Unita imitates the structure and rituals of the *'ndrangheta* although it lacks great cohesion and stability.<sup>54</sup> It employs religious mysticism like the Camorra.<sup>55</sup> It is hierarchical, and has formed alliances with other Italian Mafiosi groups as well as Balkan, Columbian, Asian, and Eastern European criminal groups.<sup>56</sup>

As a result of law enforcement efforts and the defection of members, the Sacra Corona Unita "...no longer exists as a single viable organisation."<sup>57</sup> However, other Apulian organized crime groups continue to engage in illegal business endeavours.<sup>58</sup>

### 2.3.3 The Evolution of La Cosa Nostra in Canada

Italian immigrants did not create organized crime in America.<sup>59</sup> Organized crime already existed.<sup>60</sup> However, some Italian immigrants did create or replicate the Mafia in

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<sup>49</sup> *The Mafia Encyclopedia*, *supra* note 35 at 64.

<sup>50</sup> *Angels, Mobsters & Narco-Terrorists: The Rising Menace of Global Crime Empires*, *supra* note 11 at 70.

<sup>51</sup> "Italian Organised Crime: Mafia Associations and Criminal Enterprises", *supra* note 1 at 25.

<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.*

<sup>55</sup> *Angels, Mobsters & Narco-Terrorists: The Rising Menace of Global Crime Empires*, *supra* note 11 at 70.

<sup>56</sup> *Ibid.* at 71.

<sup>57</sup> "Italian Organised Crime: Mafia Associations and Criminal Enterprises", *supra* note 1 at 25.

<sup>58</sup> *Ibid.*

America. The strangeness and socio-economic problems within their new world and the desire to preserve cultural values and institutions led immigrants generally, including Italian immigrants, to band together and interact with individuals from their own family, ethnicity, region, and history.<sup>61</sup> Essentially, like other immigrants, they sought to preserve their identity. Ethnic groups in New York had distinct territories, as did Mafia Families, and the larger the territory, the more status in the Mafia fraternity.<sup>62</sup>

The origins of the Mafia groups in America stemmed from the immigration of some four million Italians who, between 1891 and 1921, came primarily from the Mezzogiorno area which includes Sicily, the area of Campania, and the province of Calabria<sup>63</sup> – the places south of Rome where Italian Mafia-type organized crime groups resided. The Mafia in Canada originally mostly came from Calabria.<sup>64</sup> Some of these North American immigrants brought with them not only their language and culture, but also a way of life.

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<sup>59</sup> *Angels, Mobsters & Narco-Terrorists: The Rising Menace of Global Crime Empires*, *supra* note 11 at 48.

<sup>60</sup> *Ibid.*; and *Mob Rule: Inside the Canadian Mafia*, *supra* note 1 at 2. Nicaso and Lamothe provide examples of organized crime before La Cosa Nostra – namely, slave traders, pirates, extortionists, horse thieves, con men, pimps and prostitutes, Wild West bank robbers, and cattle rustlers. Dubro asserts that Chinese secret societies from Hong Kong and China also existed.

<sup>61</sup> David Critchley, *The Origin of Organized Crime in America: The New York City Mafia, 1891-1931* (New York: Routledge, 2009) [*The Origin of Organized Crime in America: The New York City Mafia, 1891-1931*] at 14 and 16; and *Angels, Mobsters & Narco-Terrorists: The Rising Menace of Global Crime Empires*, *supra* note 11 at 48-49. Nicaso and Lamothe assert:

It was in the cities of the East, as urban centers developed, that criminal initiatives became organized. As immigrants arrived in America from disparate countries of the world, they often ghettoized and kept to themselves, both replicating their compact and frequently isolated towns and communities at home and banding together for comfort and protection in places where customs and language were unfamiliar and impenetrable. ...

<sup>62</sup> *The Origin of Organized Crime in America: The New York City Mafia, 1891-1931*, *supra* note 61 at 9.

<sup>63</sup> Howard Abadinsky, *Organized Crime*, 8<sup>th</sup> ed. (Belmont: Thomson Wadsworth, 2007) [*Organized Crime*] at 70; and *The Origin of Organized Crime in America: The New York City Mafia, 1891-1931*, *supra* note 61 at 14. Critchley asserts that over 80 per cent of the 2.1 million Italians who immigrated to the United States between 1900 and 1910 were from southern Italy where secret criminal societies existed. He also asserts, *ibid.* at 4, that prior to World War I, New York had more Italians than Florence, Venice, and Genoa together.

<sup>64</sup> *Angels, Mobsters & Narco-Terrorists: The Rising Menace of Global Crime Empires*, *supra* note 11 at 18-19; and Stephen Schneider, *Iced: The Story of Organized Crime in Canada* (Mississauga: John Wiley & Sons Canada, 2009) [*Iced: The Story of Organized Crime in Canada*] at 227. Schneider asserts, *ibid.* at 532-33, that Calabrian leadership ended by the early 1980s when the Rizzuto Family or “Sixth Family”, led by Nicolò and then Vito Rizzuto, took control over the mafia in Montreal.

Italian immigrants imported “...a ritual brotherhood consisting of loosely linked but otherwise independent and uncoordinated ‘families’ organized hierarchically.”<sup>65</sup> Sicilian organizational forms and internal practices predominantly influenced American Mafia Families, such as those in New York City.<sup>66</sup> For instance, at a micro level, the Sicilian *cosche* or *cosca* which is a series of connections of sets of brothers, such as fathers, sons, brothers, brothers-in-law and god-parents, was used as the core of each organization.<sup>67</sup> Sicilian *cosca* in the 19<sup>th</sup> century usually had up to ten men.<sup>68</sup> Associates beyond kin comprised the outer part of the *cosca*.<sup>69</sup> At a macro level, the Sicilian *caporegime*, which provides rules and practices to elect a boss and councilmen within a Family, was used in America.<sup>70</sup> And, until the late 1920s, only Sicilians could be members of the Mafia in New York City.<sup>71</sup>

These imported brotherhoods contained initiation ceremonies, passwords, rituals, membership rules, loyalty, and codes of conduct, and fostered a shared identity.<sup>72</sup> The rituals or ceremonies by Mafia Families in various cities in America and Canada resembled those of the Sicilian Mafia<sup>73</sup> and in some areas the Camorra.<sup>74</sup> Members of various Mafiosi groups in Canada came from Mafiosi groups in Italy.<sup>75</sup> The presence of these Mafiosi characteristics in America, and the fact that until 1931 membership in some Mafia groups, such as the Sicilian Mafia, provided immigrants with membership in

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<sup>65</sup> *Organized Crime*, *supra* note 63 at 71. Abadinsky refers to research by Eric Hobsbawm in 1969. Abadinsky asserts, *ibid.* at 73-85, that after the Castellammarese war in 1931, five Italian American crime families with distinct identities emerged: the Luciano/Genovese Family; the Mineo/Gambino Family; the Reina/Lucchese Family; the Profaci/Colombo Family; and the Bonanno Family.

<sup>66</sup> *The Origin of Organized Crime in America: The New York City Mafia, 1891-1931*, *supra* note 61 at 61.

<sup>67</sup> *Ibid.* at 62.

<sup>68</sup> *Ibid.* at 51.

<sup>69</sup> *Ibid.* at 62.

<sup>70</sup> *Ibid.*

<sup>71</sup> *Ibid.* at 132.

<sup>72</sup> *Angels, Mobsters & Narco-Terrorists: The Rising Menace of Global Crime Empires*, *supra* note 11 at 12; *Organized Crime*, *supra* note 63 at 71; and *Iced: The Story of Organized Crime in Canada*, *supra* note 64 at 228. David Critchley in *The Origin of Organized Crime in America: The New York City Mafia, 1891-1931*, *supra* note 61 at 64 notes that by the 1920s, passwords both in Italy and America were replaced by third-party introductions.

<sup>73</sup> *The Origin of Organized Crime in America: The New York City Mafia, 1891-1931*, *supra* note 61 at 63.

<sup>74</sup> *Ibid.* at 119-20; and *Mob Rule: Inside the Canadian Mafia*, *supra* note 1 at 114. The Camorra in Brooklyn had ritualistic bloodletting practices similar to the Sicilians.

<sup>75</sup> *Mob Rule: Inside the Canadian Mafia*, *supra* note 1 at 177. For instance, Remo “Rocco” Commisso and Cosimo Commisso of the Siderno Mafia group in Ontario immigrated to Canada in 1961 from Calabria where their father had been a Mafia “don” until the 1940s when he was gunned down in a Mafia feud.

America,<sup>76</sup> do not mean, however, that the American Mafia organizations were simply extensions of or controlled by Italian Mafiosi organizations.<sup>77</sup> While the link to Sicily was significant, it would gradually be severed.<sup>78</sup> The American Mafia would adapt or acculturate the Italian organizational forms and internal practices to the new country,<sup>79</sup> and the first generation of Italian-born bosses would die.<sup>80</sup> As a result, La Cosa Nostra emerged.

The importation of the Mafia way of life did not occur simply due to cultural norms. La Cosa Nostra occurred as a result of the social and economic difficulties.<sup>81</sup> It also occurred as a result of ethnic prejudices that Italian Americans faced in a laissez-faire white Anglo-Saxon society.<sup>82</sup> Individuals of Italian ancestry were prevalent in American organized crime not because of a predisposition toward crime, but rather the need to survive through security in numbers.<sup>83</sup> However, with some Italian Mafiosi men came their criminal records,<sup>84</sup> and thus, their criminal knowledge and perhaps criminal propensities.

In Canada, by 1934 and for the next 50 years approximately, La Cosa Nostra would become “the single-most dominant organized crime force...”<sup>85</sup> due to their organizational structure and ambitious visionary leadership.<sup>86</sup> Prohibition had provided

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<sup>76</sup> *The Origin of Organized Crime in America: The New York City Mafia, 1891-1931*, supra note 61 at 62 and 70. A telegram or “letter of consent” from the Sicilian Mafia would enable members to have dual membership in both the American and Sicilian Mafia. This practice changed around 1931 after the Castellammare War in order to prevent uncontrollable growth of American Families.

<sup>77</sup> *Ibid.* at 60-61 and 71.

<sup>78</sup> *Ibid.* at 233. The Castellammare War of 1930 and 1931, a mass war among American Families, terminated dual membership in the Italian and American Mafia organizations. That it was a war to purge the older conservative Mafiosi and make way for the new more Americanized Mafia members, according to the “Purge thesis”, has been discredited, *ibid.* at 199.

<sup>79</sup> *Ibid.* at 61 and 233.

<sup>80</sup> *Ibid.* at 233.

<sup>81</sup> *Organized Crime*, supra note 63 at 70.

<sup>82</sup> *Ibid.*

<sup>83</sup> *Ibid.* at 71.

<sup>84</sup> *The Origin of Organized Crime in America: The New York City Mafia, 1891-1931*, supra note 61 at 120. Critchley notes that several of the Camorristi of Brooklyn had criminal records in Italy, and those that did not acquired their criminal expertise on the streets in America.

<sup>85</sup> *Iced: The Story of Organized Crime in Canada*, supra note 64 at 227. Schneider asserts the same for the United States.

<sup>86</sup> *Ibid.* at 227-28.

these organized crime groups with substantial financial profits, and taught them how to control the manufacture and sale of goods and to monopolize a market or territory.<sup>87</sup> The familial bonds and code of *omerta* – loyalty, discipline and silence – ensured exclusivity of membership.<sup>88</sup> Most of the La Cosa Nostra groups that arose in Canada were influenced by *'ndrangheta*.<sup>89</sup> The use of family as the centre of each La Cosa Nostra group ensured, and “...promoted shared bonds, values, and goals within each crime family....”<sup>90</sup> Exclusivity and loyalty was also established through the recruitment of members from Mafia strongholds in Sicily and Calabria:

The steady stream of Italian immigrants into Canada and the United States also meant there was an abundance of prospects from which to recruit members. Most of these immigrants came from the mafia strongholds of Sicily and Calabrian and, although only a small fraction were made members of the mafia or *'Ndrangheta*, an intensive police crackdown on organized crime in Italy during the postwar years did result in an exodus of experienced mafiosi who would be influential in establishing the traditions of the secret societies in their adopted countries.<sup>91</sup>

By the late 1940s and early 1950s, some American Mafia Families had infiltrated Canada.<sup>92</sup> These Families established alliances with Canadian Family bosses in Canada, and also took over non-Mafiosi criminal operations as well.<sup>93</sup> This American connection seemingly entrenched La Cosa Nostra in Canada, and empowered the empire of this organized crime group. Steve Schneider described this phenomenon:

If any one individual can take credit for the Cosa Nostra’s invasion of Canada, it was Charles Luciano,<sup>94</sup> the far-sighted and highly ambitious American mobster who has been widely cited as the father of modern organized crime. Inspired by the Roman Empire, Lucky Luciano sought a comparable criminal dynasty and in 1933 even created a governing Mafia Commission in the U.S. ... Luciano’s grand vision also resulted in the partitioning of the United States and Canada into twenty-four separate regions, each of which would be under the

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<sup>87</sup> *Ibid.* at 228.

<sup>88</sup> *Ibid.* This exclusivity of membership was described above in subsection one “The Sicilian Mafia or Cosa Nostra, and the Calabrian *'Ndrangheta*” of section two “The History of La Cosa Nostra: Italian Mafiosi Groups” in this Chapter.

<sup>89</sup> *Ibid.* at 227.

<sup>90</sup> *Ibid.* at 228.

<sup>91</sup> *Ibid.*

<sup>92</sup> *Mob Rule: Inside the Canadian Mafia*, *supra* note 1 at 43-44.

<sup>93</sup> *Iced: The Story of Organized Crime in Canada*, *supra* note 64 at 228-29.

<sup>94</sup> Salvatore Lucania also known as Charles “Lucky” Luciano was born in Sicily, and emerged as a leader in the Masseria crime Family, later to become the Luciano/Genovese Family: *Organized Crime*, *supra* note 63 at 73.

jurisdiction of a particular mafia family. The implication for Canada was that it would be treated as a protectorate of the Cosa Nostra. As a result, the Montreal mafia became a wing of New York's Bonanno Family, southwestern Ontario fell under the influence of the Detroit mob, while the rest of the Ontario's underworld became the fiefdom of Buffalo's mafia boss Stefano Magaddino.<sup>95</sup>

Indeed, other authors writing about La Cosa Nostra also noted the connection between Families in the United States and Canada. For instance, the Bonanno Family of New York City initially established close ties with Vic Cotroni who founded the Mafia in Montreal, Quebec,<sup>96</sup> and later, established ties with Canadian-born Paul Volpe who abandoned pursuits of a legitimate career to establish his own criminal identity<sup>97</sup> and was eventually initiated into the Mafia in Hamilton, Ontario.<sup>98</sup> The Magaddino Family of Buffalo and northern New York State established an alliance with Johnny "Pops" Papalia of Hamilton, Ontario.<sup>99</sup> Canadian connections were seemingly not exclusive and would evolve with changes in the power of Families. Papalia also established connections with an underboss in the Bonanno Family in order to run an international heroin importation ring,<sup>100</sup> and later, Volpe would have the support of the Magaddino Family.<sup>101</sup>

#### 2.3.4 The Reputation for Violence and Intimidation: Part of the Identity of Mafiosi and La Cosa Nostra Outlaws

La Cosa Nostra participated in a number of different types of crimes – counterfeiting;<sup>102</sup> racketeering in various enterprises, such as the poultry market in New York City;<sup>103</sup> and bootlegging during Prohibition.<sup>104</sup> However, it is the ways, means and mindset of Mafiosi and La Cosa Nostra groups and the identity afforded their members within a Family or *cosca*, rather than the specific crimes that the group commits, that characterizes it as an organized crime outlaw group or criminal organization. This

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<sup>95</sup> *Iced: The Story of Organized Crime in Canada*, *supra* note 64 at 228-29.

<sup>96</sup> *Mob Rule: Inside the Canadian Mafia*, *supra* note 1 at 44.

<sup>97</sup> *Ibid.* at 29.

<sup>98</sup> *Ibid.* at 48-49.

<sup>99</sup> *Ibid.* at 44.

<sup>100</sup> *Ibid.* at 44-45.

<sup>101</sup> *Ibid.* at 85.

<sup>102</sup> *The Origin of Organized Crime in America: The New York City Mafia, 1891-1931*, *supra* note 61 at 38-39.

<sup>103</sup> *Ibid.* at 75.

<sup>104</sup> *Organized Crime*, *supra* note 63 at 72.

organized crime outlaw group uses the power of this group identity not only to gain economic benefits or advantages, like other organized crime outlaws, but historically, Mafiosi and La Cosa Nostra groups sought political and legal power. Their power was extensive and multi-faceted. The power rested on a on the reputation of a Family or *cosca* within the community for violence and intimidation, and acts of its members perpetuate and reinforce this reputation.

A reputation for violence and intimidation is one attribute or defining feature of an organized crime group – it is part of the group’s identity. The power of this reputation must be built and maintained by its members, and the use of this reputation must be exclusive to these members in order to preserve the identity of the group. This section will review the power and use of a reputation for violence and intimidation within the activities of Mafiosi groups, and La Cosa Nostra. This review will demonstrate how this reputation contributes to defining who these organized crime outlaws are.

Raimondo Catanzaro distinguishes the Italian Mafia from ordinary criminals and criminal conspiracies, but he also distinguishes them from his concept of organized crime. He asserts that although aspects of Mafioso behaviour have links to “common organized crime”,<sup>105</sup> and although the Mafia has been confused with “free-lance bandits”,<sup>106</sup> it remains distinct from these groups as well as from common criminality due to the cumulative nature of its ideology or mindset, socio-political power, and organization of its activities. The Mafia does not identify with the common criminal or group of common criminals.<sup>107</sup> It has a unique cultural and socio-political background: its historical roots in Sicilian society; its existence requires organization; its activities comprise part of the normal economic system; and it exerts political pressure and social

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<sup>105</sup> Raimondo Catanzaro, *Men of Respect: A Social History of the Sicilian Mafia*, trans. by Raymond Rosenthal (Don Mills: Maxwell Macmillan Canada, Inc., 1992) [*Men of Respect: A Social History of the Sicilian Mafia*] at 3.

<sup>106</sup> *Ibid.* at 4.

<sup>107</sup> *Ibid.* at 17.

control.<sup>108</sup> It uses political alliances with trade unions, the judiciary, the police, administrative bodies, and political groups, to effect its crimes.<sup>109</sup>

Catanzaro asserts that the Sicilian Mafia has been defined in the 1800s and 1900s based on a unique mental or psychological state or spirit that transcends criminality and focuses on a moral (or amoral) code involving violence, intimidation, loyalty, solidarity, silence and respect.<sup>110</sup> However, the Mafia is more. It is a management group with a strategy for criminal activities.<sup>111</sup>

We can therefore...think of the Mafia in a variety of ways: in terms of the goals it tries to achieve—economical and political dominance; in terms of its structure—not a formal organization but rather a collection of groups, or *cosche*; in terms of its culture—its psychology of respect; and finally in terms of the means it employs to achieve its ends—violence or the threat of it.<sup>112</sup>

Like organized crime and unlike free-lance bandits, Mafiosi obtain payoffs for protection; establish commercial businesses; and form associations in order to extort, obtain kickbacks, or monopolize enterprises.<sup>113</sup> However, they do not spend their entire lives conducting routine crimes, such as robberies, extortions and kidnappings. They may do so at first, and then, become mandators or higher level operators.<sup>114</sup> The types of criminal activities of North American Mafia have varied and have become more complicated as the organizations grew and their territories expanded. However, the attributes accorded to the Mafia by Catanzaro – economic and political power by a collection of groups that operate in terms of respect and employ violence and intimidation to achieve their ends – are also seen in ways and means of La Cosa Nostra.

Diego Gambetta argues that the Sicilian Mafia is “...a specific economic enterprise, an industry which produces, promotes, and sells private protection.”<sup>115</sup> He argues that

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<sup>108</sup> *Ibid.* at 11.

<sup>109</sup> *Ibid.* at 17.

<sup>110</sup> *Ibid.* at 5-7 and 12.

<sup>111</sup> *Ibid.* at 17.

<sup>112</sup> *Ibid.* at 18.

<sup>113</sup> *Ibid.* at 3-4.

<sup>114</sup> *Ibid.* at 3.

<sup>115</sup> Diego Gambetta, *The Sicilian Mafia: The Business of Private Protection* (Cambridge: Harvard University Press, 1993) [*The Sicilian Mafia: The Business of Private Protection*] at 1. Gambetta states, *ibid.* at 53, that “...the mafia is best understood as a set of firms specializing in the supply of protection....”

violence is a means used by the Mafia, and not the main attribute or way to characterize the Mafia.<sup>116</sup> Protection is a commodity, and facilitates or encourages economic exchange.<sup>117</sup> The market for protection is created when the state criminalizes acts or commodities.<sup>118</sup> Gambetta uses a description of a transaction to illustrate the role of the Mafia in economic exchanges both in modern day and after 1860.<sup>119</sup> When a buyer seeks product, he wishes to underpay or cheat the seller, and the seller seeks to overcharge or cheat the buyer. The Mafia or a Mafioso acts as mediator to ensure that both parties receive a fair deal, and receives a percentage of the transaction.<sup>120</sup> Further, a Mafioso may provide protection against competition by directing business to a particular seller.<sup>121</sup> Generally, a Mafioso will guarantee only a limited number of sellers.<sup>122</sup> This relationship only works or is necessary in socio-economic settings, such as the criminal milieu, where no formal and accepted rules, such as laws and regulations, exist to govern exchanges. Where just, fair, and effective laws exist in conventional society, no such intervention is required. Where no laws or no conventional laws exist, then a non-state agent who has the power to enforce rules within a subculture of violence is required.

The attribute or defining feature of violence and intimidation has been transmitted to La Cosa Nostra. By the 1920s during Prohibition, all the five Families in America<sup>123</sup>

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<sup>116</sup> *Ibid.* at 2.

<sup>117</sup> *Ibid.*

<sup>118</sup> *Ibid.* at 3. Gambetta states:

...[E]very time the state decrees a particular transaction or commodity illegal, a potential market for private protection is created. Trading becomes by definition vulnerable, and illegal dealers have an incentive to seek the protection of other agencies....

<sup>119</sup> *Ibid.* at 18.

<sup>120</sup> *Ibid.* at 15. Gambetta describes the role of the Mafia in this way:

A *vaccaro* (cattle breeder) I interviewed in Palermo succinctly expressed the core elements of the hypothesis I wish to present: "When the butcher comes to me to buy an animal, he knows that I want to cheat him. But I know that he wants to cheat me. Thus we need, say, Peppe [that is, a third party] to make us agree. And we both pay Peppe a percentage of the deal." This statement has far-reaching theoretical consequences. There are mutual low-trust expectations generating a demand for guarantees on both sides, and there is "Peppe," a man capable of meeting this demand and trusted by both butcher and *vaccaro* to be capable of doing so. ...

<sup>121</sup> *Ibid.* at 22.

<sup>122</sup> *Ibid.*

<sup>123</sup> *The Origin of Organized Crime in America: The New York City Mafia, 1891-1931*, *supra* note 61 at 36, 154 and 160-61. Critchley lists these five Families as the Guiseppe "Joseph" Morello Family, the Nicolo Schiro Family, and the Salvatore D'Aquila Family which existed at the turn of the 20<sup>th</sup> century, and the Giuseppe "Joe the Boss" Masseria Family, and Joseph Profaci Family which arose during Prohibition.

engaged in severe violence and murderous acts against one another over power and territory.<sup>124</sup> Violence accompanied efforts to secure the lucrative profits of bootlegging. This use of violence continued, and evidence from the “Commission Case” in 1986 revealed that the New York Commission (a governing body for La Cosa Nostra Families in New York) can authorize the execution of Family members.<sup>125</sup> The power and role of this Commission and the national Commission for La Cosa Nostra Families is discussed further in subsection four “Application of Concepts within Social Control and Bond Theory to the Identity of Outlaws” in section four “Social Control and Bond Theory” in Chapter Three.

In Canada, evidence of the nature and extent of violence within early Mafia groups and La Cosa Nostra exists in the form of documentation as well as informer information. In the 1950s and early 1960s, a Mafia group from Siderno in Reggio, Calabria with extensive ties to the Calabrian Honoured Society or *'ndrangheta* in Italy and the United States, came to Canada.<sup>126</sup> Its presence and its increased use of violence would fuel the Mafiosi wars in North America in the early 1980s.<sup>127</sup> Documents seized by Ontario police from the Toronto home of a member of the Siderno Mafia, Francesco Caccamo, revealed the sacred rituals of the Society and its use of punishment and violent death.<sup>128</sup> Interviews in the late 1970s for a television program with an informer and former member of the Siderno Mafia would confirm that the group engaged in counterfeit money operations, extortion, narcotics, smuggling aliens, and the “occasional hit”, and that they existed in Italy, the United States, and Canada.<sup>129</sup> Severe violence still

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<sup>124</sup> *Ibid.* at 186. The Castellammare War of 1930 and 1931 exemplifies violence and murder among Mafia Families. Critchley asserts that this War was not a defining point in American Mafia history, nor was it as bloody as portrayed. However, it does demonstrate the degree of power and violence within the American Mafia at that time, on the basis of identification with a “familial” group.

<sup>125</sup> *Organized Crime*, *supra* note 61 at 111-12. Abadinsky also refers to the “Commission Case” as *United States v. Salerno*. The accused, Anthony Salerno and Vincent Cafaro were members of the Genovese Family, and charged with various offences, including violations under the Racketeer Influenced and Corrupt Organizations Act. Related citations that describe various aspects of the case, but not the evidence of the role of the Commission, are *United States v. Salerno*, 85 C.r. 139 (S.D. N.Y. 1986) and 481 U.S. 739 (1987).

<sup>126</sup> *Mob Rule: Inside the Canadian Mafia*, *supra* note 1 at 112.

<sup>127</sup> *Ibid.* at 113.

<sup>128</sup> *Ibid.* at 114. These documents came to be known as the “Caccamo Papers.” Caccamo would later be convicted of counterfeiting and illegal possession of a firearm.

<sup>129</sup> *Ibid.* at 117-19.

characterizes Mafiosi groups in Italy,<sup>130</sup> and in North America, violence increased by the 1980s as La Cosa Nostra members relied less on old Italian Mafia traditions and values in favour of brute force and intimidation.<sup>131</sup>

Informant Cecil Kirby provided evidence of the various acts that he committed for the Siderno Mafia in Canada. He had been an outlaw motorcycle gang member of the Satan's Choice gang which later became the Hells Angels, and his connections introduced him to the Commisso Mafia group for whom he would do enforcement work.<sup>132</sup> The extensive nature of these acts of a hired criminal-hand in a four-year period demonstrates the significance of engaging in violence in conducting Mafiosi enterprises and industries. It shows a penchant for violence that defines them, and how they conduct their affairs.

That Mafiosi groups in Italy and La Cosa Nostra in North America use familial ties to ensure loyalty to the group, and that they employ violence, are attributes or defining features of this organized crime group. However, the use of violence and intimidation

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<sup>130</sup> "Crime and Criminal Policy in Italy: Tradition and Modernity in a Troubled Country", *supra* note 5 at 467. Although the population of Mafia areas – that is to say, Campania, Puglia, Calabria and Sicily – contain less than 30 per cent of the Italian population, but account for more murders. For example, in 2004, 51 per cent of all murders in Italy took place in those four southern regions. Since 1880, Sicily has had double the murder rates of Italy.

<sup>131</sup> *Mob Rule: Inside the Canadian Mafia*, *supra* note 1 at 10.

<sup>132</sup> *Ibid.* at 198. In Fall of 1976 he blew up a vehicle of salesman employed by a beverage company that was in competition with a Siderno family beverage company, *ibid.* at 186. In November 1976, he threatened a man in the construction industry in order to pay a bill, *ibid.* at 187. In December 1976, he was asked to kill, and attempted to kill, an informant who was to testify against a Commisso associate, *ibid.* In May 1977, he bombed the restaurant of a local gambling organizer whom the Commissos were extorting, and in so doing, accidentally killed an untargeted victim, *ibid.* at 188. In February 1978, he bombed the house of a construction worker who owed money to a contractor who had hired the Commissos to assist, *ibid.* at 189. In May 1978, he extorted a developer who owed money to a Commisso associate, *ibid.* In early 1978, he blew up an apartment building that was owned by two brothers who owed money to a Commisso associate, *ibid.* In July 1978, he was set fire to a tavern, *ibid.* at 190. In August 1978, he was asked to blow up a restaurant, but turned down the job which another arsonist executed, *ibid.* In 1978 he attempted to extort the owner of a company, but beat up the wrong person, *ibid.* In 1979, he set fire to a house because the tenant would not leave, *ibid.* at 190-91. In 1979, he was asked to burn down a hotel for insurance fraud, but after he set his price, another arsonist was contacted and executed the job, *ibid.* at 191-92. In April or May of 1980, he was hired to murder someone for insurance fraud, but his attempts failed and he targeted the wrong person, *ibid.* at 192. In May 1980, he bombed a restaurant after Cosimo Commisso was insulted by an employee, *ibid.* In July 1980, he was hired to bomb the house of a debtor, but bombed it at the wrong time, *ibid.* at 193. Between August and October 1980, he was hired to break the arms or the legs of a construction company owner who owed money to a Commisso associate, but he declined, *ibid.*

does not wholly or mostly capture who they are. This distinction remain significant when one considers attempts to define “organized crime” and “criminal organizations.” The definition in the Canadian *Criminal Code* indeed requires proof that the criminal organization has “...as one of its main purposes or main activities the facilitation or commission of one or more serious offences....”<sup>133</sup> The only other element of the definition of a criminal organization is that it is composed of three or more persons.<sup>134</sup> These “serious offences” in the definition of “criminal organization” are not offences that conjure images of violence.<sup>135</sup> However, violent acts are often common in conjunction with the maintenance of these activities. Further, the *Criminal Code* criminalizes specific acts that are done in connection with a criminal organization, and proscribes more severe sentences for those acts. All of those specially mentioned acts are all crimes of explicit or implicit societal violence.<sup>136</sup> Thus, Canada may be subtly defining a criminal organization by a feature of violence. The use of violence and intimidation plays a role in the criminal enterprises or industries of most organized crime outlaws, and may be the characteristic that severs their ties to conventional society and demands the attention of law enforcement in controlling their outlaw behaviour. However, as the complex, multi-faceted nature of Mafiosi and La Cosa Nostra identities reveals, the use of violence and intimidation alone cannot capture the essence of the identity of an organized crime outlaw or organized crime outlaw group.

<sup>133</sup> *Criminal Code*, R.S.C. 1985, c. C-46 [*Criminal Code*] at s. 467.1(1)(b).

<sup>134</sup> *Ibid.* at s. 467.1(1)(a).

<sup>135</sup> *Ibid.* at s. 467.1 defines “serious 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.

This definition has now been amended pursuant to *Regulations Prescribing Certain Offences to be Serious Offences*, S.O.R./2010-161 July 13, 2010, s. 1, online: Canada Gazette <<http://canadagazette.gc.ca/rp-pr/p2/2010/2010-08-04/html/sor-dors161-eng.html>>. “Serious offence” under section 467.1 will now include:

- (a) keeping a common gaming or betting house (subsection 201(1) and paragraph 201(2)(b));
- (b) betting, pool-selling and book-making (section 202);
- (c) committing offences in relation to lotteries and games of chance (section 206);
- (d) keeping a common bawdy-house (subsection 210(1) and paragraph 210(2)(c)).

<sup>136</sup> *Criminal Code*, *supra* note 133 at s. 82(2) the possession of explosive substances in connection with a criminal organization; s. 231 murder to be in the first degree regardless of whether it was planned and deliberate, if the killing was done in connection with a criminal organization, or if it was done while committing or attempting to commit an indictable offence in connection with a criminal organization; s. 244.2 drive-by shootings in connection with a criminal organization.

## 2.4 OUTLAW MOTORCYCLE GANGS

### 2.4.1 The Origins of Outlaw Motorcycle Gangs in Canada

The first bikers in North American were “disoriented and disillusioned WWII veterans, functioning alcoholics, unemployed factory workers, and a few rebellious teenagers.”<sup>1</sup>

From these individuals and their social circumstances, developed the biker persona.

Some of these bikers – one per cent of them – became outlaws within outlaw motorcycle clubs that rejected society’s laws.<sup>2</sup>

Motorcycle clubs had existed in one form or another since the early 1920s. Most were benign, involved in touring and several forms of motor sports like track racing and hill climbing. But a tiny percentage had assumed a darker image. Embittered and disillusioned by the American dream during the Depression, gangs formed up, mainly in the grungy industrial districts of Southern California, to ride and drink together, subsisting on menial jobs and dealing in stolen motorcycle parts. Because Harley-Davidson was the most abundant and popular motorcycle, it was obvious that it would be the brand of choice, both as a possession and a source of stolen income.

Following World War II, thousands of veterans spilled out of the armed forces, disoriented and disenfranchised. Although the GI Bill of Rights offered the most liberal safety net for ex-soldiers in history, inevitably some drifted toward the fringes of society, unable to make the transition from the intensity of warfare to the comparatively pallid pace of civilian life. They, like the men who had returned from the Civil War and headed toward the great western frontier, or the World War I veterans who formed the so-called Lost Generation, were altered forever, inured to violence and incapable of coping with the strictures of organized society.<sup>3</sup>

The first anti-social or outlaw motorcycle bike club was formed shortly after World War II by a group of war veterans who called themselves the Pissed Off Bastards of Bloomington or POBOB from San Bernardino, California.<sup>4</sup> The entrenchment of the outlaw biker identity occurred shortly thereafter.

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<sup>1</sup> Brock Yates, *Outlaw Machine* (Boston: Little, Brown and Company, 1999) [*Outlaw Machine*] at 7-8.

<sup>2</sup> *R. v. Lindsay*, 2005 CanLII 24240, [2005] O.J. No. 2870 (Ont. S.C.J.) [*R. v. Lindsay* trial decision] at para. 205. Then-Staff Sergeant Jacques Lemieux opined that a “one percenter” is a motorcycle club that is a criminal organization. Essentially, one percent of bikers are outlaw bikers.

<sup>3</sup> *Outlaw Machine*, *supra* note 1 at 13-14.

<sup>4</sup> Howard Abadinsky, *Organized Crime*, 8<sup>th</sup> ed. (Belmont: Thomson Wadsworth, 2007) [*Organized Crime*] at 210.

On July 4<sup>th</sup> weekend in 1947, thousands of bikers attended a convention in Hollister, California.<sup>5</sup> Some of the bikers became unruly – drinking, racing, and causing damage in the town, and the small local police force could not control the disorder until additional police came to assist much later.<sup>6</sup> On July 21, 1947, *Life* magazine depicted a biker waving a beer bottle while dozens of empties lay at his feet.<sup>7</sup> Thus, the creation of the evil image of outlaw motorcycle gangs, and their corresponding reputation began. Bikers, as well as their bikes, came to induce fear and loathing:

With that single black-and-white photograph in America's most popular and respected newsmagazine, the images of motorcycling and of Harley-Davidson were altered forever. From that moment on, motorcycles would be tinged with evil: predatory machines ridden by raging barbarians. This legend would be enhanced in years hence by magazine stories, songs, and a spate of motion pictures. ...<sup>8</sup>

The *Life* photograph produced public outrage.<sup>9</sup> In the wake of public concern about incidents at Hollister, in 1948, the first chapter of the Hells Angels Motorcycle Club was formed in San Bernardino, California – an offshoot of some of the outlaws from the Pissed Off Bastards of Bloomington.<sup>10</sup> This outlaw motorcycle gang would not only incite public outrage, but eventually, in some areas of the United States and Canada, it would cause terror. It remains, a force to be reckoned with.

Outlaw motorcycle gangs have a characteristic within their identity that renders them unique in comparison to the other organized crime outlaws in this Chapter: they wear their identity on their backs in the form of club patches, and directly on their skin by

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<sup>5</sup> The estimates regarding the number and nature of the motorcyclists differ. Brock Yates in *Outlaw Machine*, *supra* note 1 at 11 asserts that 4000 members of a motorcycle club, the Salinas (California) Ramblers Motorcycle Club. Howard Abadinsky in *Organized Crime*, *supra* note 4 at 210-11 refers to Hunter S. Thompson's assertions that 3000 cyclists attended Hollister for an American Motorcycle Association event; and to Daniel Wolf's assertions that at an American Motorcycle Association event, 500 unaffiliated bikers disrupted the event with their unruly behaviour.

<sup>6</sup> *Organized Crime*, *supra* note 4 at 210-11.

<sup>7</sup> *Outlaw Machine*, *supra* note 1 at 11. Yates refers to an issue of *Life* magazine from July 21, 1947 at page 31.

<sup>8</sup> *Ibid.* at 12. Motion pictures included *The Wild One*, *Rebel Without a Cause*, and *The Enthusiast*: *Ibid.* at 31-33, and later, *Born Losers*, *The Glory Stompers*, *The Savage Seven*, *Devil's Angels*, *Cycle Savages*, *Angels from Hell*, *Hell's Angels on Wheels*, *Run, Angel, Run!*, *Angel Unchained*, *Hell's Chosen Few*, *Rebel Rousers*, *Naked Angels*, and *Angels Die Hard*: *Ibid.* at 53, and eventually, *Hells Angels Forever* which the club produced itself in 1983, and *Easy Rider*: *Ibid.* at 54-55.

<sup>9</sup> *Ibid.* at 19.

<sup>10</sup> *Organized Crime*, *supra* note 4 at 211.

tattoos. Somewhat unique are the extensive written and unwritten rules of these groups define who members must be – these rules define their identity. And, a lengthy and exclusive initiation or induction process educates members as to the values and norms of the club, and protects the group from infiltration by law enforcement. Their reputation for violence and intimidation is well known within criminal subcultures as well as conventional society.

#### 2.4.2 The Hells Angels Motorcycle Club in Canada

The structure and attributes of the Hells Angels are representative of many outlaw motorcycle gangs, and their proliferation and dominance within the outlaw biker sub-culture as well as within the criminal milieu, makes their history worth relating. In 1957, Ralph Hubert “Sonny” Barger formed the third and what would become the “mother” chapter of the Hells Angels in Oakland, California.<sup>11</sup> Barger became President of the Hells Angels,<sup>12</sup> and remains one of the most iconic and influential members of the club. He contributed greatly to the expansion and organization of the club, and had the club colours or insignia trade-marked.<sup>13</sup> The colours or patch of a full member of the Hells Angels consists of a three-piece patch sewn onto a leather or jean vest.<sup>14</sup> The protection of the name and insignia of the Club would prove to be very important in protecting Hells Angels property, power, and reputation for violence.

The Hells Angels formed their first chapter in Canada in 1977 when the Canadian Popeyes gang “patched over” or became the Hells Angels Montreal chapter.<sup>15</sup> They also formed another chapter in Laval, Quebec.<sup>16</sup> At this time, the Outlaws Motorcycle Club had been the only major outlaw motorcycle gang in Canada,<sup>17</sup> and the Hells Angels

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<sup>11</sup> U.S. Department of Justice, “Hells Angels Motorcycle Club” in National Drug Intelligence Center, *Drugs and Crime: Outlaw Motorcycle Gang Profile* (October 2002) at 1; and *R. v. Lindsay* trial decision, *supra* note 2 at para. 202.

<sup>12</sup> *R. v. Lindsay* trial decision, *supra* note 2 at para. 205. Then-Staff Sergeant Jacques Lemieux testified that Barger is the unofficial world president of the Hells Angels.

<sup>13</sup> *Outlaw Machine*, *supra* note 1 at 34.

<sup>14</sup> *R. v. Lindsay* trial decision, *supra* note 2 at para. 235.

<sup>15</sup> *Ibid.* at para. 209; and *Organized Crime*, *supra* note 4 at 216.

<sup>16</sup> *R. v. Lindsay* trial decision, *supra* note 4 at paras. 209.

<sup>17</sup> *Ibid.*

immediately began warring with the Outlaws.<sup>18</sup> Within a few years the Hells Angels had expanded across the country<sup>19</sup> obliterating rival biker groups such as the Outlaws and Bandidos, as well as other organized crime groups, through violence or absorption in order to control the drug trade.<sup>20</sup> Today, the organization is the largest and most powerful club in Canada.<sup>21</sup> In American they are considered one of the “big four” outlaw motorcycle gangs – the other three being the Pagans founded in 1959, the Bandidos founded in 1966, and Outlaws in 1935.<sup>22</sup> They have chapters all over the world.<sup>23</sup>

In 1983, the Hells Angels opened a chapter first in Vancouver, and then opened more chapters in British Columbia.<sup>24</sup> In 1984, they created chapters in Sherbrooke, Quebec and Halifax, Nova Scotia.<sup>25</sup> These two chapters, together with the Montreal chapter, would murder members from Laval who had attracted police attention due to rampant drug use,<sup>26</sup> and the Montreal and Sherbrooke chapters would absorb the Laval chapter.<sup>27</sup> As a result of killings followed by police raids in Nova Scotia, the Hells Angel chapter in Halifax would eventually close in August 2003.<sup>28</sup>

Further law enforcement efforts in Operation SHARQC, with the assistance of evidence from a past Hells Angels “Sergeant-at-Arms” turned informant, would result in the arrest of more than 123 people in Quebec, New Brunswick, the Dominican Republic and France

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<sup>18</sup> *Organized Crime*, *supra* note 4 at 216.

<sup>19</sup> *R. v. Lindsay* trial decision, *supra* note 2 at paras. 209-10; and *Organized Crime*, *supra* note 4 at 216.

<sup>20</sup> *R. v. Lindsay* trial decision, *supra* note 2 at paras. 208.

<sup>21</sup> *Organized Crime*, *supra* note 4 at 216.

<sup>22</sup> *Ibid.* at 214-15. The other three of the “big four” include the Pagans founded in 1959, the Bandidos founded in 1966, and Outlaws in 1935.

<sup>23</sup> *R. v. Lindsay* trial decision, *supra* note 2 at paras. 213; and *Organized Crime*, *supra* note 4 at 212 and 215.

<sup>24</sup> *Ibid.* at paras. 210.

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*; *Organized Crime*, *supra* note 4 at 216; and James Dubro, *Mob Rule: Inside the Canadian Mafia* (Toronto: Macmillan of Canada, 1985) at 257. Dubro states that as the result of a police raid of Hells Angels clubhouses throughout Quebec and Halifax, Nova Scotia on April 11, 1985, over 80 members were arrested only seven were charged with criminal offences. Police believed the bodies of six Hells Angels were buried near one of the clubhouses, but only five bodies were recovered in June 1985. The bodies showed evidence of having been shot, and they had chains around them, concrete blocks attached to their feet, and were stuffed in sleeping bags.

<sup>27</sup> *R. v. Lindsay* trial decision, *supra* note 2 at paras. 210.

<sup>28</sup> Dan Arsenault, “Outlaw Bikers Ogle N.S.” (17 November 2010) *The Chronicle Herald* online: <<http://thechronicleherald.ca/Front/1212342.html>> [“Outlaw Bikers Ogle N.S.”].

in April 2009.<sup>29</sup> One hundred and eleven of those arrested were full-patch members in the Quebec chapter of the Hells Angels,<sup>30</sup> and were charged with offences, such as murder, offences in connection with a criminal organization, extortion, drug trafficking, and conspiracy to commit murder and drug trafficking<sup>31</sup> that were committed from 1992 to 2009 during wars between the Hells Angels and the Rock Machine motorcycle gangs.<sup>32</sup> However, 31 of those charges against members of the Hells Angels have been stayed base due to unreasonable delay in trial proceedings that would prevent the accused from having fair trials.<sup>33</sup>

The weakening of the Quebec chapters has enticed outlaw motorcycle gang rivals of the Hells Angels to become active in Nova Scotia where only Hells Angels support clubs, such as Bacchus and the Darksiders, have existed since the closure of the Halifax chapter.<sup>34</sup> This phenomenon remains significant: lost or unprotected territory opens a niche of social vices to be filled by other outlaw groups.<sup>35</sup> A mere connection of support clubs with the Hells Angels serves to protect a region such as Nova Scotia from infiltration by other outlaws, and thus, demonstrates the power of an outlaw motorcycle gang name and reputation within the criminal milieu. Thus, whether this latest

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<sup>29</sup> CBC News Online, "Top Hells Angel Arrested in Montreal" (1 November 2010) online: CBC News <<http://www.cbc.ca/canada/montreal/story/2010/11/01/hells-angels-arrested.html>> ["Top Hells Angel Arrested in Montreal"]; and Paul Cherry, "SharQC Takes Bite Out of Hells Angels" (17 April 2009) *The Gazette* online:

<<http://www.montrealgazette.com/news/SharQc+takes+bite+Hells+Angels/1498885/story.html>> ["SharQC Takes Bite Out of Hells Angels"]. SHARQC is an acronym for Stratégie Hells Angels Région Québec.

<sup>30</sup> "Top Hells Angel Arrested in Montreal", *supra* note 29; and "SharQC Takes Bite Out of Hells Angels", *supra* note 29.

<sup>31</sup> Anne Sutherland "Fugitive Hells Angel Captured in Montreal" (1 November 2010) *The Gazette* online: Montreal Gazette <<http://www.montrealgazette.com/news/Surété+Québec+arrests+Hells+Angels+Ouimet+taxi/3761062/story.html>>.

<sup>32</sup> Max Harrold & Paul Cherry, "Major Police Operation Against Hells Angels" (15 April 2009) *The Gazette* online: Montreal Gazette <<http://www.montrealgazette.com/news/Major+police+operation+against+Hells+Angels/1498587/story.html>>.

<sup>33</sup> CBC News Online, "Quebec to appeal release of 31 accused bikers" (01 June 2011) *CBC News* online: cbc.ca <<http://www.cbc.ca/news/canada/montreal/story/2011/06/01/quebec-sharqc-stay-proceedings-appeal.html>>.

<sup>34</sup> "Outlaw Bikers Ogle N.S.", *supra* note 28.

<sup>35</sup> This phenomenon will be discussed further in subsection four "Expanded Law Enforcement Personnel and Law Enforcement Powers" of section two "Requisite One for Anti-Organized Crime Measures" in Chapter Four of this thesis.

enforcement effort has ended the Quebec chapters of the Hells Angels remains to be seen.<sup>36</sup>

### 2.4.3 Organizational Structure of the Hells Angels

Like other outlaw motorcycle gangs, such as the Bandidos and the Outlaws,<sup>37</sup> the Hells Angels have a hierarchical structure<sup>38</sup> and many rules and regulations.<sup>39</sup> The organizational structure of outlaw motorcycle gangs renders them similar to other and “traditional” organized crime groups, such as the Italian Mafia and North American La Cosa Nostra. For instance, author and journalist Yves Lavigne asserts:

The Hell’s Angels Motorcycle Club is well suited to operate as a criminal organization, whether it’s selling crank [methamphetamine] or corpses. Angels are committed to live outside the law. They are a close-knit group sworn to secrecy under threat of death. ...

The Hell’s Angels Motorcycle Club is organized to insulate its leadership from prosecution. The club is hierarchically structured and well disciplined so it can function even after the arrest of members. It enforces its code of silence with death and camouflages orders through layers of bosses who protect themselves with graft and corruption. The Hell’s Angels organization chart resembles that of traditional organized crime, with which the club slowly aligns itself during the 1970s and 1980s. The club’s East Coast and West Coast officers carry out the same duties that traditional organized crime’s Commission [the body comprised only of the bosses or heads of American Mafia groups or Families<sup>40</sup>] does when they regulate and oversee club business such as the creation of new chapters. The chapter president is equivalent to the family boss. The secretary-treasurer is sometimes the most logical member and offers advice like *consigliere*; a lawyer who is a club associate also may act in this capacity. The vice-president is like a Mafia underboss. The sergeant-at-arms and road captain are like *caporegima*, or lieutenants. And members are soldiers.

The Hell’s Angels and traditional organized crime operate the same way. They control the area where they commit crimes. They corrupt police and public officials to insulate themselves from prosecution. They use associates and fronts to manipulate and influence people.<sup>41</sup>

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<sup>36</sup> William Marsden, “Police Wipe Hells Angels Off Quebec Map” (15 April 2009) *The Gazette* online: Montreal Gazette

<<http://www.montrealgazette.com/news/Police+wipe+Hells+Angels+Quebec/1500021/story.html>>.

<sup>37</sup> *Organized Crime*, *supra* note 4 at 217. While Hells Angels rules require each chapter to have at least 6 members, their numbers nationally and internationally may not end all the chapters in Quebec.

<sup>38</sup> *R. v. Lindsay* trial decision, *supra* note 2 at paras. 230-33.

<sup>39</sup> *Ibid.* at paras. 253-62.

<sup>40</sup> *Organized Crime*, *supra* note 4 at 112.

<sup>41</sup> Yves Lavigne, *Hell’s Angels: Taking Care of Business* (USA: Seal Books, 1987) at 62-63.

Thus, the Hells Angels commit crime by protecting themselves against law enforcement, and by using their insular and hierarchical structure to indoctrinate want-to-be-members – that is to say, by teaching newcomers the values and norms of the club. Only a chosen few may join. This exclusivity of membership also serves to reinforce the identity of the group: only those who will act in accordance with the values and norms of the club – that is to say, those who can uphold the reputation for violence and intimidation – are selected and allowed to be part of this group.

At a macro-level, the Hells Angels has a charter or chapter located in a specific geographic area that serves as its territory to conduct business,<sup>42</sup> except for each provincial Nomads chapter which has not specific territory and whose influential members conduct extensive business.<sup>43</sup> All and only full-patch members of each chapter must meet once a week<sup>44</sup> at the chapter clubhouse<sup>45</sup> for “church.”<sup>46</sup> The Nomads usually do not have a clubhouse, however, they may have one in British Columbia. Individuals who wish to get “on the program” and become members usually must be known by the organization for five years, and must be sponsored by a full-patch member.<sup>47</sup> Countries are divided in to regions,<sup>48</sup> and regional meetings are held once a month.<sup>49</sup> Multiple chapters exist within a province and country,<sup>50</sup> and national meetings are held four times a year in Canada.<sup>51</sup> In Canada, all chapters abide by the same rules, and have a president, vice-president, sergeant-at-arms, secretary and treasurer.<sup>52</sup> Twice a year, representatives from each country meet at world meetings in order to deal with issues regarding the Hells Angels organization as a whole.<sup>53</sup> This degree of organization, and the complex and lengthy process of becoming a member of outlaw motorcycle gangs, shields these gangs

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<sup>42</sup> *R. v. Lindsay* trial decision, *supra* note 2 at paras. 214.

<sup>43</sup> *Ibid.* at paras. 224.

<sup>44</sup> *Ibid.* at paras. 214.

<sup>45</sup> *Ibid.* at paras. 227.

<sup>46</sup> *Ibid.* at paras. 234.

<sup>47</sup> *Ibid.* at paras. 230.

<sup>48</sup> *Ibid.* at paras. 215.

<sup>49</sup> *Ibid.* at paras. 217.

<sup>50</sup> *Ibid.* at paras. 215.

<sup>51</sup> *Ibid.* at paras. 218.

<sup>52</sup> *Ibid.* at paras. 214.

<sup>53</sup> *Ibid.* at paras. 219.

from infiltration by law enforcement. Members take great care to know whom they are inducting into their group, and to ensure their loyalty.

At a micro-level, each chapter has a hierarchy as well consisting of full-patch members, prospects, hangarounds, and official friends. In order to become an official friend, an individual ingratiates himself to members of the club. At church, this individual may be called in to advise full-patch members as to why he seeks to become a member, and if there is consensus by all members, that individual will be “on the program” and become an official friend. A photograph of that individual is taken, and sent to Hells Angels chapters across the country in order to ensure that the individual is known<sup>54</sup> and that no other Hells Angels member or person on the program has a problem with that individual. No individuals who are or have been members of law enforcement can associate or be members of the Hells Angels. Official friends do menial tasks – sometimes criminal tasks – and must demonstrate their loyalty and worthiness to the club.<sup>55</sup> They cannot use the Hells Angels name, and can only wear support gear which is clothing that has no patches or logos, but says “Support Big Red Machine” or “Support Red and White.”

After six months to one year, full-patch members by consensus may allow him to become a hangaround.<sup>56</sup> A hangaround wears a small patch on the front of a leather vest with the name of his chapter and the label “hangaround.”<sup>57</sup> After one year, a hangaround may become a prospect.<sup>58</sup>

Prospects receive a bottom rocker with the name of his territory on the back of his vest, such as his province in Canada, and a small patch on the front of his vest with the label “prospect.”<sup>59</sup> After the minimum of another year, a prospect may become a full member<sup>60</sup> with consensus of the full-patch members of the chapter.

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<sup>54</sup> *Ibid.* at paras. 233.

<sup>55</sup> *Ibid.* at paras. 231.

<sup>56</sup> *Ibid.*

<sup>57</sup> *Ibid.* at paras. 236.

<sup>58</sup> *Ibid.* at paras. 231.

<sup>59</sup> *Ibid.* at paras. 236.

<sup>60</sup> *Ibid.* at paras. 231.

Full-patch members wear full colours – a three-piece patch sewn onto a vest. The top rocker has the name Hells Angels. The middle patch has the death head symbol and “MC” for Motorcycle Club. The bottom rocker has the territory. On the front of his vest is the name of his chapter.<sup>61</sup> Only full-patch members of the club may use or wear the Hells Angels name and the death head symbol. Members sign licensing agreements with the Hells Angels Motorcycle Club corporation in order to pledge to use the trademarks in accordance with the rule and policies of the Club.<sup>62</sup>

On retirement, a member must put the retirement date on any Hells Angel tattoo, and must return all Hells Angels paraphernalia.<sup>63</sup> If kicked out of the club, the photograph of the ex-Hells Angels member is circulated worldwide, and he must return all Hells Angels paraphernalia and remove Hells Angels and death head tattoos.<sup>64</sup> Only members may use the name of the club, and members viciously defend the right to use the name and insignia of the club.<sup>65</sup> Not only do these rules insulate members and associates of the Hells Angel from conventional law-abiding outsiders, the structure and internal social controls of the Hells Angels maintain and perpetuate the outlaw identity of the club.

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<sup>61</sup> *Ibid.* at paras. 235.

<sup>62</sup> *Ibid.* at paras. 269.

<sup>63</sup> *Ibid.* at paras. 264-65.

<sup>64</sup> *Ibid.* at paras. 264.

<sup>65</sup> *R. v. Violette*, 2009 BCSC 1557, [2009] B.C.J. No. 2262 (Q.L.) [*R. v. Violette*] at paras. 79-80 and 97-102; and *R. v. Lindsay* trial decision, *supra* note 2 at paras. 264-68. In *R. v. Violette*, full patch Hells Angels member Jean Violette extorted non-member Glen Louie by beating him in order to prevent Louie from wearing a Hells Angels belt buckle and using the Hells Angels name during drug deals. In *R. v. Lindsay*, then-Staff Sergeant Jacques Lemieux opined:

266 Staff Sergeant Lemieux testified that the Hells Angels go to great lengths to make sure that only members wear the club's colours or "patch". *The patch signifies that the wearer is part of a sophisticated organized crime group, and anyone who deals with the wearer deals with the whole organization. The Hells Angels do not want the intimidation value of the patch to be diminished by non-members wearing it.*

267 Prospects are not permitted to use the name Hells Angels.

268 Staff Sergeant Lemieux was referred to and commented on minutes of meetings entered as exhibits in these proceedings. They indicated concern about the return of colours confiscated by law enforcement, other clubs having logos resembling that of the Hells Angels, and non-members having paraphernalia bearing the name Hells Angels. *Staff Sergeant Lemieux testified that the Hells Angels go to extreme lengths to make sure only its members wear its name and logo. They do not want outsiders portraying themselves as members of the organization and diminishing its reputation. As well, a trademark must be monitored by its owner to protect against its loss. The Hells Angels protect their name and logo in the same way around the world. [Emphasis added].*

#### 2.4.4 The Power of the Patch: Symbolization of the Reputation for Violence and Intimidation

The “power of the patch” refers to the power of the reputation of a gang. The “patch” refers to gang names and emblems that adorn clothing and accessories worn by gang members, and to a more limited degree, worn by gang associates. It signifies the adoption and declaration of the outlaw identity by the member, and decries the fearsome and violent reputation of the club. A patch has power if it affects the behaviour of others to the benefit of the gang or gang member.<sup>66</sup> For instance, simply wearing the patch of a full-patch member of an outlaw motorcycle gang, such as that of the Hells Angels, is sufficient to intimidate most people.<sup>67</sup> This power enables a gang to effect its purposes through intimidation and violence. Some “untraditional”<sup>68</sup> outlaw motorcycle gangs did not have patches, but patches are commonly used by outlaw motorcycle gangs, and are used by all of the “big four” in North America.

The power of the patch has been long recognized within the criminal milieu and law enforcement circles, and more recently, has been acknowledged by courts of law across Canada.<sup>69</sup> For instance, the Ontario Superior Court of Justice in *Regina v Wagner*,<sup>70</sup> accepted the evidence of police agent Steven Gault who described the power of the patch in relation to the Hells Angels:

32 In viewing Mr. Gault's evidence, when Mr. Gault was asked under oath on October 21, 2005, whether the current Hell's Angels Motorcycle Club of Canada was what the members tried to portray themselves as — simply a bunch of old guys riding motorcycles — Gault replied as follows:

That couldn't be farther from the truth. There's very — I can't even think of one, uh, that doesn't break the law in some way, shape, or form. Whether it's on a low level or a higher one. As with Niagara, they have complete control of the coke dealing in the whole Niagara region. Anyone steps in there, they'll kill him point blank. You don't play with their game. So they're — all their lives are built upon drug dealing. Guys like Mr. Bill —

<sup>66</sup> *R. v. Lindsay* trial decision, *supra* note 2 at paras. 450.

<sup>67</sup> *R. v. Grant*, 2007 MBQB 135, [2007] M.J. No. 193 (Q.L.), *aff'd* 2009 MBCA 9, [2009] M.J. No. 9 (Q.L.) [*R. v. Grant*] at para. 10.

<sup>68</sup> *R. v. Leclerc*, [2001] R.J.Q. 747, [2001] Q.J. No. 426 (Q.L.) (Que. Ct. (Crim. and Pen. Div.)) at para. 49.

<sup>69</sup> *R. v. Lindsay* trial decision, *supra* note 2 at paras. 450 and 922; and *Regina v. Wagner*, 2008 CarswellOnt 5093 (Ont. S.C.J.) [*Regina v Wagner*] at paras. 32-34; *Regina v. Grant*, *supra* note 67 at para. 10; and *Regina v. Violette*, *supra* note 65 at para. 153.

<sup>70</sup> *Regina v. Wagner*, *supra* note 69.

" and in the evidence before me, a Hell's Angel member from Oshawa " — as well, do take bikes and drug dealing. *The patch is used non-stop for, like, extorting people out of their bikes. I've seen lots of guys there. Things to get people in debt. A little bit of coke and they take their bike. Anything you can. The patch — "referring to the Hell's Angels patch " — is muscle and everybody backs it."*

33 In a follow-up question he was asked: "Why would someone want to join the Hell's Angels Motorcycle Club today?" His answer was as follows:

*Because you'd have the power with the patch. You might be a low-level drug dealer and don't want to be juiced anymore by the Club and have to pay them. You might have just made a few enemies and you want some backing. I'd say most of it's money. That once you have the patch, you're free pretty well to do anything you want. Anybody will back you.*

34 *As I have indicated, I accept Mr. Gault's evidence on these points and find as a fact that membership in the Hell's Angels Motorcycle Club allows the individual, as a full-patch member, to commit criminal acts for profit with the full backing and benefit of the Club. Both the individual member and the Club share in the benefits. Membership gives you the power of the patch. As Mr. Gault says, it gives you the power to extort people and to deal drugs. Both types of these offences are serious and the maximum penalty for such offences would be more than five years. [Emphasis added].<sup>71</sup>*

The evidence of Steven Gault not only explains the essence of the power of the patch — that the power of the reputation of the Hells Angels organization enables members to effect their criminal purposes through intimidation and violence. His evidence also reveals the significant role that gang insignia plays in conducting criminal enterprises. The power of the patch enhances the ability of gangs to commit criminal offences, and over time, this power allows gangs to monopolize territories and trades. For these reasons, gangs often have very strict rules regarding who can use and wear the gang name and insignia. They recognize that use by non-members can dilute the power of the patch. Thus, some outlaw motorcycle gangs, such as the Hells Angels, have rules and policies regarding their use.<sup>72</sup> Further, members administer physical punishment to individuals who are not members and who use the name and insignia.<sup>73</sup>

The relationship between the patch and the gang member is reciprocal. The patch is synonymous with the gang and its reputation. Consequently, gang members who wear

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<sup>71</sup> *Ibid.* at paras. 32-34.

<sup>72</sup> *R. v. Lindsay* trial decision, *supra* note 2 at para. 237 and 269.

<sup>73</sup> *R. v. Violette*, *supra* note 65 at 79-80.

the “patch” need not verbally identify themselves to others as a gang member in order to receive the power ascribed by the reputation of the gang.<sup>74</sup> However, when gang members wear the “patch” during criminal activities or during violent and intimidating activities, the acts of the member perpetuate the fearsome reputation of the gang. Violence and intimidation seep into the patch. Thus, the patch intertwines the identity of the gang to the identity of the member.

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<sup>74</sup> *R. v. Lindsay* trial decision, *supra* note 2 at para. 450.

## 2.5 ABORIGINAL STREET GANGS

### 2.5.1 The Promise of Identity in Recruitment and Membership in Aboriginal Street Gangs

The unique nature of Aboriginal street gang outlaws lies in the influence of their socio-economic circumstances in society – both historically and contemporarily – on their adoption and internalization of the values and norms of Aboriginal street gang groups. Over-incarceration and poor social, economic, political and educational opportunities mark members of Aboriginal street gangs. The severance of ties with conventional society and lack of pro-social interactions, and the presence and pressure of anti-social values and norms to substitute therefore, have led many Aboriginal youth and young adults to join Aboriginal street gangs. This section will reveal some of the reasons for adopting and internalizing an Aboriginal street gang outlaw identity, and what sort of anti-organized crime measures can successfully target their outlawry.

The overrepresentation of Aboriginal peoples in the Canadian prison system has led to the increase of Aboriginal street gangs.<sup>1</sup> Indeed, Aboriginal prison gangs serve as recruiters for Aboriginal street gangs,<sup>2</sup> and some gangs were formed or created in prisons<sup>3</sup> and

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<sup>1</sup> “Indian Posse: Prison Gang Profile” (2006) online: Insideprisoncom <[http://www.insideprison.com/prison\\_gang\\_profile\\_IP.asp](http://www.insideprison.com/prison_gang_profile_IP.asp)>; Jana Marie Grekul & Patti LaBoucane-Benson, *An Investigation into the Formation and Recruitment of Aboriginal Gangs in Western Canada* (Ottawa: Aboriginal Corrections Policy Unit, Public Safety Canada, 2006) [*An Investigation into the Formation and Recruitment of Aboriginal Gangs in Western Canada*] at 5; and Catherine Bainbridge, Katherine Cisek & CBC Newsworld, *Indian Posse: Life in Aboriginal Gang Territory* VHS (Montreal: Wild Heart Productions Inc., 1998) [*Indian Posse: Life in Aboriginal Gang Territory*] at 21:18. According to Bainbridge, Cisek and CBC Newsworld, 70 per cent of inmates in Manitoba’s provincial prisons are Native. Grekul and LaBoucane-Benson cite research by Ovide W. Mercredi, *Aboriginal Gangs: A Report to the Correctional Service of Canada on Aboriginal Youth Gang Members in the Federal Corrections System* (October 2000) online: <<http://www.csgv.ca/counselor/assets/AboriginalGangs.pdf>>.

<sup>2</sup> *An Investigation into the Formation and Recruitment of Aboriginal Gangs in Western Canada*, *supra* note 2 at 21; “Indian Posse: Prison Gang Profile”, *supra* note 2; “Manitoba Warriors: Prison Gang Profile” (2006) online: Insideprison.com <[http://www.insideprison.com/PRISON\\_GANG\\_PROFILE\\_MW.ASP](http://www.insideprison.com/PRISON_GANG_PROFILE_MW.ASP)> [“Manitoba Warriors: Prison Gang Profile”]; and “Alberta Warriors: Prison Gang Profile” (2006) online: Insideprison.com <[http://www.insideprison.com/PRISON\\_GANG\\_PROFILE\\_AW.ASP](http://www.insideprison.com/PRISON_GANG_PROFILE_AW.ASP)> [“Alberta Warriors: Prison Gang Profile”]. The Indian Posse has members in prison and on the street. The Manitoba Warriors has members in prison and on the street.

<sup>3</sup> *An Investigation into the Formation and Recruitment of Aboriginal Gangs in Western Canada*, *supra* note 2 at 21. According to “Indian Posse: Prison Gang Profile”, *supra* note 2, the Indian Posse formed in 1988 in Stony Mountain Institution. According to “Native Syndicate: Prison Gang Profile” (2006) online: Insideprison.com <[http://www.insideprison.com/PRISON\\_GANG\\_PROFILE\\_NS.ASP](http://www.insideprison.com/PRISON_GANG_PROFILE_NS.ASP)>, the Native Syndicate probably formed in the Saskatchewan Penitentiary and Regina Correctional Centre. According to “Alberta Warriors: Prison Gang Profile”, *supra* note 3, the Alberta Warriors began in 1997 after

continue inside prisons. A gang within the prison offers support and protection to new inmates who many need that to function and survive.<sup>4</sup>

The recruitment process of Aboriginal street gangs is more violent than other gangs.<sup>5</sup> For example, on the street and outside prison, the Indian Posse initiates a new member by other members “jumping” him or attacking him.<sup>6</sup> Five guys will jump in a circle and the recruit has to “take [his] lickin’ for a couple minutes” and then get up – if he gets up – and he is given his “rag” which is the coloured bandana identifying what gang he is in.<sup>7</sup> Recruitment is “aggressively sought”,<sup>8</sup> there is a lot of pressure to join the gang<sup>9</sup> and to receive a tattoo with the letters “IP.”<sup>10</sup>

Aboriginal street gangs generally recruit aboriginal youth<sup>11</sup> from impoverished and dysfunctional families,<sup>12</sup> and in comparison to non-Aboriginal people, urban Aboriginal people are more mobile, less well-educated, less employed, and poorer.<sup>13</sup> Thus, the pool

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Correctional Services Canada dispersed members of the Manitoba Warriors from Stony Mountain Institution in Manitoba to the Edmonton Institution in Alberta.

<sup>4</sup> *An Investigation into the Formation and Recruitment of Aboriginal Gangs in Western Canada*, *supra* note 2 at 28.

<sup>5</sup> *Ibid.* at 2-3 and 20.

<sup>6</sup> *Indian Posse: Life in Aboriginal Gang Territory*, *supra* note 2 at 12:20.

<sup>7</sup> *Ibid.* at 12:27; and “Indian Posse: Prison Gang Profile”, *supra* note 2. Gang member Trevor Lacasse described recruitment in *Indian Posse: Life in Aboriginal Gang Territory*.

<sup>8</sup> “Indian Posse: Prison Gang Profile”, *supra* note 2.

<sup>9</sup> *Indian Posse: Life in Aboriginal Gang Territory*, *supra* note 2 at 12:42.

<sup>10</sup> “Indian Posse: Prison Gang Profile”, *supra* note 2.

<sup>11</sup> Mike McIntyre, “Indian Posse Founder Killed: Gang Leader Stabbed to Death During a Brawl in Penitentiary” *Winnipeg Free Press* (6 January 2010) online: Winnipeg Free Press <<http://www.winnipegfreepress.com/local/indian-posse-founder-killed-80776572.html>> [“Indian Posse Founder Killed: Gang Leader Stabbed to Death During a Brawl in Penitentiary”]; and *Indian Posse: Life in Aboriginal Gang Territory*, *supra* note 2. For instance, according to McIntyre, the Indian Posse is comprised entirely of Aboriginal members, and exists in Saskatchewan, Alberta, and Manitoba. However, according to “Indian Posse: Prison Gang Profile”, *supra* note 2, the Indian Posse has “white” and “black” members as well as Aboriginal members.

<sup>12</sup> *An Investigation into the Formation and Recruitment of Aboriginal Gangs in Western Canada*, *supra* note 2 at 21.

<sup>13</sup> E.J. Dickson-Gilmore & Chris Whitehead, “Aboriginal Organized Crime in Canada: Developing a Typology for Understanding and Strategizing Responses” (2002) 7 *Trends in Organized Crime* 3 [“Aboriginal Organized Crime in Canada: Developing a Typology for Understanding and Strategizing Responses”] at 13.

of candidates for Aboriginal street gangs is substantial<sup>14</sup> – particularly in the Canadian Prairies.<sup>15</sup>

The circumstances of a number of members of Aboriginal gangs, some high-ranking, demonstrate the kinds of backgrounds common to these outlaws. For example, four members of the Manitoba Warriors sentenced in *R. v. Pangman*,<sup>16</sup> came from poverty, hardship, or abuse of some kind. Vice-President Isadore Vermette lost his mother when he was four, moved from hotel to hotel, frequently changed schools, and developed a drug abuse problem.<sup>17</sup> Sergeant-At-Arms Garrett Courchene was abandoned by his father at the age of six or seven, moved from hotel to hotel with his mother who drank heavily, and was impoverished and hungry as a child.<sup>18</sup> Full patch member Shane Myran was raised from the age of ten by his mother after she divorced his father, and one of his brothers was killed in Stony Mountain Penitentiary which event caused Myran to associate with the Manitoba Warriors.<sup>19</sup> Apprentice and then full patch member Kevin Cook resided with his mother after his alcoholic father left the family, but was later apprehended as a result of his mother's alcoholism and then eventually returned to her care.<sup>20</sup> While Cook was incarcerated his son was killed by a member of the Indian Posse street gang, and Cook turned to the Manitoba Warriors in the correctional centre for support.<sup>21</sup> Indian Posse member Trevor Lacasse was born from an extramarital affair, and later found his father who had left when Lacasse was born.<sup>22</sup> His father's abandonment was the greatest source of Lacasse's continuing inexpressible anger.<sup>23</sup> He

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<sup>14</sup> *Indian Posse: Life in Aboriginal Gang Territory*, *supra* note 2 at 00:53, in 1997, 50 000 Aboriginal persons resided in Winnipeg, Manitoba, and, *ibid.* at 00:17, of the 2000 gang members, most of whom were Aboriginal.

<sup>15</sup> "Aboriginal Organized Crime in Canada: Developing a Typology for Understanding and Strategizing Responses", *supra* note 14 at 14. This phenomenon of being less well-educated, more mobile, less employed, and poorer than non-Aboriginal persons, exists more so for Aboriginal persons in Prairie cities, such as Winnipeg, Saskatoon and Regina, as well as the Ontario city of Thunder Bay, than in eastern cities, such as Halifax, Montreal and Toronto.

<sup>16</sup> 2001 MBCA 64, [2001] M.J. No. 217 (Q.L.) [*R. v. Pangman*].

<sup>17</sup> *Ibid.* at paras. 9-12.

<sup>18</sup> *Ibid.* at paras. 14-17.

<sup>19</sup> *Ibid.* at paras. 22-24.

<sup>20</sup> *Ibid.* at paras. 26 and 31

<sup>21</sup> *Ibid.* at para. 27.

<sup>22</sup> *Indian Posse: Life in Aboriginal Gang Territory*, *supra* note 2 at 24:25.

<sup>23</sup> *Ibid.*

saw his mom drunk, coming home with beer, and there was no food in the fridge.<sup>24</sup> Trevor experienced being in a drive-by shooting during which his cousin Joseph “Beeper” Spence, mistaken as a gang member, was killed by another kid.<sup>25</sup> He has been in and out of jail since age 12.<sup>26</sup> Co-founder of the Indian Posse, Daniel Richard Wolfe, grew up on the streets of Winnipeg, and had been in many foster care homes during his youth.<sup>27</sup> He “...turned to gangs for a sense of family and protection.”<sup>28</sup> He adopted the lifestyle and identity of a criminal outlaw.<sup>29</sup>

Not all Aboriginal persons who suffer or endure significant hardships, such as entrenched and severe poverty, alcohol and drug abuse, low educational opportunities, ill health including mental health, state institutionalization, sexual abuse, and high rates of violence in the early part of their lives, become Aboriginal street gang members. Indeed, most Aboriginal young people who grow up in high risk environment do not affiliate with gangs.<sup>30</sup> However, most Aboriginal street gang members have had such experiences.<sup>31</sup>

Membership in Aboriginal gangs results in, and results from, a severance of ties with their conventional and familial communities, and a corresponding loss of their cultural identities in non-criminal subcultures.

For Aboriginal families specifically in the Prairie Provinces, the gang issue is a growing phenomenon. Youth are being recruited into this lifestyle both on the street and in prisons, leaving school and family behind to take on the gangster identity. This criminal and violent lifestyle increases risk of victimization, criminal records and prison time, serious injury, and death. Further, when Aboriginal men choose to take on a persona generated by African American gangs [whom some Aboriginal gangs emulate], they lose their connection to their people and their identity as a Cree, Blackfoot, Lakota, Dene, or Métis etc. This migration

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<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.* at 26:12.

<sup>26</sup> *Ibid.* at 09:18.

<sup>27</sup> “Indian Posse Founder Killed: Gang Leader Stabbed to Death During a Brawl in Penitentiary”, *supra* note 12. McIntyre reports comments that had been made by Wolfe’s lawyer.

<sup>28</sup> *Ibid.* McIntyre reports that co-founder of the Indian Posse street gang, Daniel Richard Wolfe, died as the result of a prison stabbing in the Saskatchewan Penitentiary.

<sup>29</sup> *Ibid.* McIntyre reports comments that Wolfe had made regarding the sentence that put him in prison: “They’re going to give me 25 to life... That’s the life of a gangster.”

<sup>30</sup> Mark Totten, “Aboriginal Youth and Violent Gang Involvement in Canada” (2009) 3 Institute for the Prevention of Crime Review 135 [“Aboriginal Youth and Violent Gang Involvement in Canada”] at 137-38.

<sup>31</sup> *Ibid.* at 140-42.

to gang lifestyles by young men and women, therefore, can have serious consequences for the individual, family and entire communities.<sup>32</sup>

Membership in aboriginal street gangs gives its members "...an identity, empowerment and a sense of belonging and acceptance."<sup>33</sup> The adoption of this criminal outlaw identity satisfies a lack of, or a previous denial of, familial, national, or community connection.

...The gang can be a source of both self-esteem and identity for "lost" youth. For these reasons, it is likely that the gang has an appeal to youth coming from broken homes, single parent families, and abusive situations. The gang becomes a surrogate family for these disenfranchised young people. In addition to this, the gang can also serve as an economic organization, providing money to its members. As a social organization, the gang unit is a source of pro-criminal entertainment, status, excitement, camaraderie, prestige, and protection. However, the gang can also be a source of punishment, pain, assignment of criminal tasks, and can plague individuals with the constant threat of lost membership.<sup>34</sup>

Aboriginal street gangs maintain a sense of unity and identity in a variety of ways. They use hand symbols or signs to communicate; their territories are marked by graffiti<sup>35</sup> or in other ways;<sup>36</sup> and they employ identifiers such as tattoos, clothing, paraphernalia like bandannas, and symbols.<sup>37</sup> They publicly display gang-like attributes, such as clothing and tattoos.<sup>38</sup>

Gang membership may also keep Aboriginal gang members insulated from conventional law-abiding segments of society. Racial stereotypes imposed on Aboriginal people generally are also imposed on Aboriginal gang members and may increase the barriers for Aboriginal gang members who seek to move away or "desist" from a criminal or gang

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<sup>32</sup> *An Investigation into the Formation and Recruitment of Aboriginal Gangs in Western Canada*, *supra* note 2 at 2.

<sup>33</sup> *R. v. Pangman*, *supra* note 17 at para. 55.

<sup>34</sup> *An Investigation into the Formation and Recruitment of Aboriginal Gangs in Western Canada*, *supra* note 2 at 28.

<sup>35</sup> *Ibid.* at 20.

<sup>36</sup> *Indian Posse: Life in Aboriginal Gang Territory*, *supra* note 2 at 01:00 and 20:38. Indian Posse gang territory is in north end of Winnipeg and is separated from the rest of the city by railway tracks. Across the tracks is Deuce, a rival Native Gang. According to and "Indian Posse: Prison Gang Profile", *supra* note 2, the Indian Posse and Redd Alert claim their territories based on Indian Reserve boundaries.

<sup>37</sup> *An Investigation into the Formation and Recruitment of Aboriginal Gangs in Western Canada*, *supra* note 2 at 20; and *Indian Posse: Life in Aboriginal Gang Territory*, *supra* note 2 at 12:27.

<sup>38</sup> "Aboriginal Youth and Violent Gang Involvement in Canada", *supra* note 31 at 136.

identity form a new law-abiding identity.<sup>39</sup> However, the negative aspects of being a gang member may not detract individuals from joining or encourage members to leave. Indian Posse member Trevor Lacasse did not have a family growing up. "...I wanted a family growing up. I left my own family for...to start a new family and that was IP I started...Indian Posse. Brothers...brothers...and uh stuff..."<sup>40</sup> Even if an Aboriginal street gang member wanted to leave the family that he never had, many Aboriginal street gangs do not simply allow members to leave.<sup>41</sup>

### 2.5.2 The Reputation for Violence and Intimidation: Part of the Identity of Aboriginal Street Gang Outlaw Groups

Many Aboriginal street gangs comprised of youth participate in non-prestigious inconspicuous crimes such as vandalism, automobile thefts, robberies, and muggings.<sup>42</sup> Larger adult Aboriginal street gangs, such as the Manitoba Warriors, engage in gun-smuggling, drug trafficking, and prostitution.<sup>43</sup> While many of these types of criminal activities involve acts of violence or intimidation, these offences do not solely or wholly define this outlaw group. Rather, their common identity, and their significant sense of cohesion and belonging accorded with this identity, define them as an organized crime outlaw group. The presence and use of violence and intimidation to commit criminal activities, and simultaneously to perpetuate the power of their reputation, contribute to this identity, and thus, contribute to defining them as an organized crime outlaw group.

The violence of recruitment continues within the membership of Aboriginal street gangs. Aboriginal street gangs engage in serious violence both on the street as well as within

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<sup>39</sup> Lawrence Deane, Denis C. Bracken & Larry Morrissette, "Desistance Within an Urban Aboriginal Gang" (2007) 54 *Probation Journal* 125 at 136.

<sup>40</sup> *Indian Posse: Life in Aboriginal Gang Territory*, *supra* note 2 at 34:13.

<sup>41</sup> *Ibid.* at 16:48. The partner of Indian Posse member Trevor Lacasse and mother of his child, says that although Trevor has told her he is not in the gang, he still hangs out with the gang, and that when you're in a gang, the gang doesn't let you leave that freely.

<sup>42</sup> "A Snapshot of Prison Gangs and Youth Gangs in Canada: Well-Known Gangs, Membership, Offences, Risk, and Reconviction" (2006) online: Insideprison.com <<http://www.insideprison.com/prison-gangs-canada.asp>>.

<sup>43</sup> *Ibid.*

penitentiaries and correctional centres.<sup>44</sup> Membership in these gangs may not produce unity across regions. Conflict and violence may occur between or among the same gang of a different region.<sup>45</sup>

Generally, Aboriginal street gangs are hierarchical.<sup>46</sup> They have different terms for the positions in their hierarchical structures.<sup>47</sup> Leaders, King Pins, Bosses, Presidents, or Captains actively promote and engage in serious criminal activity.<sup>48</sup> Veterans, Heavies, or Higher-Ups are loyal to the gang, handle internal conflicts, and decide criminal activities for the gang.<sup>49</sup> Core members or Regular Members, Associates, or Affiliates are experienced and proven members who usually have been members since the beginning of the gang.<sup>50</sup> Recruits require sponsorship, and must satisfy gang criteria, perform serious crimes of violence, and often are good earners for the gang.<sup>51</sup> Strikers or Soldiers are highly likely to commit serious acts of violence.<sup>52</sup>

### 2.5.3 Aboriginal Street Gangs as Organized Crime Outlaw Groups

Disagreement exists as to whether Aboriginal street gangs amount to criminal organizations, and as to the motivations for their formation. Michael C. Chettleburgh, a former member of a gang in Canada, asserts that street gangs generally are less sophisticated than organized crime groups in their organizational structure, their rules for members, and the nature of their criminal activities.<sup>53</sup> Notably, sophistication is not a

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<sup>44</sup> "Indian Posse Founder Killed: Gang Leader Stabbed to Death During a Brawl in Penitentiary", *supra* note 12. McIntyre reports that co-founder of the Indian Posse street gang, Daniel Richard Wolfe, died as the result of a prison stabbing in the Saskatchewan Penitentiary.

<sup>45</sup> *Ibid.* McIntyre reports that the stabbing of Daniel Richard Wolfe occurred due to tensions between Manitoba and Saskatchewan members of the Indian Posse.

<sup>46</sup> *An Investigation into the Formation and Recruitment of Aboriginal Gangs in Western Canada*, *supra* note 2 at 20.

<sup>47</sup> "Aboriginal Youth and Violent Gang Involvement in Canada", *supra* note 31 at 136.

<sup>48</sup> *Ibid.* According to *Indian Posse: Life in Aboriginal Gang Territory*, *supra* note 2 at 13:05 and 13:14, in the Indian Posse, the Seniors and O.G.'s (Original Gangsters) are founding members and leaders of a gang, and when they tell other members what to do, they have to do it or else will face violent consequences.

<sup>49</sup> "Aboriginal Youth and Violent Gang Involvement in Canada", *supra* note at 136.

<sup>50</sup> *Ibid.* at 136-37.

<sup>51</sup> *Ibid.* at 137.

<sup>52</sup> *Ibid.* According to *Indian Posse: Life in Aboriginal Gang Territory*, *supra* note 2 at 13:05; and "Manitoba Warriors: Prison Gang Profile", *supra* note 3, in the Indian Posse and Manitoba Warriors, the Strikers are errand boys.

<sup>53</sup> Michael C. Chettleburgh, *Young Thugs: Inside the Dangerous World of Canadian Street Gangs* (Toronto: HarperCollins, 2007) at 19-20.

requirement in this thesis' definition of organized crime outlaw or organized crime outlaw group.

Jana Grekul and Patti LaBoucane-Benson, in their investigation into the formation of Aboriginal gangs in Western Canada, make similar assertions. They applied a typology of youth groups created by Robert M. Gordon in 1995<sup>54</sup> – and not specifically Aboriginal youth or Aboriginal gang-groups – to Aboriginal youth and Aboriginal gangs. Grekul and LaBoucane-Benson opine that although some Aboriginal gangs may have connections with criminal organizations, criminal organizations are rare within Aboriginal gangs.<sup>55</sup>

If we look at some of the Aboriginal street gangs in existence in the prairie region, it also becomes clear that groups such as the Redd Alert, Indian Posse, Alberta Warriors, and the Native Syndicate fit Gordon's description of a street gang. Crime for profit (though less organized than criminal organizations) and violence characterize these street gangs. For example, the Indian Posse originally organized in Winnipeg in the late 1980s and early 1990s was unorganized initially but became more organized over time. This gang is involved in low level organized street crime, including drug trafficking, assaults and break and enters. Dependent on more structured criminal organizations for their drugs, Indian Posse members are involved in street level dealing. As is characteristic of most Aboriginal street gangs, the Indian Posse is very active in correctional institutions, using fear, violence and intimidation to recruit non-members and exercise control.

The Manitoba Warriors and the offshoot Alberta Warriors both are considered street gangs, although their strength appears to come primarily from their activities and recruitment in prisons. *Both touted as being on the more organized end of the street gang continuum, these groups which started off as Aboriginal political groups, have ties to more organized criminal organizations such as outlaw motorcycle groups.* The Redd Alert, according to some reports, originated in Edmonton as an offshoot of the notorious Edmonton Northside Boys. Very active in correctional institutions, the Redd Alert developed in response to

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<sup>54</sup> Robert M. Gordon, "Criminal Business Organization, Street Gangs and "Wanna-Be" Groups: A Vancouver Perspective" (2000) 42 Canadian Journal of Criminology 39 ["Criminal Business Organization, Street Gangs and "Wanna-Be" Groups: A Vancouver Perspective"] at 45, 46 and 51. In his Greater Vancouver Gang Study in 1995, Gordon studied adults and youth in gangs in the Greater Vancouver area. His work has limited application to aboriginal street gangs because his study did not differentiate between gang members, peripheral or "wanna-be" members, or associates. Further, his subjects included a great variety of ethnicities, but did not include any Aboriginal subjects. Gordon found that of the 35 street gang "members" in his study, 60 per cent were born in Canada, and 85 per cent were visible ethnic minorities of Indo-Canadian (Fijian), Hispanic, Iranian, Chinese, and Vietnamese descent.

<sup>55</sup> *An Investigation into the Formation and Recruitment of Aboriginal Gangs in Western Canada*, supra note 2 at 18. The authors refer to Robert M. Gordon, "Street Gangs in Vancouver" in J. Greechan and R. Silverman, eds., *Canadian Delinquency* (Scarborough: Prentice Hall, 1995); and "Criminal Business Organization, Street Gangs and "Wanna-Be" Groups: A Vancouver Perspective", supra note 55.

aggressive institutional recruitment by gangs such as the Indian Posse and the Manitoba and Alberta Warriors. Aboriginal inmates formed the Redd Alert as an alternative to being forcefully recruited into these other groups.

...  
*Gordon's third group, criminal organizations are currently relatively rare in the Aboriginal community in the Prairie provinces. Though some of the street gangs, through their drug trafficking activities and connections with more organized groups, might be moving in this direction, as it now stands criminal organizations don't fit the profile of the bulk of Aboriginal gangs. ...[N]ot only with the "legitimate" world of work, but also within the world of crime, Aboriginal youth are relegated to the more disorganized, less lucrative criminal opportunities because of a variety of reasons, including structural inequality, poverty, discrimination and other factors. They do not make up the bulk of the criminal business organization, but rather are more likely to be found in the street level groups and the "wanna-bes" groups.*<sup>56</sup> [Emphasis added].

These assertions seem to imply that "low level" crime, or less sophisticated organization and structure, excludes Aboriginal street gangs from being criminal organizations. The authors rely on non-legal categories formulated by Gordon – namely, "criminal business organization", "street gang" and "'wanna-be' groups."<sup>57</sup> However, the definition of "criminal business organization" does not necessarily exclude Aboriginal street gangs. The definition requires a "formal structure" and "high degree of sophistication", but these

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<sup>56</sup> *An Investigation into the Formation and Recruitment of Aboriginal Gangs in Western Canada, supra* note 2 at 17-18.

<sup>57</sup> "Criminal Business Organization, Street Gangs and "Wanna-Be" Groups: A Vancouver Perspective", *supra* note 55 at 48-49. Gordon defines these three types of gangs as follows:

Criminal business organizations are organized groups that exhibit a formal structure and a high degree of sophistication. Organizations are comprised primarily of adults, including older adults. They engage in criminal activity primarily for economic reasons and almost invariably maintain a low profile, which is a characteristic that distinguishes them most clearly from street gangs. Organizations may have a name....

Street gangs are groups of young people, mainly young adults, who band together to form a semi-structured organization the primary purpose of which is to engage in planned and profitable criminal behaviour or organized violence against rival street gangs. They can be distinguished from other groups (especially wanna-be groups) by a self-perception of the group as a gang: a name selected and used by gang members; and some kind of identifying marks such as clothing and colours. The members will openly acknowledge gang membership because they want to be seen as gang members by others. Street gangs will tend to be less visible but more structured, better organized, and more permanent than wanna-be groups. ...

Wanna-be groups are clusters of young people who band together in a loosely structured group to engage in spontaneous social activity and exciting, impulsive, criminal activity including collective violence against other groups of youths. A wanna-be group will be highly visible and its members will openly acknowledge their "gang" involvement because they want to be seen by others as gang members. The group will have a local gathering area and a name, selected and used by its members, which may be a modified version of the name of either a local or an American street gang. The group may use clothing, colours, or some other kind of identifying marks. The group's name, meeting ground, and colours may fluctuate. ....

terms are not clear, and notably, organization and hierarchy are indeed present in many of the more notorious Aboriginal street gangs, as evidenced by the existence of presidents, vice-presidents, sergeants-at-arms, full patch members, and apprentices in the Manitoba Warriors.<sup>58</sup> Also of concern is that Grekul and LaBoucane-Benson specifically apply the criminal organization provisions in the Canadian *Criminal Code*, and do not address the findings of the Manitoba Court of Queen's Bench in *R. v. Pangman* which, in the context of a jury trial, has applied the Canadian criminal organization legislation to one of these Aboriginal street gangs – namely, the Manitoba Warriors.<sup>59</sup>

Dickson-Gilmore and Whitehead discuss the motivation of Aboriginal gangs. They assert that much, if not all, of “Aboriginal organized crime” stems from political activism and nationalism as a conscious and unconscious response to societal oppression both historically and contemporarily.<sup>60</sup>

...To say that many aboriginal people, especially youth, are estranged from Canadian society and authority is an understatement, and when this is coupled with poverty and blocked opportunity, engagement in organized criminal activity may well become a rational choice. In some measure, too, it may become a form of political protest.<sup>61</sup>

Conscious or subconscious politics or lack of attachment to pro-social groups may not be the only forces that lead individuals to join Aboriginal street gangs, however. The need to belong and have an identity may offer Aboriginal individuals the opportunity to fulfill a sense of disconnect, and an opportunity to benefit economically and socially. But notably, the definition of organized crime outlaw group includes using the power of the group identity in order to gain some personal or group benefit or advantage whether this benefit or advantage be economic, social, *political*, or (il)legal.

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<sup>58</sup> *R. v. Pangman*, *supra* note 17.

<sup>59</sup> *R. v. Pangman*, *supra* note 17; and Manitoba Court of Queen's Bench decisions in *R. v. Pangman*, (1999), 143 Man. R. (2d) 161, [1999] M.J. No. 396 (Q.L.); (1999), 141 Man. R. (2d) 143, [1999] M.J. No. 475 (Q.L.); (2000), 141 Man. R. (2d) 200, [2000] M.J. No. 5; [2000] M.J. No. 31 (Q.L.), (2000), 45 W.C.B. (2d) 155; [2000] M.J. No. 51 (Q.L.), (2000), 45 W.C.B. (2d) 56; (2000), 144 Man. R. (2d) 144, [2000] M.J. No. 60 (Q.L.); (2000), 144 Man. R. (2d) 192, [2000] M.J. No. 123 (Q.L.); (2000), 32 C.R.(5<sup>th</sup>) 272, [2000] M.J. No. 125 (Q.L.); 2000 MBQB 47, [2001] M.J. No. 235 (Q.L.); 2000 MBQB 85, [2000] M.J. No. 300 (Q.L.). This case dealt with the criminal organization provisions as they existed in 1997 prior to the amendments in 2001.

<sup>60</sup> “Aboriginal Organized Crime in Canada: Developing a Typology for Understanding and Strategizing Responses”, *supra* note 14 at 7.

<sup>61</sup> *Ibid.* at 11.

Mark Totten discusses both level of organization and motivation of “Aboriginal youth gangs.”<sup>62</sup> Unlike Chettleburgh, and Grekul and LaBoucane-Benson, Totten does not discount the existence of seriousness and sophistication of organization in these groups.<sup>63</sup> He states, “Aboriginal youth gangs are visible groups that come together for profit-driven criminal activity and severe violence.”<sup>64</sup> The engagement in violence also motivates members as it provides them with a sense of honour, self-respect, and self-esteem.<sup>65</sup> Indeed, as discussed in the prior section on defining organized crime outlaws, Beare has noted, but overemphasized, the motive of profit in her definition of organized crime.

While many Aboriginal street gang members seek economic benefit through participation in gang activities, profit or economic benefit alone does not account for participation in an organized crime group, and its over-emphasis on employment as a defining factor ignores other criminal activities of organized crime outlaws that relate to their group. For instance, while some criminal activities by members may involve economic benefit or advantage such as drug trafficking or extortion for money, other criminal activities relate to the infliction of violence to protect members and associates of the group as well as the reputation of the group. Further, a definition of *organized crime* rather than a definition of the individuals and groups that commit criminal acts, fails to capture the essence of organized crime outlaws. These outlaws commit criminal acts. It is *who they are* that distinguishes them from other criminals.

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<sup>62</sup> “Aboriginal Youth and Violent Gang Involvement in Canada”, *supra* note 31 at 136. While Totten’s research pertains to “Aboriginal youth”, he employs this term to include Aboriginal individuals between the ages of 12 and 30 years.

<sup>63</sup> *Ibid.* Totten at first says, “...there is a lack of organization and structure...” A few sentences later, he states that the organization varies in terms of structure, sophistication and permanence.

<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid.* at 140.

## **CHAPTER THREE THEORETICAL CONCEPTS RELEVANT TO ORGANIZED CRIME OUTLAWS**

### **3.1 INTRODUCTION TO THEORETICAL CONCEPTS**

This Chapter of this thesis will use various concepts and assertions within criminological, sociological and psychological theories to explain the formation and perpetuation of organized crime outlaw identities and outlawry. It will outline the tenets of each theory and apply it to some of the four organized crime outlaw groups described in Chapter Two in an effort to exemplify the origins and workings of outlawry. Insights from the application of these theoretical explanations will produce a list of causes or reasons for the existence of organized crime. Based on this application and these causes or reasons, at the end of each section in this Chapter, this thesis will set forth the main requisites for anti-organized crime measures – that is to say, what anti-organized crime measure should do.

This thesis does not intend to explain why *all* individuals become *criminals*, but rather, it seeks to explain why some individuals, or some individuals who are criminals, become *organized crime outlaws*. There does not exist any one or any group of causes or reasons for all organized crime outlaws. However, there are similar reasons for some, different reasons for others, and sometimes overlapping reasons.

This Chapter of the thesis will discuss social constructionism; social control and bond theory; deviance and labelling theory; and differential association or social learning and the concept of subculture. It will draw from concepts of degradation and display from social psychology in order to elaborate on aspects of the labelling theory. However, it will not directly and wholly apply the theory of social psychology to organized crime outlaws.

This Chapter will begin its theoretical analysis with an analysis of social constructionism in section two. Social constructionism does not assert that “organized crime” or “criminal organizations” are accurate and real, so much as they are socially constructed. Thus,

social constructionism cannot explain the processes behind the formation of organized crime outlaw identities. Rather, social constructionism will explain how societies perceive, believe, and construct organized crime as a social problem. Social constructionism can also explain the reasons for state reactions to this problem through the implementation of criminal laws. Further, it will explain the role of the media and popular culture in the creation, maintenance, and dismantling of outlaw identities.

Section three will analyse social control theory and bond theory, as a subset within social control theory, in order to determine why individuals obey the rules of society. The lack of social control mechanisms can produce disorder and non-conformity, and anarchy and the lack of informal social controls may act as precursors not only to criminality, but also to outlawry. In turn, outlawry can resist and hinder later efforts at imposing conventional social norms and laws.

Section four will examine the nature of social identity formation through differential association or social learning within subcultures. Criminal behaviour is learned from interaction or association with individuals who commit crimes, and subcultures of criminals, such as organized crime outlaws, provide a fertile environment for learning anti-social behaviours. Once outlaw groups or subcultures are formed, all members learn the values and normative behaviour of that subculture or group, and reinforce them with each other. Theoretically, this phenomenon would entrench organized crime outlaw identities, and their outlaw behaviour. While research regarding differential association has focused on youth gangs and youth deviance, the lessons learned from youth outlaws may also apply to adult outlaws.

Section five will examine the theory of deviance and labelling to explain the creation or recognition of the criminally deviant, and the process of socially casting out individuals from society. Of particular importance is the concept of secondary deviance which explains the process of internalization of a deviant or criminal identity, and arguably an outlaw identity.

Section six in this Chapter will not examine the entire theory of social psychology, but it will refer to two concepts within social psychology – those of degradation and display – in its attempt to explain the labelling process, and the process of internalization of identity.

Examination of insights from the theoretical concepts in sections two to six will reveal that some aspects of deviance and labelling; differential association or social learning and the concept of subculture; social control; and social constructionism, are very divergent and distinct, and thus, may account for many different causes or reasons for the formation of outlaw identities, and explain the processes of acquiring and removing the power within outlawry generally. In other respects, many concepts within these theories overlap and are compatible – particularly in relation to the creation and maintenance of identity, social cohesion, and social order. This mix of compatibility and divergence contributes to a rubric for evaluation of anti-organized crime legislation in Canada, and suggestions for amendments and non-criminal as well as non-legal approaches. Thus, section seven of this Chapter will summarize a number of insights for anti-organized crime measures based on these theoretical analyses of organized crime outlaws in order to determine whether criminal organization legislation in Canada can disarm organized crime outlaws.

## 3.2 SOCIAL CONSTRUCTIONISM

### 3.2.1 Overview

Social constructionism postulates how “...subjective meanings *become* objective facticities...”,<sup>1</sup> or how human activity produces things.<sup>2</sup> It explains the construction and perpetuation of reality, and it asserts that once constructed, de-construction and change to this reality becomes difficult even with the existence of alternative competing realities.<sup>3</sup> The analysis of how something came to be an “objective facticity” or part of reality is essential to an examination of whether this facticity accurately and genuinely reflects the entity that it claims to reflect.

This analysis in relation to crime generally illuminates how criminal conceptions and definitions come to be; how they are applied; and how behaviour patterns develop or are noted in relation to these definitions.<sup>4</sup> This analysis in relation to organized crime outlaws and outlawry will illuminate whether the criminal organization legislation in Canada accurately and genuinely captures what has come to be perceived and labelled as organized crime or criminal organizations. This is one of two ways in which social constructionism has particular relevance to organized crime outlaws.

The second way in which social constructionism remains relevant is in examining the internalization of identity, and in describing social interaction processes that maintain roles and identities. It allows for analysis of how a reality of organized crime groups and “criminal organizations” came to be, and an analysis of how organized crime identities may be formed and perpetuated.

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<sup>1</sup> Peter L. Berger & Thomas Luckmann, *The Social Construction of Reality*, 1<sup>st</sup> ed. (Garden City: Doubleday, 1966) [*The Social Construction of Reality*] at 17 [emphasis original].

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.* at 23. Peter L. Berger and Thomas Luckmann state:

The reality of everyday life is taken for granted *as* reality. It does not require additional verification over and beyond its simple presence. It is simply *there*, as self-evident and compelling facticity. I *know* that it is real. While I am capable of engaging in doubt about its reality, I am obliged to suspend such doubt as I routinely exist in everyday life. This suspension of doubt is so firm that to abandon it, as I might want to do, say, in theoretical or religious contemplation, I have to make an extreme transition. The world of everyday life proclaims itself and, when I want to challenge the proclamation, I must engage in a deliberate, by no means easy effort. ... [Emphasis original].

<sup>4</sup> Richard Quinney, *The Social Reality of Crime* (Boston: Little, Brown and Company, 1970) [*The Social Reality of Crime*] at v.

This section of this Chapter will review aspects of social constructionism that relate to these two areas – the construction or definition of organized crime or criminal organizations, and the social construction of identity. It will also analyse the effect of media on the social construction of crime. It will use these aspects of social constructionism to explain how the social construction of organized crime identities has occurred, and the role of the law in constructing organized crime and remedying organized crime.

As examination of social constructionism in this section will reveal the following:

- Insight 1. Anti-organized crime measures should calm moral panic and re-establish or maintain social order with substantive rather than hollow criminal measures that legitimize the state.
- a. These measures should be useful to law enforcement and prosecutions; they must not be overly complex in relation to evidentiary and procedural issues.
  - b. These measures should either socially construct a legal definition that applies to all organized crime outlaw groups without capturing more than the intended groups, or they must simply proscribe that certain organized crime groups are “criminal organizations” according to the *Criminal Code*.
- Insight 2. Anti-organized crime measures should fairly restrain or use media, in accordance with principles of freedom of expression, in their public dissemination of information.
- a. These measures should prevent stigmatization, ostracization, and sensationalizing organized crime outlaws.
  - b. These measures should not incite moral panic that glorifies gang lifestyles, that increases the power of their reputations, and that bolsters gang identities.
  - c. These measures should use media to launch anti-gang advertising campaigns in order to discourage gang membership; to create new non-criminal identities for these offenders if the offender has a willingness to change; and to sensationalize the powers and victories of law enforcement in order to de-sensationalize organized crime outlawry.

### 3.2.2 Social Constructionism

#### 3.2.2.1 Social Construction of Identity

Social construction asserts that the internalization of reality occurs simultaneously with the development of identity.<sup>5</sup> One's identity depends on or is determined by one's reality.<sup>6</sup> Reality may be conventional, and it may be deviant or non-conventional. Thus, one's identity may derive from a deviant or non-conventional reality.

Social interaction processes explained by social constructionism have marked similarity to those posited by differential association and social learning theory, and the negative interaction processes explained by labelling theory. Social constructionism posits that members of society construct their own reality as they interact in the world and access shared meanings.<sup>7</sup> They communicate the meaning of reality via face-to-face interactions or via a "...continuous reciprocity of expressive acts..."<sup>8</sup> These interactions or "typifications" are based on past experience, knowledge, and belief, about the individual with whom one interacts or communicates.<sup>9</sup> The phenomenon of typification and the "continuum of typifications"<sup>10</sup> as posited by social constructionism describes the development of stereotypes and assignment of labels, as well as identity.

Social constructionism posits that learning criminal behaviour not only includes association with other individuals,<sup>11</sup> but also extends beyond. It becomes differential identification.<sup>12</sup> Identity is formed by social processes, and maintained, modified and reshaped by social relations.<sup>13</sup> Behaviour patterns develop and become established by groups or segments of society, and provide a "framework for personal action."<sup>14</sup> Within

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<sup>5</sup> *The Social Construction of Reality*, *supra* note 1 at 123.

<sup>6</sup> *Ibid.* at 160.

<sup>7</sup> *The Social Reality of Crime*, *supra* note 4 at 239.

<sup>8</sup> *The Social Construction of Reality*, *supra* note 1 at 28. At *ibid.* 15, Berger and Luckmann state that their assertions were greatly influenced by George Herbert Mead and the development of his work by symbolic-interactionist theorists.

<sup>9</sup> *Ibid.* at 29-30.

<sup>10</sup> *Ibid.* at 32.

<sup>11</sup> *The Social Reality of Crime*, *supra* note 4 at 241.

<sup>12</sup> *Ibid.*

<sup>13</sup> *The Social Construction of Reality*, *supra* note 1 at 159.

<sup>14</sup> *The Social Reality of Crime*, *supra* note 4 at 234.

this context, individuals construct their own personal action patterns<sup>15</sup> which provide a source of personal identity and a frame of reference for future behaviour.<sup>16</sup>

The division of criminally defined behavior into types of behavior systems is based on various aspects of the person and his behavior. The characteristics of behavior systems ... are the *career* of the person in regard to criminally defined activity and the *group support* he receives from his actions. The career of the offender consists of the extent to which criminally defined behavior is a part of his life organization. Also included are his conception of self, his identification with crime, and his progression in activities that may be defined as criminal. Group support consists of the extent to which the person's criminally defined behavior is supported by the norms of the group or groups to which he belongs. Included are the differential association of the person with behavior patterns that have varying probabilities of being defined as criminal, his social roles, and his integration into various social groups.<sup>17</sup> [Emphasis original].

Notably, social constructionism asserts that an individual's self-conception is formed and is continuously in process of formation.<sup>18</sup> These assertions could explain the formation of identity and modification to identity not only during adolescence, but also during adulthood. The construct of identity through social relations is not always positive. Some Aboriginal youth exemplify this negative effect of social constructionism. They receive negative social reactions without actually being gang members, and must prove that they are not gang members in order to receive trust, education, employment, and social relationships.<sup>19</sup> Some Aboriginal youth succumbed to this stereotyping or false labelling, and become what others in society have constructed them as being – gang members.<sup>20</sup>

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<sup>15</sup> *Ibid.* at 236-37.

<sup>16</sup> *Ibid.* at 234.

<sup>17</sup> *Ibid.* at 248.

<sup>18</sup> *Ibid.* at 235. Quinney states:

A person's self-conception, as an image of what he means to himself and how he acts with reference to himself, is always in a process of formation. In this process, persons place themselves into categories with which they can identify, such as age, sex, occupation, ethnic group, and social class. Moreover, actions themselves give an identity to a person. On the basis of his own constructions and decisions, man is ever becoming.

<sup>19</sup> Jana Marie Grekul & Patti LaBoucane-Benson, *An Investigation into the Formation and Recruitment of Aboriginal Gangs in Western Canada* (Ottawa: Aboriginal Corrections Policy Unit, Public Safety Canada, 2006) [*An Investigation into the Formation and Recruitment of Aboriginal Gangs in Western Canada*] at 27.

<sup>20</sup> *Ibid.* at 42. Grekul and LaBoucane-Benson use labelling theory in this context, and assert that some Aboriginal youth who have been labelled as gang members by authorities have lost the battle against false labels.

### 3.2.2.2 The Use of Symbolism to Communicate Identity

Language influences social interactions and socialization, and thus, influences the formation and reinforcement of identity. In social constructionism, language “translates” unusual experiences into the reality of everyday experiences,<sup>21</sup> and deposits them into a “social stock of knowledge.”<sup>22</sup> It crystallizes and stabilizes subjective meanings into objective facticities, reintroduces their presence after they have occurred,<sup>23</sup> and thus, perpetuates them.

...[L]anguage is capable of becoming the objective repository of vast accumulations of meaning and experience, which it can then preserve in time and transmit to following generations.<sup>24</sup>

Language does not only define entities and individuals within society. It also prescribes knowledge available to individuals. The role that an individual plays in society specifies the relevant “areas of socially objectivated knowledge” to which he will be privy and utilize.<sup>25</sup> For instance, a judge or lawyer has a set of knowledge relevant to their occupations, and an organized crime outlaw has a knowledge set relevant to the commission of organized crime outlawry. This knowledge set may even be more specific to a particular organized crime outlaw group, and thus, assists in the socialization of members within an organized crime outlaw group. Accordingly, it also reinforces the social cohesion of the group, and its identity.

Language also constructs symbols which similarly entrench meaning into perceived reality, and which are stored in the “social stock of knowledge.”

Any significative theme that thus spans spheres of reality may be defined as a symbol, and the linguistic mode by which such transcendence is achieved may be called symbolic language. On the level of symbolism, then, linguistic signification attains the maximum detachment from the “here and now” of everyday life, and language soars into regions that are not only *de facto* but *a priori* unavailable to everyday experience. Language now constructs immense edifices of symbolic representations that appear to tower over the reality of everyday life like gigantic presences from another world. Religion, philosophy,

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<sup>21</sup> *The Social Construction of Reality*, *supra* note 1 at 25. *Ibid.* at 65, Berger and Luckmann describe language in its translation of experiences as a “large aggregate of collective sedimentations.”

<sup>22</sup> *Ibid.* at 40.

<sup>23</sup> *Ibid.* at 36.

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.* at 71 and 73.

art, and science are the historically most important symbol systems of this kind. To name these is already to say that, despite the maximal detachment from everyday experience that the construction of these systems requires, they can be of very great importance indeed for the reality of everyday life. Language is capable not only of constructing symbols that are highly abstracted from every day experience, but also of “bringing back” these symbols and appresenting them as objectively real elements in everyday life. In this manner, symbolism and symbolic language become essential constituents of the reality of everyday life and of the commonsense apprehension of this reality. I live a world of signs *and* symbols every day.<sup>26</sup> [Emphasis original].

These symbols put history into order for societal members to access it, share it, and base future actions on it.

The power of symbolism has particular relevance within the criminal milieu where gangs use names and insignia to convey meaning based on reputation developed over time, maintained, and repeatedly reinforced. Like any symbol, the origins and history of gang names and insignia can become forgotten, but their reputation and significance produce reactions and interactions that stem from past knowledge and experience, and perpetuation of this knowledge and experience whether or not it remains currently accurate or a true reflection of present reality.

### 3.2.2.3 Social Reality of Crime

“‘Crime’ exists within that society where there are at least two sets of normative ideologies that conflict with one another and where one social group has the power to enforce its ideology over other groups.”<sup>27</sup>

Berger and Luckmann posit that social order does not naturally occur, but rather, humans construct it.<sup>28</sup> Similarly, Richard Quinney began his social constructionism analysis of

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<sup>26</sup> *Ibid.* at 38.

<sup>27</sup> Lisa Chartrand & Cora Weber-Pillwax, “Pimatsowin Weyasowewina: Our Lives, Others’ Laws” in Janet Mosher & Joan Brockman, eds., *Constructing Crime: Contemporary Processes of Criminalization* (Vancouver: UBC Press, 2010) at 122.

<sup>28</sup> *The Social Construction of Reality*, *supra* note 1 at 49-50. Berger and Luckmann explain:

...One may ask in what manner social order itself arises.

The most general answer to this question is that social order is a human product, or, more precisely, an ongoing human production. It is produced by man in the course of his ongoing externalization. Social order is not biologically given or derived from any biological *data* in its empirical manifestations. Social order, needless to add, is also not given in man’s natural environment, though particular features of this may be factors in determining certain features of a social order (for example, its economic or technological arrangements). Social order is not part of

crime by asserting that "...a thing exists only when it is given a name; any phenomenon is real to us only when we can imagine it."<sup>29</sup> He based his analysis on six propositions, and in so doing, elaborated on social constructionism as set forth by Berger and Luckmann and applied it directly to the concept of crime. Propositions one, two and three deal with the social construction of crime, and relate to how organized crime and organized crime outlaw groups come to be defined. Proposition four relates to an analyses of the impact of identity on these groups. Proposition five relates to the use of media.

PROPOSITION 1 (DEFINITION OF CRIME): *Crime is a definition of human conduct that is created by authorized agents in a politically organized society.*<sup>30</sup>

Authorized agents of the law, such as legislators, police, prosecutors and judges, formulate and administer the criminal law, and in so doing, define crime or make it real.<sup>31</sup> For instance, the police target and arrest organized crime outlaws based on their political mandates and their application of organized crime laws.<sup>32</sup> Prosecutors lay charges and provide evidence at trial in accordance with the "criminal organization" definition, and judges determine whether the adequacy of this proof, and sometimes the justness of the law. These judgments about the actions and characteristics of others define who is criminal and what actions or behaviours are criminal,<sup>33</sup> and thus, who are organized crime outlaws.

PROPOSITION 2 (FORMULATION OF CRIMINAL DEFINITIONS): *Criminal definitions describe behaviors that conflict with the interests of segments of society that have the power to shape public policy.*<sup>34</sup>

Society is not homogenous with one value system – there exists a "we" and a paradoxical "they."<sup>35</sup> Criminal definitions occur as the result of conflict between the powerful and

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the "nature of things," and it cannot be derived from the "laws of nature." Social order exists *only* as a product of human activity. No other ontological status may be ascribed to it without hopelessly obfuscating its empirical manifestations. Both in its genesis (social order is the result of past human activity) and its existence in any instant of time (social order exists only and insofar as human activity continues to produce it) it is a human product. [Emphasis original].

<sup>29</sup> *The Social Reality of Crime*, *supra* note 4 at v.

<sup>30</sup> *Ibid.* at 15.

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.* at 101.

<sup>33</sup> *Ibid.* at 16.

<sup>34</sup> *Ibid.*

other individuals or groups.<sup>36</sup> The greater the conflict (or social problem), the greater the probability of declaring certain behaviour as criminal.<sup>37</sup> Essentially, organized crime outlaws are defined by those in society who have the power to implement or create this definition. It is against the values and norms of this powerful group that the organized crime outlaw group conflicts.

PROPOSITION 3 (APPLICATION OF CRIMINAL DEFINITIONS): *Criminal definitions are applied by the segments of society that have the power to shape the enforcement and administration of criminal law.*<sup>38</sup>

This proposition relates to Quinney's first and second propositions. Essentially, the less powerful and more offensive organized crime outlaw groups are to society, the more individuals within and who influence law enforcement and administration will seek to target and control them.

PROPOSITION 4 (DEVELOPMENT OF BEHAVIOR PATTERNS IN RELATION TO CRIMINAL DEFINITIONS): *Behavior patterns are structured in segmentally organized society in relation to criminal definitions, and within this context persons engage in actions that have relative probabilities of being defined as criminal.*<sup>39</sup>

Quinney based this fourth proposition on the premise derived from differential association and social learning theories that individuals in society "...act according to *normative systems* learned in relative social and cultural settings."<sup>40</sup> Further, he melded social constructionism with labelling theory by asserting that "...it is not the quality of the behavior but the action taken against the behavior that makes it criminal..."<sup>41</sup> Thus, the behaviour patterns of the non-powerful in society are more likely to fall within a

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<sup>35</sup> *Ibid.* at 209.

<sup>36</sup> *Ibid.* at 16-17.

<sup>37</sup> *Ibid.* at 17.

<sup>38</sup> *Ibid.* at 18.

<sup>39</sup> *Ibid.* at 20.

<sup>40</sup> *Ibid.* [emphasis original]. Quinney cites Edwin H. Sutherland, *Principles of Criminology*, 4<sup>th</sup> ed. (Philadelphia: J.B. Lippincott, 1947); and Melvin L. De Fleur & Richard Quinney, "A Reformulation of Sutherland's Differential Association Theory and a Strategy for Empirical Verification" (1966) 3 *Journal of Research in Crime and Delinquency* 1.

<sup>41</sup> *Ibid.* at 20-21.

definition of criminal, than the behaviour patterns of the powerful – particularly since the latter group formulates and applies the definition of criminal.<sup>42</sup>

Quinney integrated social constructionism with primary and secondary deviation in deviance and labelling theory as well as with differential association and social learning theories when he described how individuals create patterns of behavior, such as deviant or criminal patterns of behaviour.

Man constructs his own patterns of action in participating with others. It follows, then, that *the probability that a person will develop action patterns that have a high potential of being defined as criminal depends on the relative substance of (1) structured opportunities, (2) learning experiences, (3) interpersonal associations and identifications, and (4) self-conceptions.* Throughout his experiences, each person creates a conception of himself as a social being. Thus prepared, he behaves according to the anticipated consequences of his actions.

During experiences shared by the criminal definers and the criminally defined, personal action patterns develop among the criminally defined because they are so defined. After such persons have had continued experience in being criminally defined, they learn to manipulate the application of criminal definitions.

*Furthermore, those who have been defined as criminal begin to conceive of themselves as criminal; as they adjust to the definitions imposed upon them, they learn to play the role of the criminal. Because of others' reactions, therefore, persons may develop personal action patterns that increase the likelihood of their being defined as criminal in the future. That is, increased experience with criminal definitions increases the probability of developing actions that may be subsequently defined as criminal.*

Thus, both the criminal definers and the criminally defined are involved in reciprocal action patterns. The patterns of both the definers and the defined are shaped by their common, continued, and related experiences. The fact of each is bound to that of the other.<sup>43</sup> [Emphasis added].

This description of the conception and internalization of oneself as a criminal can equally apply to the formation of an organized crime outlaw identity. Negative social interactions between “criminal definers” and the “criminally defined” cause the latter to view himself as criminal – or as an organized crime outlaw – and thus, only reinforce this imposed definition as part of his identity.

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<sup>42</sup> *Ibid.* at 21.

<sup>43</sup> *Ibid.* at 21-22.

PROPOSITION 5 (CONSTRUCTION OF CRIMINAL CONCEPTIONS):  
*Conceptions of crime are constructed and diffused in the segments of society by various means of communication.*<sup>44</sup>

This communication may be via media, and the more powerful segments in society (those with the most critical concerns and conceptions of crime) will more likely have their conceptions communicated. Thus, the Canadian government, police forces, and the media as informed by these sources, will control much of the information disseminated to the public about organized crime, and thus, will control the nature of the portrayal of organized crime groups.

PROPOSITION 6 (THE SOCIAL REALITY OF CRIME): *The social reality of crime is constructed by the formulation and application of criminal definitions, the development of behavior patterns related to criminal definitions, and the construction of criminal conceptions.*<sup>45</sup>

This last proposition is a composite of the second, third, fourth and fifth propositions, using the definition in the first proposition.<sup>46</sup>

These propositions espoused by Quinney demonstrate how the construction of criminal conceptions develops from the perception and definition of a “social problem” in social constructionism. Not every conflict, not every person, and not every alleged and labelled “immoral”, “wrong”, “deviant”, or “criminal” behaviour in society amounts to a social problem in constructionism. Further, social problems do not exist or come into existence by themselves. The “discovery” or declaration of social problems occurs when either a “moral entrepreneur” or “single crusader”, or when members of a segment of society or group that have an interest, resources or legitimacy, launch a social movement or campaign in order to define a social problem for the public.<sup>47</sup> However, the definers of the social problem must have sufficient power in society to be heard, to facilitate moral

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<sup>44</sup> *Ibid.* at 22.

<sup>45</sup> *Ibid.* at 23.

<sup>46</sup> *Ibid.*

<sup>47</sup> Erich Goode & Nachman Ben-Yehuda, *Moral Panics: The Social Construction of Deviance* (Cambridge, Massachusetts: Blackwell, 1994) at 92.

panic, and to urge a response or remedial action.<sup>48</sup> In this way, social problems are “constructed”, “called into being” or “constituted.”<sup>49</sup>

Just as social problems do not come into existence by themselves, they do not remedy themselves. They require social institutions to correct them. State institutions, such as the law, seek to maintain or re-establish social order in times of “social disorder” or “moral panic.” Through these institutions, governments maintain their legitimacy. “...No government can rule—practically or morally—without legitimacy. Power is legitimate only when it is granted by the citizenry. ...”<sup>50</sup>

The effectiveness, justness and fairness of laws evince the legitimacy of the state. Thus, in defining criminal behaviour, the state must demonstrate the existence of the need for its laws, or it must respond to a social problem perceived by a powerful segment of the public. The main goal of the societal segment that perceives a social problem is to solve the social problem, and reinstate law-abiding normative behaviour. However, the main goal of the state in light of a social problem is to maintain its legitimacy. These goals do not necessarily overlap, and the state may initially seem legitimate by the nature of its response. However, its response cannot be superficial. The phenomenon of the social construction of crime and the paramount interest of the state in maintaining its legitimacy provides a backdrop or structure against which to analyse how the state comes to define criminal offences, such as “criminal organizations” in the Canadian *Criminal Code*.

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<sup>48</sup> *Ibid.* at 88-89. Goode and Ben-Yehuda describe “social problem” in this way:  
...[A] social problem exists when: (1) a group of people recognize or regard something as wrong; (2) they are concerned about it; and (3) they urge or take steps to correct it. Thus a social problem exist not only when substantial numbers of individuals in a society consider something wrong; it must also be seen as a remediable condition – something should be done to correct it. If the members of a society believe that nothing can be done about a condition – say, it is regarded as their fate, an act of God, or the whim of nature – constructionists do not see it as a social problem.  
But note: a condition may be objectively serious in that it kills or harms many members of a given society. To the constructionist, that still does not make it a social problem; *what makes a condition (concrete or “putative”) a social problem is the degree of felt concern about that condition, whether it is objectively serious or not. ...* [Emphasis added].

<sup>49</sup> *Ibid.* at 88.

<sup>50</sup> *The Social Reality of Crime*, *supra* note 4 at 325-26.

### 3.2.3.4 Social Construction of Organized Crime Through Media

Media constructs and influences reality. Media is not a reflection of reality, but rather “...a prism, subtly bending and distorting the view of the world it projects.”<sup>51</sup> People see not only what they want to see, but what the media wants them to see or puts in front of them.

Social constructionism posits that the conveyance of information about crime in society constructs or affects the construction of “crime” and “criminals.” It may reinforce existing conceptions,<sup>52</sup> but it also may alter or form conceptions. For instance, effects of the media affect an individual’s estimate about the frequency and amount of crime in an area – that is to say, public opinion reflects the amount of crime news rather than the actual crime rate.<sup>53</sup> As a conveyor or diffuser of information, and although the effects of mass communication may be socially mediated,<sup>54</sup> the media indeed contributes to the creation and amplification of outlaw identities, and it might be also be used to de-construct outlaw identities.

What is put in front of consumers of media depends on the “newsworthiness” or public appeal of a media story, according to the judgments of journalists and editors.<sup>55</sup> It depends on news values.<sup>56</sup> For instance, the news value or *threshold* requires events to meet a certain level of perceived importance or drama.<sup>57</sup> *Unpredictability* ascribes novelty to a story, but *predictability* also has value in that it allows media organizations to

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<sup>51</sup> Yvonne Jewkes, *Media and Crime* (London: Sage, 2004) [*Media and Crime*] at 37.

<sup>52</sup> *The Social Reality of Crime*, *supra* note 4 at 284-85. Quinney cites a study in F.J. Davis, “Crime News in Colorado Newspapers” (1952) 57 *American Journal of Sociology* 325.

<sup>53</sup> *Ibid.* at 281-82. Quinney cites a study in F.J. Davis, “Crime News in Colorado Newspapers” (1952) 57 *American Journal of Sociology* 325.

<sup>54</sup> *Ibid.* at 284. Quinney cites the research of Elihu Katz, “The Two-Step Flow of Communication: An Up-to-Date Report of an Hypothesis” (1957) 21 *Public Opinion Quarterly* 61; John W. Riley, Jr. & Mathilda White Riley, “Mass Communications and the Social System” in Robert K. Merton, Leonard Broom & Leonard S. Cottrell, Jr., eds., *Sociology Today* (New York: Basic Books, 1959); and Everett M. Rogers, *Diffusion of Innovations* (New York: The Free Press of Glencoe, 1962). Socially mediated means that the effects of media communications about crime, that is to say the development of criminal conceptions, are mediated by one’s interpersonal networks and contact since media communications influence individuals differently based on their past experiences and their present associations.

<sup>55</sup> *Media and Crime*, *supra* note 51 at 37.

<sup>56</sup> *Ibid.*

<sup>57</sup> *Ibid.* at 41.

prepare coverage.<sup>58</sup> Events must be *simplified* in order to restrict the range of meanings within a story, and make them understood quickly. *Individualization* personalizes stories in order to provide them with a human element with which media consumers can relate and empathize.<sup>59</sup> However, the effect of *individualization* may manifest in a “we” and “they” mentality where consumers relate to a victim of crime and see the alleged offender as dangerous or psychopathic.<sup>60</sup> *Risk* to the public safety imparts urgency and drama, and attracts more media attention than crime avoidance, crime prevention, or personal safety.<sup>61</sup> *Sex* significantly increases the newsworthiness of a story, and over-reporting has occurred as a result of this news value.<sup>62</sup> The presence of *celebrity* also increases the likelihood of a story becoming news.<sup>63</sup> Geographical *proximity* makes a story near to the audience, while cultural *proximity* makes a story relevant to a particular audience.<sup>64</sup> The presence of *violence* and the drama it imports into a story most affects a story’s potential for coverage.<sup>65</sup> *Spectacle and graphic imagery* increases the dramatic visual appeal of a story.<sup>66</sup> The involvement of *children*, particularly in relation to violence and crime, incorporates a moral element and elevates the value of a story.<sup>67</sup> *Conservative ideology and political diversion* increases the newsworthiness of a story due to the “symbiotic relationship” between media and politicians where in the media supports politics which usually emphasize law and order<sup>68</sup> and the legitimacy of the state, and in so doing, divert attention away from problematic social issues, such as poverty and education.<sup>69</sup> The importance of any of these news values varies with the media organization,<sup>70</sup> and the construction of any story depends on the application of the news values of the

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<sup>58</sup> *Ibid.* at 42.

<sup>59</sup> *Ibid.* at 45.

<sup>60</sup> *Ibid.* at 46.

<sup>61</sup> *Ibid.* at 47.

<sup>62</sup> *Ibid.* at 48. Jewkes cites data from J. Ditton & J. Duffy “Bias in the Newspaper Reporting of Crime News” (1983) 23 *British Journal of Criminology* 23, and states that a United Kingdom study in Strathclyde in March 1981 showed that while only 2.4 per cent of crimes involved sex and violence, crimes of sex and violence accounted from 45.8 per cent of newspaper articles.

<sup>63</sup> *Ibid.* at 49.

<sup>64</sup> *Ibid.* at 51.

<sup>65</sup> *Ibid.* at 53.

<sup>66</sup> *Ibid.* at 55.

<sup>67</sup> *Ibid.* at 56-57.

<sup>68</sup> *Ibid.* at 58.

<sup>69</sup> *Ibid.* at 60.

<sup>70</sup> *Ibid.* at 39.

organization distributing it. One cannot paint all media organizations with the same brush.

Organized crime stories satisfy many of these news values. The *violence and spectacle and graphic scenery* associated with organized crime acts meets the *threshold* of importance and drama. The *unpredictability* of these acts, and the *risk* that they will happen again, jeopardize the personal safety of the public. Inherent in the *individualization* of these stories is a “we” and “they” mentality wherein law-abiding citizens are scared and outraged by organized crime outlawry, and law enforcement is summoned to protect the public and enforce a “law and order” *conservative ideology*.<sup>71</sup> All the while, this perceived need to react to organized crime outlawry diverts attention from the causes and roots of organized crime problem.

Indeed, for decades, the media has diffused the conception of organized crime to the masses:

...Significantly, the Canadian media has always played a key role in the propagation of information (sensationalized or not) about gangs in the country. As Young (1993) found, gangs have been depicted in Canadian newspapers as a subject of growing social concern and the product of an ailing society during every wave of urban street gang activity since 1945 (Gordon, 2000: 41).<sup>72</sup>

However, the media often only captures the impressions of individuals within “legitimate” social institutions such as those of police,<sup>73</sup> rather than also capturing the

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<sup>71</sup> However, sometimes the media may have a social agenda that does not accord with the current political laws and policies of the day, and may not distribute liberal propaganda, such as occurred during Prohibition. Daniel Okrent, *Last Call: The Rise and Fall of Prohibition* (New York: Scribner, 2010) at 276, describes this disconnect:

Although the papers made celebrities out of the gangsters, they did not fail to suggest the causal relationship of the Prohibition laws and the bloodshed, not least because wet papers realized that linking the Volstead Act to murderous violence could help the wet cause.

<sup>72</sup> *An Investigation into the Formation and Recruitment of Aboriginal Gangs in Western Canada*, supra note 19 at 22. The authors refer to Robert M. Gordon, “Criminal Business Organization, Street Gangs and “Wanna-Be” Groups: A Vancouver Perspective” (2000) 42 *Canadian Journal of Criminology* 39 [Criminal Business Organization, Street Gangs and “Wanna-Be” Groups: A Vancouver Perspective”] at 41; and Gordon refers to Michael G. Young, *The History of Vancouver Youth Gangs, 1900-1985* (M.A. (Criminology) Thesis, Simon Fraser University, 1993) [unpublished].

<sup>73</sup> Gregg Barak, “Newsmaking Criminology: Reflections on the Media, Intellectuals, and Crime” in Gregg Barak, ed., *Media, Process, and the Social Construction of Crime: Studies in Newsmaking Criminology* (New York: Garland, 1994) 237 [“Newsmaking Criminology: Reflections on the Media, Intellectuals, and Crime”] at 247-48; and Renee G. Kasinsky, “Patrolling the Facts: Media, Cops, and Crime” in Gregg

opinions of individuals or groups who do not subscribe or belong to those institutions, and perhaps who seek to undermine them, such as the organized crime outlaws themselves. The media cannot capture all and every event surrounding an issue, and thus, cannot portray social problems without bias and subjectivity. It cannot show the “social reality of crime”, but rather, only the “newsmaking reality of crime.”<sup>74</sup> As a result, and in order to satisfy news values, media organizations often make “folk devils”<sup>75</sup> out of gangs and criminal organizations. For instance, the *Sydney Gazette* coined the term “bushranger” through its definition of this typically Australian outlaw;<sup>76</sup> *The Sopranos* portrayed the North American Mafia via its main character, Italian-American mobster Tony Soprano;<sup>77</sup> and the *Life* magazine depiction of the Hollister, California incident solidified the social problem of bikers.<sup>78</sup> as referred to in subsection one “The Origins of Outlaw Motorcycle Gangs in Canada” in section four “Outlaw Motorcycle Gangs” of Chapter Two.

Ordinary individuals and legitimate consumers are attracted to the mystique of organized crime,<sup>79</sup> and may be affected by media attention surrounding organized crime groups. Although almost impossible to quantify,<sup>80</sup> increased media attention focusing on a particular violent crime group in society plays some role in the increase of the anxiety and fear of individuals who are *not* part of that group.<sup>81</sup> Indeed, Grekul and LaBoucane assert in their study that media representations and sensationalization of gang criminal activity

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Barak, ed., *Media, Process, and the Social Construction of Crime: Studies in Newsmaking Criminology* (New York: Garland, 1994) 203 at 207. Kasinsky states:

The police are the primary definers of crime and its control to the public: they delineate the phenomena they subsequently control. They develop the system of classification concerning what constitutes crime, crime rates, and case clearance. They account for their work in these terms, both within the law-enforcement system and to the public. The police expend a considerable proportion of their resources on knowledge control, to achieve accountability in the legal system and the public culture. ...”

<sup>74</sup> “Media, Society and Criminology”, *supra* note 73 at 6.

<sup>75</sup> The term “folk devil” originates from Stanley Cohen, *Folk Devils and Moral Panics: The Creation of the Mods and Rockers* (London: MacGibbon and Kee, 1972).

<sup>76</sup> Bruce Tranter & Jed Donoghue, “Bushrangers: Ned Kelly and Australian Identity” (2008) 44 J. of Sociology 373 at 374.

<sup>77</sup> *The Sopranos*, 1999-2007, (Home Box Office Canada).

<sup>78</sup> Brock Yates, *Outlaw Machine* (Boston: Little, Brown and Company, 1999) [*Outlaw Machine*] at 11. Yates refers to an issue of *Life* magazine from July 21, 1947 at page 31.

<sup>79</sup> Howard Abadinsky, *Organized Crime*, 8<sup>th</sup> ed. (Belmont: Thomson Wadsworth, 2007) at 109.

<sup>80</sup> *Media and Crime*, *supra* note 51 at 144.

<sup>81</sup> *Ibid.* at 143 and 165.

has fascinated Canadians, and terrified them.<sup>82</sup> Increased media attention may also increase social control<sup>83</sup> by solidifying social cohesion among law-abiding non-deviant societal members – that is to say, by encouraging these individuals to avoid the deviant “others”, and to obey the law. In addition, it may negatively affect social interactions between members of that group and non-members of that group, such as members of conventional society, and thus, it can result in stigmatization and alienation of the targeted group from conventional society.<sup>84</sup> In this way, the media has the power to develop “otherness”,<sup>85</sup> and augment or sensationalize criminal deviancy, such as organized crime. Its construction of “otherness” can define and amplify who is deemed deviant and criminal in society. Moral consensus or even a moral majority may not exist in relation to whom societal members should feel threatened and what they should condemn.<sup>86</sup> However, media organizations will imply such consensus.<sup>87</sup>

The power of media in amplifying criminal deviance may also increase cohesion among the “others” or the deviants, and thus, intensify identities, such as organized crime outlaw identities. Outlaws in the form of organized crime members, thus, may thrive on the media portrayals as they advertise and increase their reputation for violence and intimidation, and their power within the criminal milieu and mainstream society. Thus, the media effectively acts as social constructor and labeler, and it enhances and perpetuates group identities. For instance, after the Hollister weekend in 1947 as described in subsection one “The Origins of Outlaw Motorcycle Gangs in Canada” of section four “Outlaw Motorcycle Gangs” of Chapter Two, the American Motorcyclist Association declared that one percent of motorcycle riders were the outlaw clubs giving bike riding a bad name. As a result, Sonny Barger and other Hells Angels proudly

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<sup>82</sup> *An Investigation into the Formation and Recruitment of Aboriginal Gangs in Western Canada*, *supra* note 19 at 9.

<sup>83</sup> *Media and Crime*, *supra* note 51 at 143.

<sup>84</sup> *Ibid.* at 69.

<sup>85</sup> Stuart Taylor, “Outside the Outsiders: Media Representations of Drug Use” (2008) 55 *Probation Journal* 369 at 374.

<sup>86</sup> *Media and Crime*, *supra* note 51 at 70-71.

<sup>87</sup> *Ibid.*

adopted the name “One-Percenter”, and tattooed their skin and wore patches with this label.<sup>88</sup>

To the contrary, his study of gangs in the Greater Vancouver Area in 1995, Robert Gordon concluded that members of criminal and street gangs were not affected by media representations of gangs in the news or entertainment.<sup>89</sup> However, Gordon relied on self-reporting rather than objective empirical testing, and whether his subjects had the necessary introspection and insight to make such judgments remains questionable. If non-outlaw conventional members of society are influenced by media, what would render gang members immune from such influence?

The media may have the power not only to contribute to the construction of criminal deviance in society, but also to contribute to the de-construction of deviant labels and identities. Limitations on media portrayals of organized crime outlaws will not sensationalize or glorify their power. Media may also be used to launch anti-gang advertising campaigns in order to discourage gang membership.<sup>90</sup> In addition, media portrayals generally, not just portrayals relating to outlawry and crime, affect criminal offenders, and may create new non-criminal identities for these offenders if the offender has a willingness to change.<sup>91</sup> Further, the media may sensationalize the powers and

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<sup>88</sup> Ralph “Sonny” Barger, Keith Zimmerman & Kent Zimmerman, *Hell’s Angel: The Life and Times of Sonny Barger and the Hell’s Angels Motorcycle Club* (New York: HarperCollins, 2001) [*Hell’s Angel: The Life and Times of Sonny Barger and the Hell’s Angels Motorcycle Club*] at 40-41. This enhancement of identity is examined in detail in sub-subsection one “Application of Concepts within Deviance and Labelling Theory to the Identity of Outlaws” of subsection three “Deviance and Labelling as Exemplified by Organized Crime Outlaws” in section five “Deviance and Labelling Theory” of Chapter Three.

<sup>89</sup> “Criminal Business Organization, Street Gangs and “Wanna-Be” Groups: A Vancouver Perspective”, *supra* note 72 at 54.

<sup>90</sup> Kristin M. Peterson, *Exploring Anti-Gang Advertising: Focus Group Discussions with Gang Members and At-Risk Youth* (M.A. Thesis, Greenspun School of Communication, University of Nevada, 1994) [unpublished] [*Exploring Anti-Gang Advertising: Focus Group Discussions with Gang Members and At-Risk Youth*] at 2. Peterson sought the opinions and responses of gangs and at-risk youth regarding aspects of anti-gang advertising, and showed them several anti-gang television advertisements. Her three focus group members were age 12 to 17; they were in gangs or were highly predisposed to gang activity; they had committed felony offenses which meant they were at risk of being removed from their homes and placed in correctional institutions; and they were enrolled in non-punitive rehabilitative programs. *Ibid.* at 25.

<sup>91</sup> Yvonne Jewkes, “The Use of Media in Constructing Identities in the Masculine Environment of Men’s Prisons” (2002) 17 *European Journal of Communication* 205 at 214-15. Jewkes provides an example of Tim, a “Christian heavy metal biker” whose enjoyment of an interior design show caused him to internalize meaning and values outside his pre-existing identity. Essentially, he developed an aspirational identity of an interior designer that was very different from his own original identity.

victories of law enforcement in order to de-sensationalize organized crime outlawry. For instance, in an effort to halt the heroization of gangsters such as Al Capone in the 1930s, the governmental administration under American President Theodore Roosevelt engaged in a war on crime, and specifically organized crime.<sup>92</sup> This war was fought not only on the streets and in Congress with the passage of bills enhancing the powers and jurisdiction of law enforcement, but also in the media in an effort to end public tolerance and romanticization of gangster crime.<sup>93</sup> The Federal Bureau of Investigation engaged in a public relations campaign to sensationalize their own efforts in order to counter and diffuse the publicity and power of gangsters.<sup>94</sup> In these ways, the media may prove useful in dismantling criminal identities and outlaw identities.

### 3.2.3 Social Construction of Legal Definitions of Organized Crime Outlaws

Whatever term is used, the fact remains that organized crime outlaws and organized crime outlaw groups exist in Canada. They have been referred to by descriptive names that capture aspects of their groups. Even those names have been the subject of discussion. For instance, the debate about the presence of Mafia or Mafiosi groups in Canada and the United States that occurred in the 1960s and 1970s really focused on the proper social construction of the reality rather than acknowledging that this reality existed:

By using the term “mob”, it is possible to avoid the pitfalls of the academic debate on the existence of the Mafia and the sensitivities of some politicians and certain members of the Italian community about the use of the word “Mafia”. Still it is important to realize that once all is said and done, there is a tightly knit group of Italian criminals operating in North America, and this group holds considerable sway in the underworld of criminal life.<sup>95</sup>

The denial of Mafiosi groups in North America, as described in the overview of section three “North American Mafia or La Cosa Nostra” in Chapter Two, may have arisen in part from the lack of understanding and lack of agreement about the nature, ways and

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<sup>92</sup> Claire Valier, *Theories of Crime and Punishment* (Harlow: Pearson Education, 2002) at 68. Valier cites P. Besnard, *L'anomie: ses usages et ses fonctions dans la discipline sociologique depuis Durkheim* (Paris: Presses Universitaires de France, 1987) at 65.

<sup>93</sup> *Ibid.*

<sup>94</sup> *Ibid.*

<sup>95</sup> James Dubro, *Mob Rule: Inside the Canadian Mafia* (Toronto: Macmillan of Canada, 1985) at 10.

means of the Italian Mafia. The power of the Mafia is not built from conventional societal laws or democratic principles, but rather, from illegitimate “respect” generated from fear and violence.<sup>96</sup>

Conventional definitions and ideas do not fit well for entities within the criminal milieu. This difficulty in determining by consensus a definition for “Mafia” or any organized crime group, accords with the social construction of reality as per Berger and Luckmann and the social reality of crime as per Quinney. Due to their different experiences, interactions, perceptions, and biases, some entities in society may not be easily named before they are deposited in the “social stock of knowledge” that is language.

The differences between conventional societal values and norms as compared to criminal values and norms, and the differences among criminal organizations themselves mean that organized crime outlaws may not fit neatly into one legislated definition. Indeed, much political and scholarly debate has focused on defining organized crime, and consensus within Canada and at an international level remains as far away as the Earth from the sun. Should lawmakers construct a definition of organized crime to fit a vast array of organized crime outlaw groups? One definition to capture all organized crime outlaw groups may not accurately reflect social reality. For instance, although anti-Prohibitionists, Mafiosi groups, outlaw motorcycle gangs, and Aboriginal street gangs have a couple similar attributes related to the way in which they rely on their identity and use their reputation for violence, their enterprises and acts do not have enough common attributes to fit within a legal definition. The construction of a statutory definition may be an attempt to force these groups to fit a particular mould, but an ill-fit just creates legal problems. The alternative is to not socially construct one definition, but rather, to simply outlaw the offensive groups – that is to say, to proscribe the existence of certain outlaw groups and membership in those outlaw groups. Proscription, as opposed to definition, will be discussed in subsection eight “Proscription as a Solution to Definitional, Investigative, Evidentiary, and Prosecutorial Problems within Criminal Organization Legislation” in section two of Chapter Four.

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<sup>96</sup> *Ibid.* at 15.

### 3.2.4 Social Construction of Organized Crime Outlaw Identities

#### 3.2.4.1 Social Construction of Organized Crime Outlaw Identities via Declarations of Social Problems

The concept of “gangs” and the gang image illustrate this power of language in social construction. The term “gang” is fraught with preconceptions and typifications,<sup>97</sup> and herein lies its power. This power has positive and negative results for communities. Communities with gangs most often deny that gangs exist, and thus, allow an environment that lacks authoritarian control over gangs, and thus, that is suitable for gangs to continue and increase their activities.<sup>98</sup> However, after some event or events trigger moral panic, communities acknowledge their problem, and form policies or initiatives to deal with gangs.<sup>99</sup> Some communities may over-emphasize a “gang” problem in order to receive some benefit. Various groups employ or insert the “gang metaphor” into discourse in order to bolster or legitimize their social problem, and thus, influence the allocation of resources.<sup>100</sup> Other communities mistakenly believe that they have a gang problem, and react accordingly. For instance, in Bloomington, Indiana, the spread of stereotypes and drug-related gang infiltration by police located outside Bloomington, contributed to increased law enforcement by local police.<sup>101</sup> However, social furor – public support for the alleged social problem – resulted not from the threat of gang violence, but from the aggressiveness of police action.<sup>102</sup>

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<sup>97</sup> *The Social Construction of Reality*, *supra* note 1 at 32. Berger and Luckmann state: “The social reality of everyday life is thus apprehended in a continuum of typifications, which are progressively anonymous as they are removed from the ‘here and now’ of the face-to-face situation.”

<sup>98</sup> Kimberly Tobin, *Gangs: An Individual and Group Perspective* (Upper Saddle River: Pearson Prentice Hall, 2008) at 149. Tobin cites John M. Hagedorn, *People and Folks: Gangs, Crime and the Underclass in a Rustbelt City* (Chicago: Lakeview, 1988); and C. Ronald Huff, “Denial, Overreaction, and Misidentification: A Postscript on Public Policy” in C. Ronald Huff, ed., *Gangs in America*, 1<sup>st</sup> ed. (Newbury Park: Sage, 1990).

<sup>99</sup> *Ibid.*

<sup>100</sup> Ronald Burns, Carol Y. Thompson, & Robert L. Young, “Representing Gangs in the News: Media Constructions of Criminal Gangs” (2000) 20 *Sociological Spectrum* 409 at 428-29.

<sup>101</sup> Diane Schaefer, “Police Gang Intelligence Infiltrates a Small City” (2002) 39 *Social Science Journal* 95 at 99-101.

<sup>102</sup> *Ibid.* at 102-03.

Kristin M. Peterson describes the development of gangs as a social problem, and then corresponding real and imaginary barriers that result from the ways in which the gang social problem develops:

...Gangs often initiate barriers to distinguish themselves from other groups of “outsiders” and protect territory by using distinct names, colors, clothing, symbols, graffiti, speech, and by using violence (Hutchinson 137; Monti 13). Yet, some barriers are the result of the denial by officials to acknowledge a gang problem exists in order to protect a city’s image and economic development or avoid dealing with sensitive issues of race and class (Huff 310; Miller 277). If the gang problem worsens, this denial is inevitably followed with an overreaction by law enforcement and media whose “sporadic panics” then define gang activity as a criminal problem (Hagehorn 23; Huff 312; Moore, “Gangs” 32). This overreaction causes the general public to create erroneous perceptions of gangs and harbor fear towards gang members in general (Hagehorn 160, 166). While such fear may be justifiable at times, the public’s failure to understand the complexity of the gang problem exaggerates an “us against the world” mentality within gangs which reinforces group solidarity and causes gang members to construct artificial barriers against teachers and schools or other people and places that they had once turned to for support (Monti).<sup>103</sup>

The creation and perpetuation of these barriers results from tainted or affected social interactions, and the entrenchment of criminal conceptions through experience or media communication.

For instance, the origins of outlaw motorcycle gangs exemplify this phenomenon. The *Life* magazine photo of a biker waving a beer bottle while dozens of empties lay at his feet<sup>104</sup> portrayed the bikers at Hollister, California on the weekend of July 4, 1947 as unruly, uncontrollable, and fearsome. This image would taint motorcyclists generally, and produce public outrage<sup>105</sup> and moral panic that stemmed from the perception that bikers were a social problem. Perhaps, one per cent of these motorcyclists indeed were a problem because the Hells Angels and other biker groups adopted this “One-Percenter” label.<sup>106</sup> If they were not already a problem, they became one due to fact that Canadian

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<sup>103</sup> *Exploring Anti-Gang Advertising: Focus Group Discussions with Gang Members and At-Risk Youth*, *supra* note 90 at 21.

<sup>104</sup> *Outlaw Machine*, *supra* note 78 at 11. Yates refers to an issue of *Life* magazine from July 21, 1947 at page 31.

<sup>105</sup> *Ibid.* at 19.

<sup>106</sup> *Hell’s Angel: The Life and Times of Sonny Barger and the Hell’s Angels Motorcycle Club*, *supra* note 88 at 40-41.

and American governments did not respond quickly enough to the development of organized outlaw motorcycle gangs, such as the Hells Angels. As a result, these outlaws cemented their existence in North America.

The declaration of organized crime outlaws as a social problem, entrenches them within the criminal subculture, and reinforces their identity with their group:

Progression into organized crime increasingly isolates the offender from conventional society. Though there are variations according to the person's location within the hierarchy, most organized offenders are committed to the world of crime. Most of their activities are in continuous violation of the law. But by a process of justification, based in part on a contempt for the rest of society, they are able to maintain an appropriate self-image. Underworld leaders may, however, choose to live segmented lives, retiring to the seclusion of pseudo-respectability. Their commitment, nevertheless, remains with the world of crime, where they receive their prestige, power, and are provided with a luxurious way of life.<sup>107</sup>

That organized crime members and associates are isolated from conventional society, means that anti-organized crime measures must reduce isolation and seek to break the associations and identifications of these individuals with the organized crime societal segment, and integrate or reintegrate them into law-abiding conventional communities.

#### 3.2.4.2 Social Construction of Organized Crime Outlaw Identities Via Language

The social construction of organized crime outlaws has also stemmed from the power of language both inside and outside the group. In relation to juvenile gangs, much prior to the development of social constructionism, Frederic M. Thrasher found that the social construction of knowledge occurs within gangs as they interpret events and develop their own social stock of knowledge to draw upon, and to pass along to new members.

Thrasher noted that language affected group patterns of behaviour and morality:

In developing their own organization, gang boys cannot go beyond their experiences, and hence their codes and chosen activities must be studied with reference to the moral codes and activities they meet in the communities where

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<sup>107</sup> *The Social Reality of Crime*, *supra* note 4 at 268.

they live. Gang morality develops from the interpretation or definition which the gang, in the light of its previous experience, puts upon events.<sup>108</sup>

Gangs acquire their own languages based on words whose meanings depend on experiences specific to the group,<sup>109</sup> and may use words and names in order to confuse the listener, such as the police.<sup>110</sup>

Further, Thrasher asserted that language that is used *inside the gang* develops the unity or solidarity of a gang, as do the symbols and name of the group:

The unity of the group is further aided by the individual slogans, words, traditions, and so on, which are developed by the gang and which symbolized in common terms its objectives. The gang's planning must be carried on in terms of the common meanings which these symbols make possible. The name of the gang is of particular significance as a means of social control. It affords a common stimulus or value to which all members of the gang may respond with common sentiments. It is the rallying and unifying stimulus in a conflict situation. Since each member of the group is more or less identified with the group name, it becomes a matter of common pride to defend and exalt it.<sup>111</sup>

This phenomenon also appears to have application and relevance to adult organized crime. While it remains unproven by Thrasher's research, experts in criminal organization cases in Canada have testified as to the significance of gang names and symbols in the maintenance and perpetuation of the identity and reputation of an organized crime outlaw group.

Language which is used *outside an outlaw group and imposed on it*, produces and perpetuates stereotypes, and these stereotypes affect the construction of such outlaws or gangs in two ways: either by not distinguishing between the different types and attributes of organized crime outlaws, or by distinguishing on racial and ethnic grounds.<sup>112</sup>

Stereotyping generally results in conflagration of gangs, and in racial discrimination against certain groups:

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<sup>108</sup> Frederic M. Thrasher, *The Gang: A Study of 1,313 Gangs in Chicago* (Chicago: University of Chicago Press, 1927) at 32.

<sup>109</sup> *Ibid.* at 266-67.

<sup>110</sup> *Ibid.* at 268.

<sup>111</sup> *Ibid.* at 281.

<sup>112</sup> *An Investigation into the Formation and Recruitment of Aboriginal Gangs in Western Canada*, *supra* note 19 at 25-26.

...Part of the “construction” of gangs in the media and by politicians is to resort to stereotyping by ethnic group. We read and hear of the “Asian” gang problem, the problem of Jamaican Blacks in the east, and “Aboriginal gangs”. We don’t often hear of “Caucasian” or “White” gangs. Racial and ethnic stereotyping leads to processes such as racial profiling and creates increased misunderstanding, labelling, mistrust and hostility between groups.

However, by lumping all these groups together and referring to them as various components or pieces of ‘one big gang problem’ (i.e. whether Asian or Aboriginal, society is faced with “ethnic” hoodlums wreaking havoc on mainstream society), we conflate the uniqueness of each group we are dealing with. It is entirely possible that the various “ethnic” gangs referred to, and the “white” gangs we never hear of, are at base caused by different processes. *While more research is needed to ascertain whether this particular speculation has any validity, if we for a moment consider this to be a possibility, then lumping all these groups together, and attempting to deal with them all in the same way, might prove futile.*

For instance, Aboriginal gangs appear to have different causes and characteristics than other gangs. Their recruitment processes are considerably more violent than other gangs. Whereas other groups tend to “court” potential members by buying them gifts and showing them how wonderful and lucrative gang life can be, Aboriginal gangs subject new recruits to a “jumping in” process where the recruit is beaten by many gang members for a set period of time. Aboriginal gangs are more apt to follow the “standard” for gangs in the United States, where tattoos, hand symbols, and strict chains of command define gang membership and function. In this sense Aboriginal gangs are an anomaly on the Canadian gang landscape. When we refer to Aboriginal gangs in the media as “just another example” of young people today being attracted to a criminal lifestyle, and when the media and others construct all “ethnic” gangs in this manner, we lose sight of what are likely very significant differences. This is not to deny that there are many similarities among and between gangs, but it is the existence of these differences that are obscured in the public discussions of the problem.<sup>113</sup> [Emphasis added].

Arguably, the above comments apply to any organized crime outlaw as most, from a social constructionist critique, develop from the historicity of language and its stereotyping. The use of stereotyping to construct what is a gang or a what is a criminal organization and thus who is a gang or who is organized crime member, leads to further stereotyping, and creates or maintains a sense of “otherness.”<sup>114</sup>

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<sup>113</sup> *Ibid.*

<sup>114</sup> *Ibid.* at 26.

Further, distorted social construction via stereotyping diverts, hides or removes from consideration, the causes or origins of separate and distinct gangs or criminal organizations. It will fail to consider the distinct and individual circumstances of gang members, and the different degrees of entrenchment within the criminal milieu and internalization of the gang identity.<sup>115</sup> In these ways, it prevents the tailoring of anti-gang or anti-organized crime initiatives to the specific societal factors that give rise to the problem, and the varying degrees of effect on outlaws. This social constructionist analysis of gangs and organized crime, demonstrates the need for a state response that does not simply employ the criminal law to cast a single net to snare and control all gang or organized crime outlaws. The social problem of gangs or organized crime requires more than one state response, since the law or laws themselves may not sufficiently address the various roots of the problem.

### 3.2.4.3 Social Construction of Organized Crime Outlaw Identities Via Media

Insights from social constructionism illuminate the power and the problems with the dissemination of information by the media. As exemplified by the Prohibitionist movement, the use of advertising to sell social causes potentially serves as “a vehicle for social change.”<sup>116</sup> In the early 1900s, proponents of the abolition, temperance, and women’s rights movements attempted to use education to inform the public about these issues, and to generate reform.<sup>117</sup> After little success in spite of extensive propaganda campaigns,<sup>118</sup> Prohibitionists politicized the issue by seeking to mobilize the legislatures to enact laws to address the problem,<sup>119</sup> and by sensationalizing it as a war effort.<sup>120</sup> After

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<sup>115</sup> Michael C. Chettleburgh, *Young Thugs: Inside the Dangerous World of Canadian Street Gangs* (Toronto: HarperCollins, 2007) at 20-21. In his discussion about defining street gang members, Chettleburgh asserts that not all street gang members are the same, and within the gang there are different roles as well.

<sup>116</sup> *Exploring Anti-Gang Advertising: Focus Group Discussions with Gang Members and At-Risk Youth*, *supra* note 90 at 10-12. Peterson notes the use of Smokey the Bear in order to prevent forest fires.

<sup>117</sup> *Ibid.* at 13.

<sup>118</sup> Craig Heron, *Booze: A Distilled History* (Toronto: Between the Lines, 2003) at 149. In the late 1800s, the temperance movement distributed news-sheets, pamphlets, poster, songbooks, poetry, playlets and recitations with their message.

<sup>119</sup> *Ibid.* at 131 and 150-51.

<sup>120</sup> C.W. Hunt, *Booze, Boats and Billions: Smuggling Liquid Gold!* (Toronto: McClelland and Stewart, 1988) at 36.

the imposition of Prohibition, the media continued to contribute to the movement by sensationalizing anti-Prohibitionist bootlegger activities<sup>121</sup> – particularly the violent acts of organized crime anti-Prohibitionists as well as their corruption of law enforcement and public officials.<sup>122</sup>

The basic premise of advertising to sell social causes is that educating people may influence the decisions that they make.<sup>123</sup> It uses persuasion to change their attitudes and actions.<sup>124</sup> It can socially control individuals. Acceptance of a communication as a viable method of reform or action, makes that communication no longer a control strategy.<sup>125</sup> It makes it a reality.

Portrayal of an event in the media can be the equivalent of advertising. Thus, media portrayals of organized crime outlaws can persuade the public – both organized crime outlaws and non-outlaws alike – to think a certain way about a social issue, and can increase pressure on governments to react to it. One of the problems with these types of media portrayals is the effect on justice – particularly in relation to individuals accused of criminal organization offences. The effects of the media on the *R. v. Pangman*<sup>126</sup> trial involving some members of the Manitoba Warriors, reflects the significant and potentially dangerous effects of the media:

27 The media hype and complexity escalated to such an extent that the Manitoba government constructed a custom-built high security courthouse in an old mustard-seed cleaning plant. The normal courts were said to be not large enough nor sufficiently secure. One judge was designated to hear all applications for bail. He dismissed them all. Review applications also failed. The new reverse onus bail provision for organised crime may have contributed to this extraordinary detention. The Remand Centre conditions were severe with contact visits tightly limited.

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<sup>121</sup> *Ibid.* at 61.

<sup>122</sup> Philip P. Mason, *Rumrunning and the Roaring Twenties: Prohibition on the Michigan-Ontario Waterway* (Detroit: Wayne State University Press, 1995) at 146. Mason asserts that in 1929 and 1930, Detroit residents were provided a “steady diet of gang violence, murder, and other liquor-related crimes.”

<sup>123</sup> *Exploring Anti-Gang Advertising: Focus Group Discussions with Gang Members and At-Risk Youth*, *supra* note 90 at 14.

<sup>124</sup> *Ibid.* at 17.

<sup>125</sup> *Ibid.* at 16.

<sup>126</sup> *R. v. Pangman*, 2000 MBQB 85, [2000] J.J. No. 300 (Q.L.) (Man. Q.B.).

28 The security-driven design of the special courthouse has to be seen to be believed. The design is suitable for a trial of urban terrorists rather than a young street gang. Nine inch metal walls separate lawyer's interview rooms from the space occupied by the accused clients. In the courtroom, 35 boxes for accused are in three rows separated from each other by thick glass and inaccessible to defence lawyers. The accused were chained to the floor. The public were confined to 37 seats in an upstairs room behind glass in a gallery specifically located such that there was no direct view of the witnesses or the jury.

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31 Only the most avid and self-congratulatory prosecutor could pronounce this trial as a success and a vindication of the anti-gang measures. In terms of organised crime this street gang was, as even the crown counsel put it, "in the junior leagues." Having endured this extraordinary use of state power, the Manitoba Warriors has been given notoriety which may lead to a more cohesive group in the future. As suggested by defence counsel Richard Peck, "[t]his has given them identity, empowerment and a sense of belonging denied to them by society at large." Current membership according to police figures is 1560 in 1999 as compared to 1575 in 1997.<sup>127</sup>

The portrayal or advertisement of the power and reputation for violence of organized crime outlaws, such as the accused in *R. v. Pangman*, widened the schism between conventional society members and the accused, and in so doing, it increased the cohesion of the outlaw group itself. In these ways, left unconstrained, the media increases the organized crime problem in society.

### 3.2.5 Insights for Anti-Organized Crime Measures According to Social Constructionism

The application of social constructionism to organized crime outlaws prescribes a number of requisites for criminal organization measures. The law must calm moral panic and re-establish or maintain social order with substantive rather than hollow criminal measures that legitimize the state. That is to say, they must calm moral panic because they actually address the social problem of organized crime, and not because they *appear* to remedy the social problem. They must be useful to law enforcement and prosecutions. They must not be overly complex in relation to evidentiary and procedural issues. The difficulty in socially constructing one definition for all organized crime outlaw groups,

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<sup>127</sup> Don Stuart, "Time to Recodify Criminal Law And Rise Above Law and Order Expediency: Lessons from the Manitoba Warriors Prosecution" (2000) 28 Man. L.J. 89 at paras. 27, 28 and 31.

and the difficulty in constructing a definition that is provable in court, suggests that proscription of the existence of certain outlaw groups and membership in those outlaw groups may best reflect reality. Proscription may accurately reflect what governments are attempting to do by passing legislation that targets organized crime.

In order to prevent stigmatization, ostracization, and sensationalizing organized crime outlaws, criminal organization laws should fairly restrain media, in accordance with principles of freedom of expression, in their public dissemination of information that incites moral panic, that glorifies gang lifestyles and increase the power of their reputations, and that bolsters gang identities. Criminal organization measures may also seek to use media to launch anti-gang advertising campaigns in order to discourage gang membership; to create new non-criminal identities for these offenders if the offender has a willingness to change; and to sensationalize the powers and victories of law enforcement in order to de-sensationalize organized crime outlawry.

These insights will be examined in Chapter Four, section two “Requisite One for Anti-Organized Crime Measures”, and section three “Requisite Two for Anti-Organized Crime Measures.”

### **3.3 SOCIAL CONTROL AND BOND THEORY**

#### **3.3.1 Overview**

Social control and bond theory in this section provide some explanations for the reasons that individuals *obey* the rules of society rather than deviate from them. This approach is unique and paradoxical to some other theories which will be discussed in this Chapter, such as differential association and deviance and labelling theory which seek to explain why individuals commit crime. In showing what would make individuals *not* commit crime, and *not* engage in outlawry, social control and bond theory illuminates reasons why some outlaws have *not* obeyed the rules of society and what could change in order to make them or make them want to obey the rules of society. This perspective facilitates a postulation of ways in which criminal organization laws in Canada may prevent individuals from becoming organized crime outlaws; impose social order and control on organized crime outlaws; or maintain a sense of social order and control with the presence of a certain level of organized crime outlawry in society.

This section of Chapter Three will review the essential tenets of social control and bond theory, and specifically, some concepts that relate to the maintenance of social order or equilibrium. It will demonstrate how lack of sufficient social control or lack of bonding can give rise to acts that contribute to social disorder and outlaw identities. It will explain how the concept of social order is a tenuous notion and perhaps an ideal goal, and suggest the role of the law in maintaining social control and bonding, and thus, in pursuing social order.

As examination of social control and bond theory in this section will reveal the following:

- Insight 3. Anti-organized crime measures should foster bonds among societal members.
- a. These measures should foster bonds through attachment to conventional others; commitment to obeying societal rules; involvement in conventional activities; and belief in a common and conventional value system.
  - b. These measures should ensure the re-integration and rehabilitation of organized crime offenders.

Insight 4. Anti-organized crime measures should be effective, principled, just and fair in order to secure belief and commitment to formal societal values.

- a. These measures should secure obedience by punishing non-law-abiding societal members, and deterring those who may potentially violate the law.

### 3.3.2 Social Control Theory

Social control is a function that perpetuates the life of society by maintaining equilibrium.<sup>1</sup> Essentially, social controls seek to maintain this equilibrium by shaping individuals to conform. Societal evolution occurs, but progress or change imposes itself on social control mechanisms. This definitional perspective focuses the attention of social control theorists on conformity rather than crime.

Social control theory reverses the usual question of why individuals commit crime, and asks the Hobbesian question, “Why do men obey the rules of society?”<sup>2</sup> Social control theory asserts that the “legal, social or moral codes” that “express the social will” of a community, regulate conduct.<sup>3</sup> These codes or social control mechanisms exist within sympathy, sociability, a sense of justice, and resentment, and they form “a natural, spontaneous social order” in which individuals compete, but also have common goals.<sup>4</sup> Common goals make societal individual conform, and thus, follow the normative behaviour of others – that is to say, they obey.

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<sup>1</sup> A number of definitions of “social control” exist. Edward Alsworth Ross in “Social Control. III. Belief” (1896) 2 *The American Journal of Sociology* 96 at 106, asserted that beliefs, rather than laws of social control, guide the actions or behavior of individuals. Social control theory developed from a series of articles by Edward Alsworth Ross. Other theorists have subsequently contributed or developed the idea in their own way. According to Peter L. Berger, *Invitation to Sociology: A Humanistic Perspective* (Garden City: Doubleday & Company, Inc., 1963) [*Invitation to Sociology: A Humanistic Perspective*] at 68, social control refers to “...the various means used by a society to bring its recalcitrant members back into line.” According to Arthur Lewis Wood, *Deviant Behavior and Control Strategies* (Toronto: Lexington Books, 1974) at 53, social control is “...the use of power with the intention of influencing the behavior of others.” [Emphasis original]. According to Charles R. McCann, Jr., “Edward Alsworth Ross: The Need for Social Control” (Paper presented to the 36<sup>th</sup> Annual Meeting of the History of Economics Society, University of Colorado, Denver, 26-29 June 2009) [unpublished] [“Edward Alsworth Ross: The Need for Social Control”] at 4, as interpreting Edward Alsworth Ross, “Social Control” (1896) 1 *The American Journal of Sociology* 513 [“Social Control”] at 520, social control “...aims at *establishing* social amity in an association of individuals with conflicting interests by regulating conduct, setting boundaries as to acceptable behavior and establishing means for the resolution of conflicts....”

<sup>2</sup> Travis Hirschi, *Causes of Delinquency* (Berkeley: University of California Press, 1969) [*Causes of Delinquency*] at 4-5 and 10. Hirschi asserts that both bond theorists and social control theorists seek to answer this question, and attributes the question to Thomas Hobbes, *Leviathan* (Oxford: Basil Blackwell, 1957) at 195.

<sup>3</sup> “Social Control”, *supra* note 1 at 529.

<sup>4</sup> “Edward Alsworth Ross: The Need for Social Control”, *supra* note 1 at 13, as interpreting Edward Alsworth Ross, *Social Control: A Survey of the Foundations of Order* (New York: Macmillan, 1901) at 41.

For control theorists, obedience occurs as the result of two types of restraints or controls. *Internal restraints* ensure compliance to rules as one's self, through moral beliefs or conscience, enforces compliance.<sup>5</sup> *External restraints* involve others enforcing compliance to the rules.<sup>6</sup> Control may be imposed directly or indirectly. *Direct control* involves feeling of guilt or shame imposed by one's self, or formal sanctions imposed by strict supervision or monitoring by others.<sup>7</sup> *Indirect control* is a by-product of socialization or social relationships that secure compliance to rules because non-compliance could jeopardize commitments to and relationships with others, such as family members.<sup>8</sup>

In some ways, social control and social constructionism complement one another. Social constructionists Peter L. Berger and Thomas Luckmann also asserted that social control forms as a result of human conduct, rather than from an imposition of rules on humans. Their description of institutionalization and social control within their theory of social constructionism accords with social control theory. They asserted that institutions, such as the law, exist as a result of individuals following a pattern of conduct, and as a result, they control behaviour.<sup>9</sup> Social control occurs as a result of institutionalization which

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<sup>5</sup> Ray Paternoster & Ronet Bachman, "Control Theories" in Eugene McLaughlin & Tim Newburn, *The SAGE Handbook of Criminological Theory* (London: SAGE Publications, 2010) ["Control Theories"] at 114 and 123. At *ibid.* 123, Paternoster and Bachman refer to H.G. Grasmick & R.J. Bursik, Jr., "Conscience, Significant Others, and Rational Choice: Extending the Deterrence Model" 24 *Law and Society Review* 837 in their description of internal control, as well as F.I. Nye, *Family Relationships and Deviant Behavior* (New York: Wiley, 1958) in their description of indirect and direct controls.

<sup>6</sup> "Control Theories", *supra* note 5 at 114.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.* at 114-15.

<sup>9</sup> Peter L. Berger & Thomas Luckmann, *The Social Construction of Reality*, 1<sup>st</sup> ed. (Garden City: Doubleday, 1966) at 52. Berger and Luckmann state:

Institutions further imply historicity and control. Reciprocal typifications of actions are built up in the course of a shared history. They cannot be created instantaneously. Institutions always have a history, of which they are the products. It is impossible to understand an institution adequately without an understanding of the historical process in which it was produced. *Institutions also, by the very fact of their existence, control human conduct by setting up predefined patterns of conduct, which channel it in one direction as against the many other directions that would theoretically be possible. It is important to stress that this controlling character is inherent in institutionalization as such, prior to or apart from any mechanisms of sanctions specifically set up to support an institution.* These mechanisms (the sum of which constitute what is generally called a system of social control) do, of course, exist in many institutions and in all the agglomerations of institutions that we call societies. Their controlling

develops from the established or habitualized actions of societal members.<sup>10</sup> Only if institutionalization has not completely developed or been constructed are additional social control mechanisms or modifications required.<sup>11</sup> Thus, the law does not produce social control, but rather, social control through patterns of conduct produces rules that societal members follow.

### 3.3.3 Bond Theory

Bond theory, as a subset within social control theory, considers the same question to the extent that it considers the bond of an individual to society in explaining the reasons that individuals obey the rules of society.<sup>12</sup> According to this control or bond theory, an individual commits delinquent or criminal acts when his ties or bond to the conventional order or society have somehow been weakened or broken.<sup>13</sup> The nature of this bond reveals what anti-organized crime measures should ensure does not deteriorate or break, and what needs reparation if it is weakened or broken.

Travis Hirschi, who developed bond theory,<sup>14</sup> initially asserted that desistance in crime occurs at times and at different rates for different offenders, but that crime declines with age.<sup>15</sup> However, social control theorists now recognize that formerly law-abiding

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efficacy, however, is of a secondary or supplementary kind. As we shall see again later, the primary social control is given in the existence of an institution as such. To say that a segment of human activity has been institutionalized is already to say that this segment of human activity has been subsumed under social control. Additional control mechanisms are required only insofar as the processes of institutionalization are less than completely successful. *Thus, for instance, the law may provide that anyone who breaks the incest taboo will have his head chopped off. This provision may be necessary because there have been cases when individuals offended against the taboo. It is unlikely that this sanction will have to be invoked continuously (unless the institution delineated by the incest taboo is itself in the course of disintegration, a special case we need not elaborate here). It makes little sense, therefore, to say that human sexuality is socially controlled by beheading certain individuals. Rather, human sexuality is socially controlled by its institutionalization in the course of the particular history in question. ...*[Emphasis added].

<sup>10</sup> *Ibid.* at 51-52.

<sup>11</sup> *Ibid.* at 52.

<sup>12</sup> *Causes of Delinquency*, *supra* note 2 at 16.

<sup>13</sup> *Ibid.* at 3 and 16.

<sup>14</sup> After developing bond theory, Hirschi developed a general theory of crime in M.R. Gottfredson & T. Hirschi, *A General Theory of Crime* (Stanford: Stanford University Press, 1990). However, there remains common ground (for instance, regarding attachment) between the two regarding the importance of social relationships and particularly the importance of those relationships early in life, according to Ray Paternoster and Ronet Bachman in "Control Theories", *supra* note 5 at 114-15.

<sup>15</sup> "Control Theories", *supra* note 5 at 126 and 128.

individuals can become offenders in their adult years.<sup>16</sup> According to Hirschi, bonds require *attachment* to others, such as parents, peers and school; *commitment* to obeying societal rules; *involvement* in conventional activities; and *belief* in a common and conventional value system.<sup>17</sup>

*Attachment* of an individual to others leads to the internalization of norms, conscience, or superego.<sup>18</sup> A lack of attachment to others "...is to be free from moral restraints...";<sup>19</sup> to be insensitive to the opinion of others; to be free from normative boundaries; and thus, to be free to deviate.<sup>20</sup> For instance, if the bond of an individual to parents who are members of conventional society weakens, then he is more likely to engage in deviant or criminal behaviour.<sup>21</sup> If the bond of an individual to conventional parents is strengthened, then he is less likely to engage in deviant or criminal behaviour.<sup>22</sup> Hirschi found the opposite phenomenon for individuals in relation to their peers in delinquent gangs.<sup>23</sup>

*Commitment* refers to a rational part of conformity which leads individuals to obey societal rules due to the presence of negative consequences.<sup>24</sup> The more time, energy and part of himself that an individual invests into conventional activities, the higher the costs of deviant behaviour – that is to say, the more he risks losing of his investment.<sup>25</sup> Commitment encompasses not only accumulation of investments, but also the

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<sup>16</sup> *Ibid.* at 132.

<sup>17</sup> *Causes of Delinquency, supra* note 2 at 16-23.

<sup>18</sup> *Ibid.* at 18.

<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.* at 88.

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.* at 161. Hirschi concludes from his studies:

If members of delinquent gangs tend to have in common a low stake in conformity, if their relations with each other tend to be cold and brittle, still the data presented here leave much room for the operation of group processes in the production of delinquent acts. The boy with delinquent friends is unusually likely to have committed delinquent acts, especially when his ties to conventional society are weak to begin with. In fact, the present findings, as well as those of past research on this topic, may be summarized as follows: (1) The child with little stake in conformity is susceptible to prodelinquent influences in his environment; the child with a large stake in conformity is relatively immune to these influences. (2) The greater the exposure to "criminal influences," the greater the difference in delinquent activity between high- and low-stake boys. ...

<sup>24</sup> *Ibid.* at 20.

<sup>25</sup> *Ibid.*

development of “ambition” and “aspiration” in regard to conventional actions so that an individual conforms based on what he hopes to obtain.<sup>26</sup> Attachments, or the lack of attachments, also can affect the degree of commitment to conventional rules.<sup>27</sup>

*Involvement* in conventional activities prevents an individual from thinking about and spending time in deviant activities.<sup>28</sup> Involvement, it seems, can strengthen commitment. This relationship would exist with respect to involvement in conventional activities or involvement in deviant or criminal activities.

*Belief* in a common value system within society exists among its members.<sup>29</sup> However, variations exist in the extent to which societal members believe in the rules.<sup>30</sup> An individual who commits a deviant act believes less that he should obey the rules.<sup>31</sup> The more respect that an individual feels towards others to whom he has attachments, the more likely he will accept and obey their rules.<sup>32</sup> The more weakened his beliefs in the moral validity of societal norms, the more likely he will commit deviant acts.<sup>33</sup> An individual who commits a deviant act does not construct or adopt new beliefs that free him to do so, and he does not construct a system of rationalizations to justify the deviant act.<sup>34</sup>

These tenets of bond theory seemingly differ from other concepts within deviance and labelling theory and social psychology, particularly to the extent that bond theory does not assert that an individual who engages in deviant or criminal acts internalizes new beliefs within a new common value system of a new group. However, arguably, the degradation or the acceptance of a deviant label and subsequent internalization of that label, may not completely sever the individual’s belief in the common value system of the society within which he received his label. Rather, the individual may simply have a

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<sup>26</sup> *Ibid.* at 21.

<sup>27</sup> *Ibid.* at 27.

<sup>28</sup> *Ibid.* at 22.

<sup>29</sup> *Ibid.* at 23.

<sup>30</sup> *Ibid.* at 26.

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.* at 30.

<sup>33</sup> *Ibid.* at 26.

<sup>34</sup> *Ibid.* at 25.

weakened belief in that value system. These distinctive ways of explaining how individuals obey and disobey societal rules do not amount to irreconcilable differences in the context of determining the reasons that individuals become organized crime outlaws in order to evaluate anti-organized crime measures. *Some* organized crime outlaws may indeed have only weakened bonds with society to the extent that their beliefs do not restrain them from committing criminal acts, but that they still believe in the common societal value system. *Other* outlaws may have regular or non-weakened bonds with society, and then incidences such as labelling or degradation occur so as to weaken or sever those bonds. The importance of considering all these perspectives, whether congruent or incongruent, lies in the need to explain *various* ways that *various* outlaws may come to be and come to behave.

### 3.3.4 Application of Concepts within Social Control and Bond Theory to the Identity of Outlaws

The consideration of why individuals obey the rules of society and do not engage in organized criminal outlawry requires consideration of the nature of formal mechanisms such as criminal law and punitive sanctions, informal mechanisms of social control within conventional society, as well as formal and informal mechanisms of social control within outlaw groups themselves.

The ultimate and, no doubt, the oldest means of social control is physical violence. In the savage society of children it is still the major one. But even in the politely operated societies of modern democracies the ultimate argument is violence. No state can exist without a police force or its equivalent in armed might.<sup>35</sup>

In contemporary society, formal social control methods still include coercion through the presence or the threat of official violence, and the actual use of violence against individuals who engage in non-conformist behaviour. However, modern-day acceptable methods of punitive measures and sanctions mandates consideration of social control methods that not only have within their arsenal ways to inflict pain and negatively affect liberty, but ways to facilitate, and not hinder, efforts to re-integrate and rehabilitate non-conformists such as organized crime outlaws.

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<sup>35</sup> *Invitation to Sociology: A Humanistic Perspective*, supra note 1 at 69.

Social control theory considers the reasons that formal and informal societal mechanisms keep individuals conforming or propel them to choose socially conforming behaviour, as opposed to non-conforming, deviant, or criminal behaviour. However, notably, outlaws may develop their own societal mechanisms of social control, and maintain their own sense of order in the criminal underworld by regulating breaches of their criminal or outlaw behaviour. Anti-Prohibitionist bootlegger Rocco Perri described the phenomenon of social control from within the criminal milieu:

...If a man “squealed” on him [Rocco Perri], he said, “I would not kill him, I would punish him. *That is the law of the Italians*. We do not go to the police and complain. That is useless. We take the law into our own hands. ... We believe we have the right to inflict our own penalties.<sup>36</sup> [Emphasis added].

The establishment of a national Commission for La Cosa Nostra in the United States in the early 1930s exemplifies a very powerful internal method of social control for this organized crime outlaw group. Families dealt with internal revolt on their own,<sup>37</sup> and the Commission maintains order through mediation among Families.<sup>38</sup> Its members consist of only the bosses of the most powerful groups in New York, Chicago, Buffalo and Philadelphia.<sup>39</sup>

When conflict threatened the common weal, the Commission would intervene if asked to, but only when the parties in dispute agreed to accept its authority and recommendations.<sup>40</sup>

New York also has its own Commission.<sup>41</sup> Its role includes promoting and facilitating joint ventures between Families, regulating criminal activities, resolving actual and potential disputes between Families, approving the initiation of new members into the Families, and authorizing the execution of Family members<sup>42</sup>

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<sup>36</sup> Craig Heron, *Booze: A Distilled History* (Toronto: Between the Lines, 2003) at 262.

<sup>37</sup> David Critchley, *The Origin of Organized Crime in America: The New York City Mafia, 1891-1931* (New York: Routledge, 2009) [*The Origin of Organized Crime in America: The New York City Mafia, 1891-1931*] at 232. Critchley cites evidence provided by Joseph Bonanno at the Kefauver Inquiry.

<sup>38</sup> *Ibid.* Critchley cites evidence provided by Joseph Bonanno at the Kefauver Inquiry.

<sup>39</sup> Howard Abadinsky, *Organized Crime*, 8<sup>th</sup> ed. (Belmont: Thomson Wadsworth, 2007) [*Organized Crime*] at 112.

<sup>40</sup> *The Origin of Organized Crime in America: The New York City Mafia, 1891-1931*, *supra* note 37 at 232.

<sup>41</sup> *Organized Crime*, *supra* note 39 at 112.

<sup>42</sup> *Ibid.* at 111-12. Related citations that describe various aspects of the case, but not the evidence of the role of the Commission, are *United States v. Salerno*, 85 C.r. 139 (S.D. N.Y. 1986) and 481 U.S. 739 (1987). The power of execution was referred to in sub-subsection two “The Reputation for Violence and

History has indicated that a *lack* of social control mechanisms may augment social disorder, non-conformity, and anarchy, and thus, may encourage not only criminality but also outlawry. The development of anti-Prohibitionist outlaws exemplifies circumstances where a lack of social control mechanisms and a lack of enforcement of social control mechanisms contributed to breeding outlawry as opposed to traditional rule-abiding behaviour. And, this consistent lack of social control resulted in outlawry resisting and hindering later efforts at imposing conventional social norms and laws.

A lack of institutional structure may play a role in bonding difficulties as well. Irving A. Spergel, in his analysis of juvenile gang organization and function, asserted that gangs form or develop from a lack of community provisions:

Gangs are created when established institutional and organizational arrangements in a community are weak or break down. Gangs are collectives, quasi-institutions, and are somewhat tribal or clanlike, with long-term viability, to the extent that normal communal and economic arrangements for the social and job development of youths are unsatisfactory or unavailable. Gang organization, it can be argued, substitutes in distinctive ways for a particular pattern of inadequacy of existing community institutions and organizational interrelationships.<sup>43</sup>

The lack of attachment to community and its social and economic provisions leaves youth, and perhaps some adults, with limited connection to conventional identities and inadequate social controls. The juvenile gang, particularly with its rules and codes of conduct, provides structure and control, a sense of solidarity within a group, and a corresponding identity.<sup>44</sup> Spergel does not apply his findings to adult outlaw groups, but does suggest that some gangs or subgroups of gangs probably integrate into adult criminal organizations.<sup>45</sup> A significant number of gang youths become adult criminals, but the number that become adult organized crime members depends on the definition of

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Intimidation: Part of the Identity of Mafiosi and La Cosa Nostra Outlaws” in subsection three “The North American Mafia or La Cosa Nostra” in section three “North American Mafia or La Cosa Nostra” in Chapter Two.

<sup>43</sup> Irving A. Spergel, *The Youth Gang Problem: A Community Approach* (New York: Oxford University Press, 1995) at 70.

<sup>44</sup> *Ibid.* at 81.

<sup>45</sup> *Ibid.*

organized crime.<sup>46</sup> However, his findings, coupled with some of the reasons for the formation of Aboriginal street gangs, suggests that lack of community social control mechanisms and pro-social provisions for adult outlaws may contribute to organized crime membership and outlawry.

Prior to Spergel, Frederic M. Thrasher also had found that the unity or solidarity of a juvenile gang also develops from internal social controls. These social controls reinforce group norms and values by entrenching them in codes of conduct<sup>47</sup> that proscribe punitive sanctions<sup>48</sup> as well as ridicule and derision<sup>49</sup> for violations. However, as an “intimate primary group”, the gang controls behaviour not only through negative methods, but positive methods of social control based on rapport, shared intimate experiences, collective representations evidenced in language and symbols or identifying characteristics, and a common social heritage.<sup>50</sup> Collectivity and commonality extinguish individuality.<sup>51</sup> Although not within the ambit of Thrasher’s study, this phenomenon also is evident in adult organized crime groups. Aboriginal street gang membership demonstrates non-conforming, deviant, and criminal behaviour. Bond theory illuminates some societal factors that have broken the ties between Aboriginal gang members and conventional society, and which, consequently, have resulted in this non-conforming, deviant, and criminal deviancy. The consideration of societal factors that have broken these bonds reveals what anti-gang or anti-organized crime should target. It also structures a critique of formal and informal social control mechanisms in society that seek to propel individuals to choose conformity or to impose conformity on them.

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<sup>46</sup> *Ibid.* at 129.

<sup>47</sup> Frederic M. Thrasher, *The Gang: A Study of 1,313 Gangs in Chicago* (Chicago: University of Chicago Press, 1927) at 284. For instance, *ibid.* at 287, the 15-member Kluck Klan gang of Chicago had approximately 15 to 20 written rules, such as:

...(1) We are not allowed to fight among ourselves or razz each other. (2) When you go out, do as you are told. (3) If you get caught, don’t squeal on the other guys. (4) Be loyal to the officers. (5) Always defend ladies and girls in trouble. (6) If you get anything, always bring it in and see if it can be useful. (7) Do not lie to each other.

<sup>48</sup> *Ibid.* at 292. Punishment ranges from hazing, ducking in cold water, a beating, or being marked for death.

<sup>49</sup> *Ibid.* at 293-94.

<sup>50</sup> *Ibid.* at 297.

<sup>51</sup> *Ibid.* at 298.

Bond theory leads to the hypothesis that the bonds between Aboriginal gang members and conventional society may have been weakened or severed. A lack of family bonding as a result of family breakdown or the placement of children into state care has occurred more frequently for Aboriginal offenders as children than non-Aboriginal offenders.<sup>52</sup> A lack of educational bonding is indicated by high secondary and post-secondary drop out rates for Aboriginal students in spite of an overall increase in attendance in the last three decades.<sup>53</sup> A lack of employment bonding in the form of higher unemployment rates and a great number of subordinate positions in the workplace, has occurred more frequently for Aboriginal individuals.<sup>54</sup> Further, the perception by many Aboriginal persons of the criminal justice system as unjust and oppressive means that Aboriginal people do not respect the criminal law, and do not wish to obtain positions within the system.<sup>55</sup> And, a lack of positive social bonding with peers has occurred for Aboriginal persons.<sup>56</sup> These weak or severed bonds can lead to low self-esteem, and a desire to belong, feel loved, and be supported.<sup>57</sup> Thus, gangs that offer may offer these bonds can appear attractive. In

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<sup>52</sup> Jana Marie Grekul & Patti LaBoucane-Benson, *An Investigation into the Formation and Recruitment of Aboriginal Gangs in Western Canada* (Ottawa: Aboriginal Corrections Policy Unit, Public Safety Canada, 2006) [*An Investigation into the Formation and Recruitment of Aboriginal Gangs in Western Canada*] at 31-32; and Lawrence Deane, Denis C. Bracken & Larry Morrissette, "Desistance Within an Urban Aboriginal Gang" (2007) 54 *Probation Journal* 125 ["Desistance Within an Urban Aboriginal Gang"] at 127. Grekul and LaBoucane-Benson cite empirical evidence from Shelley Trevehan, John-Patrick Moore, Sarah Auger, Michael MacDonald & Jennifer Sinclair, "Childhood Experiences Affect Aboriginal Offenders" (2002) 14 *Forum*, that 63% of Aboriginal offenders were involved in the child welfare system as opposed to 36% of non-Aboriginal offenders; that 36% of Aboriginal offenders had an unstable childhood as compared to 26% of non-Aboriginal offenders; and that 50% of Aboriginal offenders reported instability during adolescence as opposed to 32% of non-Aboriginal offenders. Deane, Bracken and Morrissette cite data from the Manitoba Department of Aboriginal and Northern Affairs from 2004 that 46 % of Aboriginal children in metropolitan areas live with one parent as opposed to 17% of non-Aboriginal children.

<sup>53</sup> *An Investigation into the Formation and Recruitment of Aboriginal Gangs in Western Canada*, *supra* note 52 at 32-33.

<sup>54</sup> *Ibid.* at 333-34; and "Desistance Within an Urban Aboriginal Gang", *supra* note 52 at 127. Grekul and LaBoucane-Benson cite empirical evidence from Linda L. Lindsey, Stephen Beach & Bruce Ravelli, *Core Concepts in Sociology* (Toronto: Pearson-Prentice Hall, 2006) at 199, that the unemployment rate for Aboriginal people is two to three times higher than that of the overall population; and that Aboriginal people have earned less income in comparison to other working Canadians. Deane, Bracken and Morrissette cite data from the City of Winnipeg in 2004 that unemployment rates in the neighbourhoods with gangs that they studied, were three to four times higher than other neighbourhoods in the city, and that family incomes were one third to one half the city average.

<sup>55</sup> Patricia A. Monture-Angus, "Thinking About Change" in Wanda D. McCaslin, *Justice as Healing: Indigenous Ways* (St. Paul: Living Justice Press, 2005) at 275.

<sup>56</sup> *An Investigation into the Formation and Recruitment of Aboriginal Gangs in Western Canada*, *supra* note 52 at 35-38.

<sup>57</sup> *Ibid.* at 39.

correctional institutions, where recruitment for Aboriginal street gangs often occurs, the lack of family bonding and isolation exacerbate the negative effects felt by Aboriginal offenders, and increases the attractiveness of the companionship, belonging, support and protection offered by the gang.<sup>58</sup> The gang becomes a surrogate family.

### 3.3.5 Insights for Anti-Organized Crime Measures According to Social Control and Bond Theory

Social order is an artificial, human design.<sup>59</sup> Order, balance, equilibrium is an ideal that humans may strive for. However, it is not a reality. That social control needs to be continually exercised<sup>60</sup> indicates that disorder to one degree or another, or a consistent pending challenge to order, is a more accurate description of the social balance within society. A state of *mal-order* – an order or level of societal functioning without moral panic and the recognition of perceived threats within society – more accurately describes the state of society at any given time. This societal mal-order occurs with a certain level of social control measures. The level of measures, so long as they preserve social order without great risk to the lives and well-being of non-outlaw citizens, ought to be the goal of social control mechanisms for organized crime.

The above analysis of social control and bond theory indicates that one of the reasons that individuals obey the law is that they respect its principles and internalize the values it represents. However, the mere presence of the institution of the law as a social control mechanism may not be sufficient to combat crime or outlawry. Formal social controls may not control crime and outlawry when groups within society perceive formal legal institutions as unjust. Disobedience and consequent social disorder may result when the law is not perceived as just and fair. This disobedience and consequent social disorder may continue even after law enforcement takes efforts to reduce or decimate certain organized crime outlaw groups. Outlawry can obstruct the law in re-establishing conventional social norms and laws. For instance, when law enforcement has decimated

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<sup>58</sup> *An Investigation into the Formation and Recruitment of Aboriginal Gangs in Western Canada*, *supra* note 52 at 30.

<sup>59</sup> “Edward Alsworth Ross: The Need for Social Control”, *supra* note 1 at 4, as interpreting Edward Alsworth Ross, *Social Control: A Survey of the Foundations of Order* (New York: Macmillan, 1901).

<sup>60</sup> “Social Control”, *supra* note 1 at 521.

outlaw groups such as criminal organizations, new groups rise to fill or seize the vacated territory.<sup>61</sup> With this phenomenon in mind, some social benefit exists by the presence of a known organized crime group as it controls activities within the criminal milieu, and thus, provides a sense of predictability for law enforcement. The presence of known organized crime groups and regulation of their outlawry maintains a sense of mal-order.

The potential contributions of social control and bond theory to an evaluation of criminal organization laws in Canada are that social conditions must foster bonds among societal members through attachment to conventional others, commitment to obeying societal rules, involvement in conventional activities, and belief in a common and conventional value system. Anti-organized crime measures must incorporate these goals. Further, with respect to individuals who have already become organized crime outlaws, anti-organized crime measures must ensure the re-integration and rehabilitation of organized crime offenders. Anti-organized crime measures must also be effective, principled, just and fair in order to secure belief and commitment to formal societal values. They must secure obedience by punishing non-law-abiding societal members, and deterring those who may potentially violate the law. A complete eradication of organized crime outlaws may not be attainable. Rather, maintenance of an acceptable degree of social order (or mal-order) may be a more appropriate goal.

These insights will be examined in Chapter Four, section two “Requisite One for Anti-Organized Crime Measures”, section four “Requisite Three for Anti-Organized Crime Measures”, and section five “Requisite Four for Anti-Organized Crime Measures.”

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<sup>61</sup> Antonio Nicaso & Lee Lamothe, *Angels, Mobsters & Narco-Terrorists: The Rising Menace of Global Crime Empires* (Mississauga: John Wiley & Sons Canada, 2005) at 57; and Stephen Schneider, *Iced: The Story of Organized Crime in Canada* (Mississauga: John Wiley & Sons Canada, 2009) at 479 and 501. Nicaso and Lamothe state that as a result of American law enforcement efforts in the 1980s and 1990s that targeted organized crime using the *Racketeer-Influenced and Corrupt Organizations Act*, non-La Cosa Nostra organized crime groups, such as Albanian groups, emerged in the some industries in their place. Schneider provides an example of the dismantling of Columbian cartels, and subsequent occupation by other groups of that territory.

### 3.4 DIFFERENTIAL ASSOCIATION AND SOCIAL LEARNING WITHIN GROUPS AND SUBCULTURES

#### 3.4.1 Overview

Differential association has been applied to explain the development of delinquency in youth, not adults. In the 1920s, Frederic M. Thrasher found that the juvenile gang plays an important role in developing criminality and contributing to organized crime,<sup>1</sup> and he noted that many members of adult criminal gangs were ex-reform-school boys and ex-convicts.<sup>2</sup> In his research on juvenile gangs in the mid-1990s, Irving A. Spergel indeed found that known association with gang members, the presence of neighbourhood gangs, and having a relative in a gang, increased the risk that children or youth will enter into a gang.<sup>3</sup>

Arguably, differential association could have direct application to all persons – and specifically persons in organized crime groups – regardless of age due to the principles in socialization, and the fact that individuals have continued social relations and interactions that influence their behaviour throughout their lives. And, because differential association or social learning occurs through social interaction generally, differential association arguably, could continue to occur during one’s lifetime. For instance, although some organized crime outlaws may begin differentially associating and socially learning within their family, such as members of the Mafia and La Cosa Nostra, the paths of other outlaws lead them to outlaw groups later in life, such as in adolescence or adulthood as evinced by outlaw motorcycle gangs and some Aboriginal street gangs. Being “on the program” in the Hells Angels is a method not only of initiating associates into becoming members, but it is also a way of socializing them to the values and norms

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<sup>1</sup> Frederic M. Thrasher, *The Gang: A Study of 1,313 Gangs in Chicago* (Chicago: University of Chicago Press, 1927) at 423. Thrasher opines:

The gang, then, while it is not the only element in organized crime, plays an important part in the mobilization of the criminal and the organization of the criminal community. Its influence in training criminals and facilitating crime has been partly described in the preceding chapter. It is probable that most of Chicago’s supposed 10,000 professional criminals have received gang training, and it is evident that crime in Chicago roots in the gang as its basic organized unit, no matter how it may have become elaborated into rings and syndicates.

<sup>2</sup> *Ibid.* at 419.

<sup>3</sup> Irving A. Spergel, *The Youth Gang Problem: A Community Approach* (New York: Oxford University Press, 1995) at 90.

of the group. While differential association theorists and empirical studies have focused on youth, this focus does not render the theory inapplicable to adults. This thesis suggests such an application by examining the concepts of differential association and subculture in relation to *adult* organized crime outlaws.

The principles of differential association or social learning in conjunction with the concept of subculture, contribute to an explanation for the processes by which individuals develop into groups or subcultures, and form and internalize identities. In so doing, they illuminate the development of various organized crime outlaws. Essentially, criminal behaviour is learned from interaction or association with individuals who commit crimes, and subcultures of criminals, such as organized crime outlaws, provide a fertile environment for learning anti-social behaviours. "...[A] person may be educated in either conventional or criminal means of achieving success."<sup>4</sup> Organized crime outlaw groups such as Mafiosi groups, La Cosa Nostra, outlaw motorcycle gangs, anti-Prohibitionists, and Aboriginal street gangs, exemplify the effects of differential association or social learning and subculture on identity formation. Once outlaw groups or subcultures are formed, all members learn the values and normative behaviour of that subculture or group, and reinforce them with each other. This phenomenon entrenches organized crime outlaw identities, and organized crime outlaw behaviour.

This section will outline the tenets of differential association and social learning theory as they explain criminal behaviour. It will discuss how learning and association in groups, cultures and subcultures shape identities and develop cohesion of their members, and specifically, how they shape outlaw identities and enhance cohesion of outlaw groups.

An examination of differential association and social learning in subcultures in this section will reveal the following:

Insight 5. Anti-organized crime measures should limit and prevent differential association and anti-social learning within the subcultures of outlaws by banning such associations to some degree and in some circumstances in order

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<sup>4</sup> Donald R. Cressey, *Delinquency, Crime and Differential Association* (The Hague: Martinus Nijhoff, 1964) [*Delinquency, Crime and Differential Association*] at 70-71.

to prevent the reinforcement of outlaw identities through ongoing anti-social interactions with one another.

Insight 6. These measures should prevent and limit the bolstering of organized crime identities through the use of gang names and insignia in public and in private.

Insight 7. Anti-organized crime measures should provide pro-social learning and pro-social learning environments for organized crime outlaws.

a. The measures should provide re-educative processes for members who leave or who are incapacitated from their organized crime group, and the presence of a non-outlaw environment in which ex-members can interact with law-abiding members of society.

### 3.4.2 Differential Association and Social Learning Within Groups and Subcultures

#### 3.4.2.1 Differential Association and Social Learning Generally

Edwin H. Sutherland provided a historical or genetic explanation of criminal behaviour,<sup>5</sup> and essentially asserted that criminal behaviour is not inherited.<sup>6</sup> It is learned from an excess of interaction or association with criminal patterns of behaviour or criminal conduct as opposed to interaction or association with anti-criminal patterns or anti-criminal conduct.<sup>7</sup> That is to say, differential association causes crime.<sup>8</sup>

Sutherland espoused nine tenets or principles to explain the cause of crime of which the first, fourth, sixth and seventh have particular relevance to learning normative behaviour of organized crime outlawry:

(1) *Criminal behavior is learned.* Negatively, this means that criminal behavior is not inherited, as such; also, the person who is not already trained in crime does not invent criminal behavior, just as a person does not make mechanical inventions unless he has had training in mechanics.

(2) *Criminal behavior is learned in interaction with other persons in a process of communication.* This communication is verbal in many respects but includes also “the communication of gestures.”

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<sup>5</sup> Edwin H. Sutherland, “A Statement of the Theory – 1947”, in Albert Cohen, Alfred Lindesmith & Karl Schuessler, eds., *The Sutherland Papers* (Bloomington: Indiana University Press, 1956) [“A Statement of the Theory – 1947”] at 7.

<sup>6</sup> *Ibid.* at 8.

<sup>7</sup> *Ibid.* at 9.

<sup>8</sup> *Ibid.* at 13.

(3) *The principal part of the learning of criminal behavior occurs within intimate personal groups.* Negatively, this means that the impersonal agencies of communication, such as picture shows and newspapers, play a relatively unimportant part in the genesis of criminal behavior.

(4) *When criminal behavior is learned, the learning includes (a) techniques of committing the crime, which are sometimes very complicated, sometimes very simple; (b) the specific direction of motives, drives, rationalizations, and attitudes.*

(5) *The specific direction of motives and drives is learned from definitions of legal codes as favorable and unfavourable.* In some societies an individual is surrounded by persons who invariably define the legal codes as rules to be observed, whereas in others he is surrounded by persons whose definitions are favorable to the violation of the legal codes. In our American society these definitions are almost always mixed, and consequently we have culture conflict in relation to the legal codes.

(6) *A person becomes delinquent because of an excess of definitions favorable to violation of law over definitions unfavorable to violation of law.* This is the principle of differential association. It refers to both criminal and anti-criminal associations and has to do with counteracting forces. When persons become criminals, they do so because of contacts with criminal patterns and also because of isolation from anti-criminal patterns. Any person inevitably assimilates the surrounding culture unless other patterns are in conflict; a Southerner does not pronounce "r" because other Southerners do not pronounce "r." Negatively, this proposition of differential association means that associations which are neutral so far as crime is concerned have little or no effect on the genesis of criminal behavior. Much of the experience of a person is neutral in this sense, e.g., learning to brush one's teeth. This behavior has no negative or positive effect on criminal behavior except as it may be related to associations which are concerned with the legal codes. This neutral behavior is important especially as an occupier of the time of a child so that he is not in contact with criminal behavior during the time he is engaged in neutral behavior.

(7) *Differential associations may vary in frequency, duration, priority, and intensity.* This means that associations with criminal behavior and also associations with anti-criminal behavior vary in those respects. "Frequency" and "duration" as modalities of associations are obvious and need no explanation. "Priority" is assumed to be important in the sense that lawful behavior developed in early childhood may persist throughout life, and also that delinquent behavior developed in early childhood may persist throughout life. This tendency, however, has not been adequately demonstrated, and priority seem to be important principally through its selective influence. "Intensity" is not precisely defined, but it has to do with such things as the prestige of the source of a criminal or anti-criminal pattern and with emotional reactions related to the associations. In a precise description of the criminal behavior of a person these modalities would be

stated in quantitative form and in a mathematical ratio be reached. A formula in this sense has not been developed, and the development of such a formula would be extremely difficult.

(8) *The process of learning criminal behavior by association with criminal and anti-criminal patterns involves all of the mechanisms that are involved in any other learning.* Negatively, this means that the learning of criminal behavior is not restricted to the process of imitation. A person who is seduced, for instance, learns criminal behavior by association, but this process would not ordinarily be described as imitation.

(9) *Though criminal behavior is an expression of general needs and values, it is not explained by those general needs and values since non-criminal behavior is an expression of the same needs and values.* Thieves generally steal in order to secure money, but likewise honest laborers work in order to secure money. The attempts by many scholars to explain criminal behavior by general drives and values, such as the happiness principle, striving for social status, the money motive, or frustration, have been and must continue to be futile since they explain lawful behavior as completely as they explain criminal behavior. They are similar to respiration, which is necessary for any behavior but which does not differentiate criminal from non-criminal behavior.<sup>9</sup>

Notably, Edwin H. Sutherland asserted in his third principle that “impersonal agencies of communication” such as media play an insignificant role in the “genesis of criminal behavior.” The time period of Edwin H. Sutherland’s assertions must be considered. In contemporary society, unlike the 1940s, media and the communication of information generally have assumed heightened importance – perhaps due to their ease of transmission and ingestion. The significant impact of media in contemporary society has been discussed in sub-subsection two “Social Construction of Organized Crime Through Media” in subsection two “Social Constructionism” in this section.

The fourth principle specifies some knowledge of crime. Simply knowing how to commit crime does not account for all or even most criminal behaviour.<sup>10</sup> One must have learned “motives, drives, rationalizations, and attitudes” that create a willingness to commit

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<sup>9</sup> *Ibid.* at 7.

<sup>10</sup> Ronald L. Akers, *Social Learning and Social Structure: A General Theory of Crime and Deviance* (Boston: Northeastern University Press, 1998) [*Social Learning and Social Structure: A General Theory of Crime and Deviance*] at 25.

criminal acts.<sup>11</sup> Organized crime outlaw groups provide both the means to learn the techniques of committing crime – namely, through socialization within or induction into the group – as well as a rationalization for or attitude toward committing crime. The techniques of committing crime may evolve over time as exemplified by the adaptation of smuggling techniques by anti-Prohibitionists who developed new ways of transporting liquor to avoid capture by law enforcement. The development of new techniques to commit crime by organized crime outlaws is taught or passed on to new members of organized crime outlaw groups. Some outlaw motorcycle gangs developed new techniques, ironically, as a result of criminal organization laws themselves. Disclosure laws mandate the disclosure of police techniques and information not otherwise revealed to such organizations, and as a result, outlaws learn to modify their techniques in order to evade law enforcement in the future. In relation to a criminal organization prosecution in British Columbia, Inspector Gary Shinkaruk stated:

“The Hells Angels continue to learn from every court proceeding and adapt their methods of operation to keep ahead of law enforcement,” inspector Shinkaruk told a House of Commons justice committee meeting in 2009. “Disclosure during court proceedings has given the Hells Angels a clear understanding of law-enforcement processes, techniques, policies, and regulations. They are keenly aware of our limitations,” he told lawmakers.<sup>12</sup>

The sixth principle remains the most relevant to organized crime outlaws. Through contacts with organized crime patterns and isolation from or less contact with non-organized crime patterns (that is to say, differential association), individuals assimilate patterns of the group and would become organized crime outlaws.

The seventh principle asserts that the more frequently, longer, more intensely and earlier an individual is exposed to learning criminal behaviours, the more likely that individual will engage in criminal behaviours. Thus, the more frequently, longer and more intensely and earlier an individual is exposed to learning organized crime behaviours, one expects that the more likely that individual will engage in organized crime behaviours. Notably, the requirement of “*earlier*” suggests that *early* exposure has *more* of an effect on the

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<sup>11</sup> *Ibid.* at 26.

<sup>12</sup> Neal Hall, *Hell To Pay: Hells Angels vs. The Million Dollar Rat* (Mississauga: John Wiley & Sons Canada, Ltd., 2011) at 192.

behaviour. Thus, one would expect that exposure *generally* and *later such as in adulthood* may still have an effect. This expectation requires empirical evaluation.

The theoretical principles espoused by Edwin H. Sutherland have received much and varied criticism.<sup>13</sup> Perhaps, the principles of differential association remain overly simplistic,<sup>14</sup> unquantifiable or improvable in some respects,<sup>15</sup> too broad,<sup>16</sup> lacking in “universal application”,<sup>17</sup> and inadequate in their consideration of extraneous factors.<sup>18</sup> However, the essence of the principles of differential association have relevance to the formation of organized crime outlaws and the development and perpetuation of their identities. The specific way or ways in which a new or potential organized crime member learns to be an organized crime outlaw from other such outlaws, and the precise number or ratio and type of significant associations with outlaws, matter not. Merely the fact that significant associations with organized crime outlaw groups contribute to organized crime outlaw membership and further organized crime outlaw identities, must be considered in developing and implementing anti-organized crime measures.

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<sup>13</sup> *Delinquency, Crime and Differential Association*, *supra* note 4 at 81-82. Cressey cites a number of sources, and succinctly outlines a few such criticisms:

...It has been stated or implied that the theory of differential association is defective because it omits consideration of free will, is based on a psychology assuming rational deliberation, ignores the role of the victim, does not explain the origin of crime, does not define terms such as “systematic” and “excess,” does not take “biological factors” into account, is of little or no value to “practical men,” is not comprehensive enough because it is not interdisciplinary, is not allied closely enough with more general sociological theory and research, and is too comprehensive because it applies to non-criminals, and assumes that all persons have equal access to criminal and anti-criminal behaviour patterns. ...

<sup>14</sup> *Ibid.* at 88-89. Cressey asserts that Sutherland does not provide sufficient explanation for the process by which criminal behaviour is learned.

<sup>15</sup> “A Statement of the Theory – 1947”, *supra* note 5 at 10. Sutherland himself notes that quantification of a ratio or development of a formula regarding the frequency, duration, priority and intensity of differential associations, remains “extremely difficult.”

<sup>16</sup> *Ibid.* at 19. Sutherland states that he sought a causal explanation of criminal behaviour by looking at conditions that were “universally associated” with crime, and “learning, interaction, and communication” generally accounted for processes to explain criminal behaviour.

<sup>17</sup> Not all differential association will lead to criminal behaviour, and any assertion of a correct ratio is nearly impossible to determine, and may likely be self-serving.

<sup>18</sup> “A Statement of the Theory – 1947”, *supra* note 5 at 31-32. Sutherland himself notes that differential association does not account for the presence of opportunities to commit crime. That is to say, a lack or limitation on opportunity may result in no or less criminal behaviour.

Ronald L. Akers integrated Sutherland's theory of differential association with social learning and social behavioural principles,<sup>19</sup> and re-formulated the nine principles of differential association into seven somewhat clearer statements.<sup>20</sup> However, the essence of his theory of social learning is summarized in one statement:

The probability that persons will engage in criminal and deviant behavior is increased and the probability of their conforming to the norm is decreased when they differentially associate with others who commit criminal behavior and espouse definitions favorable to it, are relatively more exposed in-person or symbolically to salient criminal/deviant models, define it as desirable or justified in a situation discriminative for the behavior, and have received in the past and anticipate in the current or future situation relatively greater reward than punishment for the behavior.<sup>21</sup>

Akers posited that learning produces both conforming and deviant behaviour, but that deviant behaviour is more likely in circumstances in which an individual differentially associates with others who commit crime or violate social norms; the individual receives differential reinforcement for his violative behaviour over conforming behaviour; the individual has exposure to and observes more deviant behaviour than conforming behaviour; and the individual has learned definitions that favour the commission of crime or deviance.<sup>22</sup>

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<sup>19</sup> *Social Learning and Social Structure: A General Theory of Crime and Deviance*, *supra* note 10 at xv and 46.

<sup>20</sup> *Ibid.* at 45, as citing Robert L. Burgess & Ronald L. Akers, "A Differential Association-Reinforcement Theory of Criminal Behaviour" (1966) 14 *Social Problems* 128. Akers sets forth his seven statements to modify Sutherland's nine principles:

1. Criminal behavior is learned according to the principles of operant conditioning.
2. Criminal behavior is learned both in nonsocial situations that are reinforcing or discriminative and through that social interaction in which the behavior of other persons is reinforcing or discriminative for criminal behavior.
3. The principal part of the learning of criminal behavior occurs in those groups which comprise the individual's major source of reinforcement.
4. The learning of criminal behavior, including specific techniques, attitudes, and avoidance procedures, is a function of the effective and available reinforcers, and the existing reinforcement contingencies.
5. The specific class of behaviors which are learned and their frequency of occurrence are a function of the reinforcers which are effective and available, and the rules or norms by which these reinforcers are applied.
6. Criminal behavior is a function of norms which are discriminative for criminal behavior, the learning of which takes place when such behavior is more highly reinforced than noncriminal behavior.
7. The strength of criminal behavior is a direct function of the amount, frequency, and probability of its reinforcement.

<sup>21</sup> *Ibid.* at 50.

<sup>22</sup> *Ibid.* at 51.

Social learning theory, as it integrates differential association, suggests that an individual learns to favour the commission of crime or deviance – or outlawry – over conformity from significant exposure to and association with individuals who engage in criminal, deviant – or outlaw – behaviour, where that individual receives reinforcement for engaging in outlaw behaviour rather than conventional normative behaviour, and where that individual has or develops “learned definitions” that encourage him to engage in outlawry. These suggestions may explain the way in which individuals become members of criminal organizations. Through their association with the organized crime outlaws, these individuals have exposure to and observe more outlaw behaviour than law-abiding behaviour. They receive positive reinforcement from organized crime outlaw members for behaviour which accords with outlaw behavioural norms. And, they come to “learn definitions” or accept and internalize outlaw behaviour as the norm. The key to social learning as it relates to or encourages organized crime outlaw behaviour, lies in access to or involvement in a social group that accepts or values this outlawry as normative behaviour. A subculture provides such social group.

### 3.4.3 Attributes of and Processes within Cultures, Subcultures and Groups

#### 3.4.3.1 Culture

The concept of culture facilitates an understanding of the concept of *subculture* and *subculture of violence*.

...Culture enables people to solve the problems created *for* them by the social structure. Culture consists of “traditional ways of solving problems” or of “learned problem solutions” which are transmitted through the processes of childhood socialization. ...Structure and culture make incompatible demands and it is at these points of pressure that subcultures have evolved to “solve” the problems that arise. Subcultures typically borrow elements from the larger culture and rework them into distinctive forms. Such elements (violence and hedonism, for example) are available to all: but not everyone is a bearer of a subculture which gives them unusual predominance. “The crucial condition for the emergence of new cultural forms is the existence, *in effective interaction with one*

*another, of a number of actors with similar problems of adjustment.” ...*<sup>23</sup>  
[Emphasis original].

Outlaws, including organized crime outlaws, who stand in contrast to conventional societal norms and who have “problems of adjustment”, in some instances collectively form or join a new culture – namely, a subculture. While this definition refers to transmission of culture through “the processes of childhood socialization”, “problems of adjustment” do not always occur during childhood or youth. Rather, some individuals as adults may problems with the larger culture, and thus, one expects that they would begin to seek alternative culture(s) or a subculture at any time in their life and learn the values and norms of a new culture or subculture through socialization. Thus, logically, learning culture and subculture (through pro-social or differential associations) could occur not only during childhood.

#### 3.4.3.2 Subcultures and Subcultures of Violence

Within the culture of a dominant society can exist a *subculture*. Milton M. Gordon defined *subculture* as:

...a sub-division of national culture, composed of a combination of factorable social situations such as class status, ethnic background, regional and rural or urban residence, and religious affiliation, but *forming in their combination a functioning unity which has an integrated impact on the participating individual*. [Emphasis original].<sup>24</sup>

Subcultures are not totally different from, or completely in conflict with, the larger culture.<sup>25</sup>

A subculture implies that there are value judgements or a social value system which is apart from and part of a larger or central value system. From the viewpoint of this larger dominant culture, the values of the subculture set the latter apart and prevent total integration, occasionally causing open or covert conflicts. *The dominant culture may directly or indirectly promote this apartness, of course, and the degree of reciprocal integration may vary, but whatever the reason for the*

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<sup>23</sup> David Downes & Paul Rock, *Understanding Deviance*, 5<sup>th</sup> ed. (New York: Oxford University, 2007) at 126, as quoting from and relying on A. Cohen, *Delinquent Boys: The Culture of the Gang* (Glencoe: Free Press, 1955) at 59.

<sup>24</sup> Milton M. Gordon, “The Concept of the Sub-Culture and its Application [1947]” in Ken Gelder & Sarah Thornton, eds., *The Subcultures Reader* (New York: Routledge, 1997) 40 at 40-41.

<sup>25</sup> Marvin E. Wolfgang and Franco Ferracuti, *The Subculture of Violence: Towards an Integrated Theory in Criminology* (London: Tavistock, 1967) at 101.

*difference, normative isolation and solidarity of the subculture result. There are shared values that are learned, adopted, and even exhibited by participants in the subculture, and that differ in quantity and quality from those of the dominant culture. Just as a man is born into a culture, so he may be born into a subculture.*<sup>26</sup> [Emphasis added].

This “apartness” within the concept of subculture connects to the theory of deviance and labelling. Howard S. Becker asserted that when people who engage in deviance interact, they will likely form a subculture based on their different perspectives and behaviours.<sup>27</sup> Deviance and labelling theory also asserts that social norms of one group in society – usually the more powerful group – serve as the marker for measurement, comparison and judgment<sup>28</sup> of the others. Similarly, such “reference groups” exist in the theory of subculture as noted by Albert K. Cohen.<sup>29</sup> The existence of comparisons, markers for measurement and reference groups come into play when one asks the question, “Who am I?” That is to say, they come into play when one questions or seeks one’s identity.

Subcultures also may be *subcultures of violence* whose values contain a “potent theme of violence”<sup>30</sup> according to the theoretical assertions of Marvin E. Wolfgang and Franco Ferracuti. While the theory of a *subculture of violence* as set forth by Wolfgang and Ferracuti has received a “measure of acceptance in the field”<sup>31</sup> as well as some criticism of its ability to explain violence in the United States,<sup>32</sup> the *concept* of the existence of a *subculture of violence* is still referred to by sociologists and criminologists. Sociologist

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<sup>26</sup> *Ibid.* at 99-100.

<sup>27</sup> Howard S. Becker, *Outsiders* (New York: Free Press, 1968) [*Outsiders*] at 81-82. Becker asserted: ... Where people who engage in deviant activities have the opportunity to interact with one another they are likely to develop a culture built around the problems rising out of the differences between their definition of what they do and the definition held by other members of the society. They develop perspectives on themselves and their deviant activities and on their relations with other members of the society. ... Since these cultures operate within, and in distinction to, the culture of the larger society, they are often called subcultures.

<sup>28</sup> Michel Foucault, “The Means of Correct Training” in Paul Rabinow, ed., *The Foucault Reader* (New York: Pantheon Books, 1984) [“The Means of Correct Training”] at 196-97.

<sup>29</sup> Albert K. Cohen, “A General Theory of Subcultures” in Ken Gelder & Sarah Thornton, eds., *The Subcultures Reader* (New York: Routledge, 1997) 44 [“A General Theory of Subcultures”] at 47 and 48.

<sup>30</sup> *The Subculture of Violence: Towards an Integrated Theory in Criminology*, *supra* note 25 at 140.

<sup>31</sup> Howard S. Erlanger, “The Empirical Status of the Subculture of Violence Thesis” (1974) 22 *Social Problems* 280 at 289.

<sup>32</sup> *Ibid.* Erlanger suggests, *ibid.* at 288 and 289, that further research is required in relation to Wolfgang and Ferracuti’s study, such as on establishing the pervasiveness of a subculture, and clarifying the definition of the subculture so as to remove demographics.

Craig J. Forsyth noted its study when he described the impact of this subculture of violence on individuals who subscribe to it:

...The subculture had arisen in the past for specific historical reasons, but it transmitted from generation to generation as a set of ideas which can be understood apart from those original social conditions (Erlanger 1974, 1976). Each individual independently encounters these social environments, and to a degree his behavior is a response to the social environment. But each individual also learns ideas and interpretations of these conditions from others who face similar conditions, and to a certain degree his behavior is a reply to those interpretations ...

Subcultures of violence are made up of groups whose values sanction the use of violence and who are quick to use force in interpersonal relations. The result is a quick responsive culture in which there is either a lot of fighting or a lot of killing depending on the nature of interaction and the presence of firearms. ...

People in the subculture of violence tend to value honor more highly than people in the dominant culture. On the other hand they tend to value human life less highly. There are also normative conflicts between the subculture of violence and the dominant culture. Those refer to "rules" about what behaviors are expected in response to the trivial jostles or remarks that were the cause of so many homicides. Those norms are backed up with social rewards and punishments: people who do not follow the norms are criticized or ridiculed by other people in the subculture, and those who follow them are admired and respected. Those norms take on a certain life of their own, independent of whether they are approved by the individuals who follow them, since the failure to follow the norms may result in the person becoming a victim of the violence (Barlow 1987; Vold and Bernard 1986; Wolfgang and Ferracuti 1981). ...<sup>33</sup>

Because differential association or social learning occurs through social interaction generally, it occurs within cultures and subcultures. One would expect that the unique attributes of subcultures of violence would provide an environment ripe for social learning, and thus, facilitate organized crime outlaw values and normative behaviour. Proof of this expectation requires empirical research.

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<sup>33</sup> Craig J. Forsyth, "The Use of the Subculture of Violence as Mitigation in a Capital Murder Case" (1998) 13 *Journal of Police and Criminal Psychology* 67 ["The Use of the Subculture of Violence as Mitigation in a Capital Murder Case"] at 72-73. Forsyth refers to G.B. Vold & T.J. Bernard, *Theoretical Criminology* (New York: Oxford University Press, 1986); H.D. Barlow, *Introduction to Criminology* (Boston: Little, Brown and Company, 1987); Wolfgang and Ferracuti, *The Subculture of Violence* (Beverly Hills: Sage, 1981); H.S. Erlanger, "The Empirical Status of the Subculture of Violence Thesis" (1974) 22 *Social Problems* 280; and H.S. Erlanger, "Is There a Subculture of Violence in the South?" (1976) *Journal of Criminal Law and Criminology* 483.

### 3.4.3.3 Groups

Like cultures and subcultures, *groups* have cohesion, but may be smaller in scale and less integrated in an individual's life. *Groups* may exist within a culture or subculture. And, like cultures and subcultures, differential association or social learning can occur within groups. However, *groups*, but not always cultures or subcultures, may have or use symbols that bolster their identity. The presence of symbols that denote the common interests of the group, such as "music, rituals, distinctive names, titles, banner, slogans and insignia", seem to increase "morale or emotional unity."<sup>34</sup> The symbolic value of names and insignia to group "morale or emotional unity" remains of some significance to outlaws, and in particular, gangs and criminal organizations that sometimes have identifiers specific to the group.

Not only do these symbolic names and insignia instill particular social reactions to members of the group, they also increase the internal cohesion of the group, and thus, the power of the group as against others.<sup>35</sup> This phenomenon is exemplified by the display of patches worn by some outlaw motorcycle gangs. Staff-Sergeant Jacques Lemieux, now retired, provided the expert opinion that mere display of the Hells Angels insignia demonstrates the power of the group:

**450** In the opinion of Staff Sergeant Lemieux, the main purpose of the Hells Angels organization is to facilitate the commission of criminal activity by its members. The Hells Angels have a reputation for violence and intimidation. By wearing the three-piece patch, an individual identifies himself as a member of that organization, an organization that is reputed to be violent and involved in intimidation. He does not have to identify himself in order to commit criminal activities.

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<sup>34</sup> Robert L. Sutherland, Julian L. Woodward & Milton A. Maxwell, *Introductory Sociology*, 6<sup>th</sup> ed. (Chicago: J.B. Lippincott, 1961) at 131. Six elements within a group seem to bolster "morale or emotional unity":

...when (1) members feel that the preservation of the group is of vital importance to their personal welfare, when (2) each has a sense of sharing in the achievement of its objectives, when (3) the relations of the members are intimate and personal so that words of encouragement and praise flow freely from one to another, when (4) the group's objective is not too easily attained but calls for the exercise of concerted effort, when (5) *the common interests of the group are symbolized for the members in the appealing forms of music, ritual, distinctive names, titles, banners, slogans, insignia*, and when (6) the members are made aware of the significance and superiority of their group through acquaintance with the glorified tradition of its achievements. ... [Emphasis added].

<sup>35</sup> *R. v. Lindsay*, 2005 CanLII 24240, [2005] O.J. No. 2870 (Ont. S.C.J.) [*R. v. Lindsay*] at paras. 450-51.

451 The individual also enjoys the benefit of the organization backing its members. [Ralph Sonny] Barger referred to this in his book as "one on all, all on one", meaning when a person fights with one Hells Angel, he fights with them all.

#### 3.4.4 Identity Formation and Perpetuation Via Differential Association and Social Learning in Groups or Subcultures of Violence

The concepts of subculture and group suggest a way in which internal cohesion among members develops and perpetuates – not only by learning, but also by accepting, adopting, and passing along the normative behaviours and institutions of the socializing group. This process enables members to answer the question, “Who am I?” It provides them with an identity.

*Members of a group use one another as reference points for self-image and for establishing the relationship of self to others. This process implies continuing reinforcement of the subcultural values. A wish to remain an ingroup participant does not necessarily mean, however, a total personal commitment or commitment to the totality of subcultural values. The individual may occasionally be more concerned with maintaining his group association than with sharing the group's values. He may be reluctant to exhibit his group allegiance in a way that is discordant with his own beliefs, but at the same time he may place a higher value on remaining a member of the group than on abrogating the prescription of conduct. The juvenile who conforms to the delinquent gang's demands for fighting but who dislikes the resort to violence, and the soldier who goes to combat with deep hatred for war are both unwilling to sever association with their groups but cannot be said to share much in the value of violence. The value these two individuals will share with their groups is that of maintaining the group. Thus, while the manifest representation (conduct) of the subculture may generally be a valid index of normatively induced values, latent and different values may be retained by some individuals who are members of the group that share in this subculture. ...<sup>36</sup> [Emphasis added].*

The above examples of the juvenile and soldier who do not like violence but engage in it in order to remain a member of their group, demonstrate a lack of complete adoption or internalization of the group identity but a willingness to engage in the prescribed behaviour and to propagate the group regardless. In conjunction with a labelling perspective (which theory will be discussed in section five “Deviance and Labelling Theory” next), this phenomenon within subcultures reveals that even though members who have been assigned a label within the stage of primary deviance will not necessarily

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<sup>36</sup> *The Subculture of Violence: Towards an Integrated Theory in Criminology*, supra note 25 at 102-03.

internalize that label though he may engage in secondary deviance. However, an outsider observer would not be able to distinguish between the subculture member who wholeheartedly internalized the subculture identity, and the member who did not.

The above examples also show that within the learning or socialization process, psychological personality variables play a role in the acceptance or rejection of the subcultural norms,<sup>37</sup> and that both cultures and subcultures tolerate a certain degree of non-normative or deviant behaviour.<sup>38</sup> However, they only tolerate behaviour which does not undermine their existence<sup>39</sup> – that is to say, behaviour that does not cause disorder and threaten internal cohesion. Subcultures and groups have formal and informal sanctions that penalize members who violate the values or norms, and even sever membership.<sup>40</sup> In a subculture of violence, these social control mechanisms may include violent and intimidating means of ensuring compliance with normative rules and violent punitive sanctions against those who violate them. The existence of punitive sanctions within groups or subcultures generally, and subcultures-of-violence specifically, demonstrates mechanisms which not only assist members to learn deviant normative behaviour through positive and negative reinforcement, but also trains those individuals to adopt,<sup>41</sup> and thus, essentially internalize those behaviours. This process – learning or training with punitive sanctions – facilitates understanding the socialization and internalization processes within outlaw groups within the criminal milieu.

Prisons exemplify subcultures of violence, and places for differential association to occur. Michel Foucault asserted that convicts have their own value system,<sup>42</sup> and that the prison breeds “delinquents” through “anti-social” association:

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<sup>37</sup> *Ibid.* at 107.

<sup>38</sup> *Ibid.* at 103.

<sup>39</sup> *Ibid.* at 101.

<sup>40</sup> *Ibid.* at 106.

<sup>41</sup> *Delinquency, Crime and Differential Association*, *supra* note 4 at 3. Cressey refers to the early work of Edwin H. Sutherland, *Principles of Criminology*, 2<sup>nd</sup> ed. (Philadelphia: Lippincott, 1934).

<sup>42</sup> “The Means of Correct Training”, *supra* note 28 at 220-21. *Ibid.* at 220, Foucault distinguishes between “delinquent” who has an affinity for crime or identifies with himself as a criminal, and the offender who has simply engaged in crime:

The delinquent is also to be distinguished from the offender in that he is not only the author of his acts (the author responsible in terms of certain criteria of free, conscious will), but is

--The prison makes possible, even encourages, the organization of a milieu of delinquents, loyal to one another, hierarchized, ready to aid and abet any future criminal act: "Society prohibits association of more than twenty persons...and it constitutes for itself associations of 200, 500, 1,200 convicts in the *maisons centrales*, which are constructed for them *ad hoc*, and which it divides up for their greater convenience into workshops, courtyards, dormitories, refectories, where they can all meet together.... And it multiplies them across France in such a way that, where there is a prison, there is an association...and as many anti-social clubs." And it is in these clubs that the education of the young first offender takes place....<sup>43</sup>

That Aboriginal overrepresentation in the Canadian prison system has led to the increase of Aboriginal street gangs,<sup>44</sup> supports these theoretical assertions of Foucault. Further, Aboriginal prison gangs serve as recruiters for Aboriginal street gangs, and some gangs were formed or created in prisons.<sup>45</sup> This phenomenon suggests that the power within a group or subculture to teach its members normative behaviour through "anti-social" or differential associations, can create or embolden not only criminally deviant, but also organized crime outlaw identities.

### 3.4.5 Application of Differential Association and Social Learning Within Groups and Subcultures to Organized Crime Outlaw Identities

Many organized crime outlaw groups fall within the category of subculture due to the presence of apartness, difference, and solidarity within their group, and due to the presence and transmission of their learned normative behaviour patterns. These outlaws are "culture-carriers"<sup>46</sup> or subculture-carriers who exemplify the attitudes toward and means to commit outlawry, transmit them to new members within their group, and reinforce them among other members. The process of learning normative behaviour patterns occurs in the criminal milieu, and specifically, in organized crime groups and

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linked to his offense by a whole bundle of complex threads (instincts, drives, tendencies, character). ...

<sup>43</sup> *Ibid.* at 228.

<sup>44</sup> Jana Marie Grekul & Patti LaBoucane-Benson, *An Investigation into the Formation and Recruitment of Aboriginal Gangs in Western Canada* (Ottawa: Aboriginal Corrections Policy Unit, Public Safety Canada, 2006) [*An Investigation into the Formation and Recruitment of Aboriginal Gangs in Western Canada*] at 5. The authors cite research by Ovide W. Mercredi, *Aboriginal Gangs: A Report to the Correctional Service of Canada on Aboriginal Youth Gang Members in the Federal Corrections System* (2000).

<sup>45</sup> *Ibid.* at 21.

<sup>46</sup> *The Subculture of Violence: Towards an Integrated Theory in Criminology*, *supra* note 25 at 99-100.

subcultures.<sup>47</sup> Associations or social interactions, whether reinforcing conventional or deviant norms, affects any behaviour, generally,<sup>48</sup> therefore, affects organized crime outlaw behaviour.

Organized crime outlaw groups exemplify not only a *subculture* but also a *subculture of violence*. As described in Chapter Two, anti-Prohibitionist organized crime outlaws, Mafiosi groups and La Cosa Nostra, outlaw motorcycle gangs, and Aboriginal street gangs, all employ violence. In applying the description by Forsyth, their "...values sanction the use of violence and [they] are quick to use force in interpersonal relations. ...[T]here is either a lot of fighting or a lot of killing depending on the nature of interaction and the presence of firearms. ..."<sup>49</sup> And, as particularly exemplified by Mafiosi groups and La Cosa Nostra, they "...tend to value honor more highly than people in the dominant culture."<sup>50</sup>

Mafiosi groups and La Cosa Nostra demonstrate that some organized crime outlaws are born into an existing organized crime outlaw subculture or group. Long, frequent, intense<sup>51</sup> and significant associations with members this subculture or group, will increase the likelihood that individuals will *become* organized crime outlaws, engage in such outlawry, and will adopt the organized crime outlaw identity. For example, the fraternal association of Sicilian Mafia and *'ndrangheta* members and the absolute power over every part of their members' lives<sup>52</sup> uses or creates a familial environment for differential association to occur. If an individual grows up in Calabria, he likely has a blood relation to the *'ndrangheta*,<sup>53</sup> and will likely learn the normative behaviour of that group. Thus, he has an increased likelihood, based on frequency, duration, priority and intensity of

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<sup>47</sup> Howard Abadinsky, *Organized Crime*, 8<sup>th</sup> ed. (Belmont: Thomson Wadsworth, 2007) [*Organized Crime*] at 16.

<sup>48</sup> *Ibid.*

<sup>49</sup> "The Use of the Subculture of Violence as Mitigation in a Capital Murder Case", *supra* note 33 at 72.

<sup>50</sup> *Ibid.*

<sup>51</sup> "A Statement of the Theory – 1947", *supra* note 5 at 9-10. Sutherland posited that the frequency, duration, priority and intensity of differential associations affected the nature or degree of learning.

<sup>52</sup> Letizia Paoli, "Italian Organised Crime: Mafia Associations and Criminal Enterprises" (2004) 6 *Global Crime* 19 ["Italian Organised Crime: Mafia Associations and Criminal Enterprises"] at 22.

<sup>53</sup> Antonio Nicaso & Lee Lamothe, *Angels, Mobsters & Narco-Terrorists: The Rising Menace of Global Crime Empires* (Mississauga: John Wiley & Sons Canada, 2005) at 11.

association, of becoming a member of this Italian Mafioso group. Further, the secrecy obligations of “men of honour”<sup>54</sup> only would entrench the perceived importance of the anti-social values and norms learned in these Italian outlaw groups.

The perpetuation of these Sicilian and Calabrian Mafiosi groups in North America, imports a similar differential association or social learning process within these outlaw subcultures. The North American La Cosa Nostra employed or adopted the normative behaviour of the Italian Mafia, and in particular, the use of violence and intimidation. This Italian mode of life was “impressed” in a criminal organization in North America.<sup>55</sup> Essentially the individuals, as well as the corporations and the organizations themselves, internalized the methods of the Mafia.<sup>56</sup> Such organized crime outlaw characteristics necessitate criminal organization laws that can penetrate cohesive groups and diffuse the educative processes within them.

As members of a subculture of violence, outlaw motorcycle gangs also demonstrate the products of differential association or social learning. They are a social group whose members have shared values and normative behaviour. They use each other as reference points in order to define themselves and guide their behaviour as described above by Cohen and Becker<sup>57</sup> and they induct new members into their group after a lengthy and arduous “program” which, if completed, will demonstrate that these members have accepted the rules, demonstrated commitment, and have learned the normative behaviour of the group. Many outlaw motorcycle gangs reward these new members with “full patches” which contain the gang’s name and insignia, and are displayed on the clothing and accessories worn by members in order to reinforce their power as a group, and in particular as a violent outlaw group. This latter phenomenon accords with the use of symbols by groups to reinforce identity.

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<sup>54</sup> “Italian Organised Crime: Mafia Associations and Criminal Enterprises”, *supra* note 52 at 21.

<sup>55</sup> *Organized Crime*, *supra* note 47 at 71.

<sup>56</sup> *Ibid.*

<sup>57</sup> “A General Theory of Subcultures”, *supra* note 29 at 47 and 48; and *Outsiders*, *supra* note 27 at 81-82.

Aboriginal street gangs demonstrate differential association within communities, families, and institutional settings such as in prison. Criminal behaviour and gang behaviour is taught and learned<sup>58</sup> in areas or neighbourhoods characterized by poverty, crime, and gang presence.<sup>59</sup> Association with criminally deviant family members and peers lead Aboriginal youth to become involved in Aboriginal street gangs.<sup>60</sup>

*...Family involvement in gangs is clearly a precursor to gang involvement for the ex-gang members interviewed.* One subject, originally from Winnipeg, started by stating that his family was involved in the gang lifestyle. Another, from Saskatoon, stated he was:

“surrounded by family members who were gang members. I had no connection with my family otherwise – they were alcoholics and drug addicts.” ...

...It seems that among the Aboriginal young people in our study, lack of respect, lack of self-esteem, and the pursuit of these attributes led to gang involvement. Gangs, as peer groups, are a source of respect – at least in the eyes of recruits. The ex-gang member from Winnipeg states he “...wanted a reputation. I spent time in neighbourhood parks and earned a reputation from dealing drugs and standing up to other gang members.” If there is a lack of bonding in the home, marginalized youth will seek respect elsewhere. *Surrounded by other like-situated youth, combined with family and friends already gang involved, and the pathway to gang involvement seems rather straightforward.* As [Edwin H.] Sutherland would say, *in the case of disenfranchised youth in urban and rural areas, an environment abundant in criminal “definitions” and criminal “associations” makes this illegitimate career pathway almost inevitable.* Sutherland’s theory implies that the side with the most, and the most significant, “definitions” will win out. A youngster surrounded by pro-social definitions – doctor/teacher parents, siblings who are engaged in sport or art, friends who are high achievers in school – will likely follow the pro-social route and find respect and recognition in legitimate, legal pursuits.

Furthermore, these pro-social associations, in addition to influencing the ‘route’ the young person takes, are also a source of learning. The associations teach individuals the ‘tricks of the trade’ whether they be pro-social, for example

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<sup>58</sup> E.J. Dickson-Gilmore & Chris Whitehead, “Aboriginal Organized Crime in Canada: Developing a Typology for Understanding and Strategizing Responses” (2002) 7 Trends in Organized Crime 3 at 15.

<sup>59</sup> Catherine Bainbridge, Katherine Cisek & CBC Newsworld, *Indian Posse: Life in Aboriginal Gang Territory* VHS (Montreal: Wild Heart Productions Inc., 1998) [*Indian Posse: Life in Aboriginal Gang Territory*]. *Ibid.* at 03:10 and 05:33, father of gang member Trevor Lacasse, Paul Lacasse states that in the north end of Winnipeg, girls are put on street by gang members and the traffic in the area is due to “johns.” Vehicles don’t stop for him. Occupants don’t live or work in the area. He states, *ibid.* at 06:50, that prostitution goes on 24 hours a day. Resident of the same neighbourhood, Marie Kelly, states, *ibid.* at 05:13, that prostitution is a problem in the area.

<sup>60</sup> *Ibid.* at 19:42. Indian Posse member Trevor Lacasse says that the kids in his neighbourhood (including his brothers) see him as a role model when he was wearing his flagging his gang colours, wearing his flags. Trevor is not waving guns around now and harming people any more, and so now the kids see that instead of the old Trevor. However, he is still a member of the gang.

how to study effectively. *On the other hand, a young person who is surrounded by family members already well ensconced in a gang lifestyle, surrounded by poverty and unemployment, associating with friends who skip school and instead make money by drug running, is more likely to follow the illegitimate/criminal route characterizing the lifestyle of his or her close associates. Importantly, the anti-social associations in this case, teach the individual more criminal techniques for being successful in crime, for example, how to evade police while on a drug run.*<sup>61</sup> [Emphasis added].

Indeed, Paul Lacasse, resident in Indian Posse territory in the north end of Winnipeg, lost three of his sons to the gang, and his fourth son was at risk.<sup>62</sup> The Regina Anti-Gang Services or RAGS program targets 300 known Aboriginal gang members, 75 per cent of whom are between the age of 12 and 20. In order to facilitate the exit of a member from a gang, RAGS recognizes that power of gang territory and association, and states that “...the person must be physically removed from other gang members or any surroundings that may help gang members locate them.”<sup>63</sup>

In addition to the influence of negative associations on Aboriginal youth to join gangs, Laboucane and Grekul note the need for protection also led to Aboriginal association with gangs.<sup>64</sup> The concept of a *subculture of violence* explains this need for protection and the necessity of differential association. If one’s community already has the presence of violence or is greatly influenced by a subculture of violence, then differential association in a gang (and thus, employment of the values of a subculture of violence) facilitates personal security, safety, and even survival. The gang provides the tools (the group normative behaviour as well as the power of the group) to protect oneself.

These organized crime outlaw groups, each in their own way, show the ways that differential association and social learning can inculcate individuals into adopting an organized crime outlaw identity and participating in activities of the outlaw group. These

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<sup>61</sup> *An Investigation into the Formation and Recruitment of Aboriginal Gangs in Western Canada*, supra note 44 at 36-37.

<sup>62</sup> *Indian Posse: Life in Aboriginal Gang Territory*, supra note 59 at 01:19. Paul Lacasse lost sons Norman, Benji, and Trevor to the gangs, and at the time of filming, Paul Jr. was at risk.

<sup>63</sup> “Regina Anti-Gang Services: RAGS” (30 July 2010) online: Public Safety Canada <<http://www.publicsafety.gc.ca/prg/cp/ythgng/cpa01-rags-eng.aspx>>.

<sup>64</sup> *An Investigation into the Formation and Recruitment of Aboriginal Gangs in Western Canada*, supra note 44 at 37.

outlaw groups also demonstrate the ways in which subcultures of violence can entrench and nourish this identity as members by maintaining values and normative behaviour based on violence and intimidation.

### 3.4.6 Insights for Anti-Organized Crime Measures According to Differential Association and Social Learning Within Groups and Subcultures

Notably, some indication of a phenomenon of reverse differential association may exist. Reverse differential association occurred when members of criminal organizations exited illegitimate business, and engaged in non-criminal endeavours. This phenomenon occurred during Prohibition and its demise,<sup>65</sup> and indicates that social, economic, political circumstances may affect learned deviant normative behaviour, and suggests that societal enfranchisement may persuade some organized crime outlaws to leave outlawry and adopt legal and conventional behaviours. In order to encourage or pursue this reversal of identity, anti-organized crime measures may need to address societal states that disenfranchise certain societal groups.

Differential association or social learning within subcultures of outlaws such as Italian Mafiosi groups, La Cosa Nostra, Aboriginal street gangs, and outlaw motorcycle gangs, demonstrates a need for re-educative processes based on anti-criminal patterns of behaviour for members who leave or who are incapacitated from their organized crime group, and the presence of a non-outlaw environment in which ex-members can interact with law-abiding members of society. This insight from this socio-criminological theory has been accepted in models for anti-gang initiatives.

Indeed, the health care model asserts that part of an anti-organized crime strategy should include the rehabilitation and redirection of deviant or delinquent acts of individuals who

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<sup>65</sup> *Organized Crime*, *supra* note 47 at 54. Abadinsky describes this phenomenon:

With the onset of the Great Depression (1929) and the subsequent repeal of Prohibition (1933), the financial base of OC narrowed considerably. Many players dropped out; some went into legitimate enterprises or employment; others drifted into conventional criminality. Bootlegging, as noted earlier, required trucks, drivers, mechanics, garages, warehouses, bookkeepers, and lawyers—skills and assets that could be converted to non-criminal endeavors. For those who remained in the business, reorganization was necessary. ....

have become members of gangs<sup>66</sup> or criminal organization groups. Further, the third component of the Spergel model of gang prevention and intervention, now referred to as the Comprehensive, Community-Wide Approach to Gang Prevention, Intervention and Suppression Program model,<sup>67</sup> emphasizes educative processes and opportunities to reintegrate into conventional society. The Spergel model is a primary initiative of the Office of Juvenile Justice and Delinquency Prevention of the United States Department of Justice.<sup>68</sup> The model advocates community mobilization to create programs to strengthen institutions in the community;<sup>69</sup> social intervention in the form of programs that seek to increase the resilience of individuals against gang membership;<sup>70</sup> provision of programs to increase educational and employment opportunities;<sup>71</sup> suppression by augmenting legal system responses to gangs;<sup>72</sup> and organizational changes and development to improve the administration of agencies that deal with gangs.<sup>73</sup> This third component of the Spergel model asserts that the provision of programs which increase educational and employment opportunities will achieve socio-cultural goals through instilling institutional norms, and thus, counteract social disorder and deviancy.<sup>74</sup> The provision of educational and

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<sup>66</sup> Kimberly Tobin, *Gangs: An Individual and Group Perspective* (Upper Saddle River: Pearson Prentice Hall, 2008) [*Gangs: An Individual and Group Perspective*] at 148. Tobin refers to the health care model in formulating three prevention levels for anti-gang strategies. As discussed in, *infra*, in Chapter Four at section four “Requisite Three for Anti-Organized Crime Measures” at sub-section “1. Fostering Pro-Social Bonds Through Anti-Organized Crime Legal Measures”, primary prevention and secondary prevention amount to the principles in *Requisite Three*. Primary prevention targets youth or individuals before they involve themselves in a gang, and specifically, targets youth or individuals at risk of gang membership due to attributes of their population or community and not individual attributes. Secondary prevention targets individuals who have a high risk of joining gangs or who have had exposure to gangs, and uses intensive efforts to increase the resilience of these individuals against gang membership.

<sup>67</sup> Irving A. Spergel, “A Comprehensive, Community-Wide Approach to the Youth-Gang Problem” (Paper presented to the 2010 Canada-U.S. Gang Summit Conference, Toronto, Ontario, 25 March 2010) online: 2010 Canada-U.S. Gang Summit <<http://www.gangsummit.com/Assets/Spergel%20Speech.pdf>> [“A Comprehensive, Community-Wide Approach to the Youth-Gang Problem”] at 1. This model is discussed further, *infra*, in Chapter Four at section four “Requisite Three for Anti-Organized Crime Measures” at sub-section “1. Fostering Pro-Social Bonds Through Anti-Organized Crime Legal Measures.”

<sup>68</sup> *Ibid.*

<sup>69</sup> *Ibid.* at 9.

<sup>70</sup> *Ibid.* at 9-10.

<sup>71</sup> *Ibid.* at 10.

<sup>72</sup> *Ibid.* at 11-12.

<sup>73</sup> *Ibid.* at 12.

<sup>74</sup> Kimberly Tobin, *Gangs: An Individual and Group Perspective* (Upper Saddle River: Pearson Prentice Hall, 2008) at 150. Tobin cites research within the Spergel model according to Irving Spergel and G. David Curry, “The National Youth Gang Survey: A Research and Development Process” in Arnold P. Goldstein and C. Ronald Huff, eds., *Gang Intervention Handbook* (Champaign: Research Press, 1993) [“The National Youth Gang Survey: A Research and Development Process”]. Gang policy in the United States, for the most part, has incorporated five main components set forth in the Spergel model of gang prevention

employment opportunities remains the most expensive and most challenging anti-gang measure to implement, but achieves the most success in countering gang membership or activity.<sup>75</sup> Opportunity provisions are the most effective strategy for cities with chronic gang problems, and community mobilization is the most effective strategy for cities with emerging gang problems.<sup>76</sup> However, opportunity provision policies and community mobilization policies often remained the least utilized.<sup>77</sup>

In addition to prevention and intervention techniques, concepts of differential association or social learning within subcultures of outlaws support the employment of other anti-organized crime measures as well. The reinforcement of their identities through ongoing anti-social interactions with one another within their outlaw groups necessitates that anti-organized crime responses ban such associations to some degree and in some circumstances. First, the bolstering of their identity through the use of names and insignia, suggests that organized crime measures place limitations on the display of gang name and insignia in public and in private.

Second, disassociation from gangs may need to occur in a physical sense, such as by parents removing their children from delinquent, criminal or gang environments.<sup>78</sup> It may occur when accused persons who are gang members are released on bail and courts impose conditions of non-association with the gang. Further, courts ought to consider

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and intervention. As referred to in more detail, *infra* at Chapter Four in section six “Requisite Five for Anti-Organized Crime Measures” at subsection two “Reactive Anti-Organized Crime Methods to Limit and Prevent Differential Association and Anti-Social Learning Within Subcultures of Outlaws”, at sub-subsection “b. Reactive Methods of Suppression Via the Criminal Law”, at sub-sub-subsection “ii. Non-Association Orders in Bail Conditions as a Reactive Method of Suppression”, the Spergel model of gang prevention and intervention also includes community mobilization to create programs to strengthen institutions in the community; social intervention in the form of programs that seek to increase the resilience of individuals against gang membership; provision of programs to increase educational and employment opportunities; suppression by augmenting legal system responses to gangs; and organizational changes and development alter the administration of agencies that deal with gangs.

<sup>75</sup> *Ibid.* at 154. Tobin cites empirical research of Irving Spergel and G. David Curry in “The National Youth Gang Survey: A Research and Development Process”, *supra* note 74.

<sup>76</sup> *Ibid.* at 150. Tobin cites research within the Spergel model according to Irving Spergel and G. David Curry in “The National Youth Gang Survey: A Research and Development Process”, *supra* note 74.

<sup>77</sup> *Ibid.* Tobin cites research within the Spergel model according to Irving Spergel and G. David Curry in “The National Youth Gang Survey: A Research and Development Process”, *supra* note 74.

<sup>78</sup> *Indian Posse: Life in Aboriginal Gang Territory*, *supra* note 59. One mother, Mary Kelly, moved her children from a neighbourhood in which Indian Posse operated in order to submerge her children into a different lifestyle and avoid the negative influence of the gang.

where the accused person intends to reside, and whether a condition of not attending the gang territory is necessary in order to not only prevent further crimes from occurring, but to prevent the continuance of anti-social relations which may encourage further criminal activity, and in order for some pro-social associations to begin to develop through government and community agencies. If a sentence is not so severe as to mandate prison, then courts ought to consider the same types of conditions in imposing conditions of probation. If a sentence results in imprisonment for two years or more, then parole boards ought to consider such types of conditions in releasing the offender into the community.

These insights will be examined in Chapter Four, section five “Requisite Four for Anti-Organized Crime Measures”, section six “Requisite Five for Anti-Organized Crime Measures”, and section seven “Requisite Six for Anti-Organized Crime Measures.”

### **3.5 DEVIANCE AND LABELLING THEORY**

#### **3.5.1 Overview**

The preservation or maintenance of collective values and norms leads to the condemnation of acts that violate those values and norms. This condemnation defines deviance and crime, and thus, defines who is deviant and criminal. The process of labelling the deviant and the criminal contributes to an explanation for the genesis and development of some organized crime outlaw identities.

This section of Chapter Three will set forth generally the theory of deviance and labelling, and specifically it will discuss the phenomena of primary and secondary deviance as well as self-labelling. It will use the circumstances and perspectives of outlaws who were anti-Prohibitionists, Mafiosi and La Cosa Nostra members, outlaw motorcycle gang members and Aboriginal street gang members to breathe life into these theoretical concepts. In so doing, this section will illuminate the process of internalizing an organized crime outlaw identity.

As examination of deviance and labelling theory in this section will reveal the following:

Insight 8. Anti-organized crime approaches should avoid the imposition of formal negative labels and stigmatization in order to prevent potential deviants or outlaws from being ousted from larger society.

Insight 9. Anti-organized crime measures should maintain or foster positive interactions between perceived deviants or outlaws and members of conventional society.

Insight 10. Anti-organized crime measures should reduce the internal cohesion and power of gangs or organized crime outlaws in order to prevent the perpetuation of their identity and the empowerment of their reputations.

#### **3.5.2 Deviance and Labelling Theory Generally**

In recent years, criminologists have sought to use labelling theory to complement other theories regarding deviance.<sup>1</sup> However, as far back the 1800s, much before the

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<sup>1</sup> Jón Gunnar Bernburg, Marvin D. Krohn & Craig J. Rivera, "Official Labeling, Criminal Embeddedness, and Subsequent Delinquency: A Longitudinal Test of Labeling Theory" (2006) 43 *J. of Research in Crime and Delinquency* 67 ["Official Labeling, Criminal Embeddedness, and Subsequent Delinquency: A Longitudinal Test of Labeling Theory"] at 67-68.

development of labelling theory, Émile Durkheim espoused the repercussions of collectivity in his discussion of social solidarity as it relates to the concept of anomie:

The link of social solidarity to which repressive law corresponds is one whose break constitutes a crime; we give this name to every act which, in any degree whatever, evokes against its author the characteristic reaction which we term 'punishment'. To seek the nature of this link is thus to ask what is the cause of punishment, or, more precisely what crime essentially consists in... ..an act is criminal when it offends strong and defined states of the *conscience collective*. ... We do not deny that every delict is universally condemned, but we take as agreed that the condemnation to which it is subjected results from its delinquent character. Then, however, we are hard put to say in what its delinquent character consists. Is it to be found in an especially serious transgression? Perhaps so; but that is simply to restate the question by putting one word in place of another, for it is precisely the problem to understand what this transgression is, and particularly this specific transgression which society reproves by means of organised punishment and which constitutes criminality. It can evidently come from only one or several characteristics common to all criminological types. The only one which satisfied this condition is the very opposition between a crime, whatever it may be, and certain collective sentiments. It is, accordingly, this opposition which forms the crime, rather than being a derivation of crime. In other words, we must not say that an action shocks the *conscience collective* because it is criminal, but rather that it is criminal because it shocks the *conscience collective*. We do not condemn it because it is a crime, but it is a crime because we condemn it. ...<sup>2</sup>  
[Emphasis original]

Social solidarity through condemnation or labelling applies to the development of the term “organized crime” and “criminal organizations.” These labels do not occur because the entities are inherently criminal, or because their members participate in crime. Rather, these labels are applied because of the perception and response of the collective – namely, that the collective (or *a* collective) feels abhorrence, intimidation and the fear in relation to these sorts of groups, and as a result, these groups become so labelled. Further, when society, through its government, formally denounces or condemns their conduct in law, the label in relation to these groups becomes entrenched, and the collective reaction may perpetuate or enhance.

Similar to Durkheim, Gary S. Becker posited that society creates deviance not by creating social situations that cause deviance, or social factors which cause individuals to act in a

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<sup>2</sup> Emile Durkheim, *Anomie and the Moral Structure of Industry*, trans. by Anthony Giddens, ed. (London: Cambridge University Press, 1972) at 123-24.

deviant fashion. Rather, society creates deviance through the application of rules and sanctions to individuals, and an individual who breaks them is regarded as an “outsider”.<sup>3</sup>

...[S]ocial groups create deviance by making the rules whose infraction constitutes deviance, and by applying those rules to particular people and labeling them as outsiders. From this point of view, deviance is *not* a quality of the act the person commits, but rather a consequence of the application by others of rules and sanctions to an “offender.” The deviant is one to whom that label has successfully been applied; deviant behavior is behavior that people so label.”<sup>4</sup> [Emphasis original].

Essentially, the powerful in society, who are perceived as the “norm”, label and cast out the less powerful in society.<sup>5</sup> They use their social norms as a ruler against which all others are judged, measured and compared,<sup>6</sup> and assign a label to an individual or another group in society that deviates from this norm. The greater the schism between the social norm and the deviancy, the more significant the label. Relations and reactions by the “normal” to the deviant change as a result of that label and become negative. These negative social reactions to the person labelled as deviant cause that individual to react to the stigma.<sup>7</sup> He negotiates his own meaning and activities in relation to these “normal” others.<sup>8</sup> He internalizes his deviant label, and engages in further behaviour in keeping

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<sup>3</sup> Howard S. Becker, *Outsiders* (New York: Free Press, 1968) [*Outsiders*] at 1.

<sup>4</sup> *Ibid.* at 9.

<sup>5</sup> *Ibid.* at 15, 17 and 18.

<sup>6</sup> Michel Foucault, “The Means of Correct Training” in Paul Rabinow, ed., *The Foucault Reader* (New York: Pantheon Books, 1984) [“The Means of Correct Training”] at 196-97.

<sup>7</sup> Edwin M. Lemert, “Societal Reaction, Differentiation, and Individuation” in Charles C. Lemert & Michael F. Winter, eds., *Crime and Deviance: Essays and Innovations of Edwin M. Lemert* (Lanham: Rowman & Littlefield, 2000) [“Societal Reaction, Differentiation, and Individuation”] at 38. Lemert describes the process of labelling an individual who first engages in deviance (also called “primary deviation”), and the subsequent change in behaviour as a result (also called “secondary deviation”), in this way:

The sequence of interaction leading to secondary deviation is roughly as follows: (1) primary deviation; (2) social penalties; (3) further primary deviation; (4) stronger penalties and rejections; (5) further deviation, perhaps with hostilities and resentment beginning to focus upon those doing the penalizing; (6) crisis reached in the tolerance quotient, expressed in formal action by the community stigmatizing the deviant; (7) strengthening of the deviant conduct as a reaction to the stigmatizing and penalties; (8) ultimate acceptance of deviant social status and efforts at adjustment on the basis of the associated role.

<sup>8</sup> David Downes & Paul Rock, *Understanding Deviance*, 5<sup>th</sup> Ed. (New York: Oxford University, 2007) at 177. Downes and Rock describe the impact of labeling and “symbolic interactionism” on deviants as follows:

...Deviants are those who construct activities and assess meanings in the company of others. They are not always constrained. Neither are they always free. They are restricted by circumstances, by the significance which behaviour can attain and by their ability to negotiate meaning. ...

with that label.<sup>9</sup> If he perceives his judges or labellers as incompetent or illegitimately entitled to do so, the deviant or outsider may view *them* rather than *himself* as “outsiders.”<sup>10</sup> As will be discussed in section six “Identity Formation From a Social Psychology Perspective” in this Chapter, this phenomenon accords with a possible outcome within the concept of degradation where a “victim” of a degradation or casting out ceremony attacks the institution imposing the negative identity, and may seek to devalue those attempting to degrade him.<sup>11</sup>

The assignment of a label can occur not only through social definition, but also by individual definition. Some individuals can label themselves even when no societal labelling or social reaction has occurred prior.<sup>12</sup> These individuals must be well-socialized actors; they must agree with societal norms and recognize violations of those norms; and they must be “motivated to conform to social expectations” and be cognizant of the cultural labels that apply to violators of those norms.<sup>13</sup> This phenomenon of self-labelling, without societal imputation of a label, may also result in the formation of a deviant identity:

...A crucial symbolic interactionist insight is that social control is largely a product of self-control (Shott 1979). That is, role-taking abilities enable individuals to view themselves from the imagined perspective of others. One can anticipate and respond in advance to others’ reactions regarding a contemplated course of action.

These considerations suggest that one can also reflexively assess the *meaning* of one’s actual or contemplated behaviors. Those people who contemplate violating social norms or who engage in actual rule breaking do not depend on the presence and reactions of others to assess the meaning of those actions. They can do so imaginatively or vicariously. In short, public, official

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<sup>9</sup> Sean Maddan, *The Labeling of Sex Offenders: The Unintended Consequences of the Best Intentional Public Policies* (Lanham: University Press of America, 2008) [*The Labeling of Sex Offenders: The Unintended Consequences of the Best Intentional Public Policies*] at 22.

<sup>10</sup> *Outsiders*, *supra* note 3 at 1-2.

<sup>11</sup> Andrew J. Weigert, J. Smith Teitge & Dennis W. Teitge, *Society and Identity: Toward a Sociological Psychology* (Cambridge: Cambridge University, 1986) at 47-48. Weigert, Teitge and Teitge cite Harold Garfinkel, “Conditions of Successful Degradation Ceremonies” (1956) 61 *American Journal of Sociology* 420.

<sup>12</sup> Mordechai Rotenberg, “Self-Labeling: A Missing Link in the ‘Societal Reaction’ Theory of Deviance” (1974) 22 *The Sociological Review* 335 [“Self-Labeling: A Missing Link in the ‘Societal Reaction’ Theory of Deviance”] at 337.

<sup>13</sup> Peggy A. Thoits, “Self-Labeling Processes in Mental Illness: The Role of Emotional Deviance” (1985) 91 *The American Journal of Sociology* 221 at 223.

labeling of one's rule breaking is not necessary for the emergence of a deviant identity; there can be private *self*-labeling. ...<sup>14</sup> [Emphasis original].

Essentially, self-labelling also amounts to the adoption of a deviant identity.

How does the adoption of a deviant or criminal identity or the assigning of a deviant or criminal label manifest in deviant or criminal behaviour? Indeed, Mordechai Rotenberg questioned this aspect of labelling theory by asserting that the labelling process cannot magically transform a person into a frog simply by calling him a frog, and nor can it turn that frog into a prince.<sup>15</sup> He asked, “[W]hat makes the label stick from the actor’s perspective?”<sup>16</sup> The answer lies in “secondary deviation” or internalization of the adopted or assigned label.

Edwin M. Lemert distinguished between the two types of symbolic reactions of societal members to the same deviant behaviour during the labelling process – that of primary deviation or deviance and that of secondary deviation or deviance.<sup>17</sup> This distinction illuminates the difference between original behaviour, and socially affected behaviour, and it explains the development of a criminally deviant identity.

...[I]f deviant acts are repetitive and have a high visibility, and if there is a severe societal reaction, which, through a process of identification is incorporated as part of the “me” of the individual, the probability is greatly increased that the integration of existing roles will be disrupted and that reorganization based upon a new role or roles will occur. (The “me” in this context is simply the subjective aspect of the societal reaction.) Reorganization may be the adoption of another normal role in which the tendencies previously defined as “pathological” are given a more acceptable social expression. *The other general possibility is the assumption of a deviant role, if such exists; or, more rarely, the person may organize an aberrant sect or group in which he creates a special role of his own. When a person begins to employ his deviant behavior or a role based upon it as a means of defense, attack, or adjustment to the overt and covert problems created by the consequent societal reaction to him, his deviation is secondary.* Objective evidence of this change will be found in the symbolic appurtenances of the new role, in clothes, speech, posture, and mannerisms, which in some cases heighten

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<sup>14</sup> *Ibid.* at 222.

<sup>15</sup> “Self-Labeling: A Missing Link in the ‘Societal Reaction’ Theory of Deviance”, *supra* note 12 at 337.

<sup>16</sup> *Ibid.* at 335.

<sup>17</sup> Edwin M. Lemert, “Some Aspects of a General Theory of Sociopathic Behavior” in Charles C. Lemert & Michael F. Winter, eds., *Crime and Deviance: Essays and Innovations of Edwin M. Lemert* (Lanham: Rowman & Littlefield, 2000) at 23.

social visibility, and which in some cases serve as symbolic cues to professionalization.<sup>18</sup> [Emphasis added].

Thus, regardless of whether the process occurs through self-labelling or through secondary deviance, the result remains the same – namely, the internalization or acceptance of a label that transforms the social interactions and behaviour of the individual, and likely, the social reactions and behavior of others toward that individual. The transformation of social interactions and reactions reinforces the new label adopted by the individual or imposed on him. Thus, the label manifests into the identity of the individual.

### 3.5.3 Application of Concepts within Deviance and Labelling Theory to the Identity of Outlaws

#### 3.5.3.1 Deviance and Labelling as Exemplified by Organized Crime Outlaws

“...Am I a criminal because I violate a law which the people do not want?”  
asked bootlegging kingpin Rocco Perri, rhetorically, in 1924.<sup>19</sup>

At the stage of primary deviation or deviance, individuals who do not fall within societal norms, become unaccepted by, or cast out from a segment or segments of conventional society. Some of these labelled deviants will become ordinary criminals. Others will become outlaws. The process of internalization and amplification within secondary deviation or deviance as espoused by Lemert and the process of self-labelling lead to the manifestation of the outlaw identity.

Ironically, secondary deviance may stem, to some degree, from an effort to conform to the social perception or portrayal of a deviant.<sup>20</sup> Whether through internalization and

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<sup>18</sup> “Societal Reaction, Differentiation, and Individuation”, *supra* note 7 at 37.

<sup>19</sup> Craig Heron, *Booze: A Distilled History* (Toronto: Between the Lines, 2003) [*Booze: A Distilled History*] at 262. Heron refers to comments made by Rocco Perri during an interview with the *Toronto Star* in 1924.

<sup>20</sup> Richard V. Ericson, *Criminal Reactions: The Labelling Perspective* (Farnborough, Hants.: Saxon House, 1975) at 68. Ericson asserts:

...[T]he ‘secondary deviant’ in the labeling perspective is one who conforms to society’s objective portrayal of him. For example, when crime control agents and other social controllers conceive and act towards the individual on the basis of a particular ‘criminal’ label, the individual’s drift into crime may increase in order to conform with others’ expectations, so that he eventually *is*

amplification, or through self-labelling, criminal deviants use conventional societal values and norms as a reference point that indicates who they are not,<sup>21</sup> and outlaws are not different in this regard. However, outlaws internalize their assigned or self-proclaimed label so as to entrench a new non-conformist identity beyond that of an individual who commits crime.

Anti-Prohibitionist bootleggers may have been seen by many segments of society, particularly temperance associations, as outlaws because they illegally participated in liquor smuggling operations. However, the support that many bootleggers received from large percentages of the Canadian and American populations, demonstrate, in answer to Rocco Perri's question, that no, he and other bootleggers are not criminal simply because they violate a law that many people do not want. Perri, the "King of the Bootleggers" in southern Ontario,<sup>22</sup> and other bootleggers became criminals and outlaws because their actions extended beyond violating Prohibition laws. Their actions and mindset transcended common criminality, and came to be labelled "gangsters" or "mobsters" as they intensely, violently, and murderously vied for territory.

In 1922, Paul Matoff, brother-in-law of renowned distiller and bootlegger Sam Bronfman of the Regina Vinegar Company and Canada Drugs Limited, was shot after have just collected money from an American bootlegger.<sup>23</sup> In 1930, Bessie Starkman, wife of Rocco Perri, was gunned down during a war with Al Capone's outlaw group.<sup>24</sup> Perri himself would disappear in 1944.<sup>25</sup> Rocco Perri would argue against the criminal label assigned to bootlegging outlaws, but he simultaneously admitted living in an underground

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similar to other 'criminals'; he *is* a criminal when he takes the label into account in guiding his own behaviour. The label 'criminal' is the name of the role and he fulfils its expectations as he does in any other role. [Emphasis original].

<sup>21</sup> *Ibid.*

<sup>22</sup> *Booze: A Distilled History*, *supra* note 19 at 245.

<sup>23</sup> *Ibid.* at 246; and Daniel Okrent, *Last Call: The Rise and Fall of Prohibition* (New York: Scribner, 2010) at 151.

<sup>24</sup> *Booze: A Distilled History*, *supra* note 19 at 246.

<sup>25</sup> *Ibid.*

world that administered its own sense of justice,<sup>26</sup> and thus, his protestations seem flimsy at best.

A very powerful Mafiosi member in Canada, Paul Volpe, would explain the ostracization of members of La Cosa Nostra in society, and thus, the reasons why police targeted such groups:

*...Deep down they [the police] hate ethnics ... and if they see an ethnic family that is doing good, they're jealous of it and say, "How come he's got it and I haven't?" ... Who the hell would be a policeman in the first place? Who would take a job as a policeman? ... They're ninety per cent drunks anyway.*<sup>27</sup>  
[Emphasis original].

Notably, Volpe was born in Canada, but became connected to Mafia Families in the United States that had ties to Italy and that had Italian members. His words evince the “we” and “they” dichotomy that exists not only from the perspective of conventional law-abiding members of society who label criminal deviants, but also from the perspective of organized crime members who look back at larger society.

Outlaw motorcycle gangs, such as the Hells Angels, exemplify the metamorphosis from simply receiving a social label of criminal deviant to internalizing an outlaw identity. Not only do they engage in criminal activity that deviates from acceptable social norms governing behaviour, but they also embrace their label, reject the stigma imposed by conventional society, and perpetuate their identity through criminal associations with other outlaws. Most, if not all, Hells Angels members have been previously labelled as a criminal or deviant, and seek interaction with other criminals or deviants for social as well as economic purposes. That a significant portion of full patch members of the Hells Angels in Canada have criminal records<sup>28</sup> indicates prior negative social interactions and previous criminal deviancy within society. The disenfranchisement of these individuals within society (perhaps through differential opportunity to achieve socio-cultural values,

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<sup>26</sup> *Ibid.* at 262. Rocco Perri acknowledged that the criminal milieu operated outside the legal system of conventional society.

<sup>27</sup> James Dubro, *Mob Rule: Inside the Canadian Mafia* (Toronto: Macmillan of Canada, 1985) at 138. William Macadam conducted the interview of Paul Volpe for the television program *Connections*, and this excerpt aired in June of 1977.

<sup>28</sup> *R. v. Violette*, 2009 BCSC 1557, [2009] B.C.J. No. 2262 (B.C. S.C.) at para. 5.

perhaps through the application of a deviant label, or perhaps due to a combination of these events), draws these individuals to the power of the gang. When the identity of the gang is bestowed on them, they accept it, and internalize what conventional society and what their deviant outlaw group say that they are. In this way, after social deviants join violent and intimidating outlaw motorcycle gangs within the criminal milieu, and spend months or years becoming members, they adopt the identity of outlaw. Some full patch Hells Angels members have related the great value and significance in obtaining full membership, and in achieving the right to wear the winged death head and the right to use the Hells Angels name.<sup>29</sup>

The history of outlaw motorcycle gangs in North America,<sup>30</sup> demonstrates the transformation from labelling to internalizing an outlaw identity. The outlaw motorcycle gang label resulted from the incident in Hollister, California on July 4<sup>th</sup> weekend in 1947,<sup>31</sup> and the subsequent negative depiction of bikers in *Life* magazine<sup>32</sup> portrayed an evil image of bikers, and their corresponding reputation began. However, the social label of outlaw motorcycle gangs only became entrenched when the American Motorcyclist Association used the designation “one-percenters” to refer to outlaw motorcycle clubs “that do not want to abide by society’s laws....”<sup>33</sup> Ralph “Sonny” Barger, Hells Angel

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<sup>29</sup> *Ibid.* at para. 18. Ronaldo Lising described the significance of being a Hells Angels member in an intercepted communication on July 13, 2004:

18 Lising goes on to tell Plante about his perspective on being in the HAMC:

No, but listen man, ya know I've been in the club for fuckin' s-, seven years now. Fuck, it took a long time to make fuckin', I was broke for a long time. I was broke. The day I got my patch my fuckin' jewelry was in the pawn shop for sale, in a store for sale, man, broke.

It took me a long time to make money and here he is with an opportunity of a lifetime and he's like, oh yeah, yeah, ya know. Okay grow up, right, I mean you're gonna have a fuckin' few bucks in your pocket and be a Hell's Angel? Fuck man. You know that's like the top of my world.

<sup>30</sup> This history is discussed in as discussed in subsection one “The Origins of Outlaw Motorcycle Gangs in Canada” of section four “Outlaw Motorcycle Gangs” of Chapter Two, and as mentioned in subsection four “Social Construction of Organized Crime Through Media” of section two “Social Constructionism” in Chapter Three.

<sup>31</sup> Brock Yates, *Outlaw Machine* (Boston: Little, Brown and Company, 1999) at 11.

<sup>32</sup> *Ibid.* Yates refers to an issue of *Life* magazine from July 21, 1947 at page 31.

<sup>33</sup> *R. v. Lindsay*, 2005 CanLII 24240, [2005] O.J. No. 2870 (Ont. S.C.J.) at para. 205. Then-Staff Sergeant Jacques Lemieux opined that a “one percenter” is a motorcycle club that is a criminal organization. Essentially, one percent of bikers are outlaw bikers.

and former President of the Hells Angels, explained the application and subsequent internalization of that label by outlaw motorcycle gangs:

Looking down on the fighting Hell's Angels was the American Motorcyclist Association's way of covering their asses and trying to clean up the reputation of bike riders in general. *In 1948, after the Hollister incident cut deep into their cred, they labeled rowdy, outlaw motorcyclists the "one-percenters." According to AMA propaganda, one percent of motorcycle riders were the outlaw clubs giving bike riding a bad name while the other ninety-nine percent were good old-fashioned ass-kissing, law-abiding citizens.*

One particular incident occurred less than a year after I took over the Oakland club. We were down in the small town of Angels Camp, California, to visit an AMA gypsy tour road rally. While over 3,700 riders joined in this AMA-sanctioned event, we were considered a disruption. During the gypsy tour, two Sacramento Hell's Angels raced out of town at speeds of over one hundred miles per hour. As they crested on top of a hill, their bikes sailed in the air, crashing down on a pack of riders coming up the hill. Both Sacto members were killed, and the accident scene was pretty ugly.

The AMA wore a big black eye after the papers wrote about it, and they decided to shitcan any such future events. Oddly enough, while the AMA looked bad, the publicity sparked even more enmity toward the Hell's Angels from the straight world.

Since then, we made it our mission to be a thorn in the AMA's ass. We held a big meeting in San Francisco and all the clubs from Southern California got together with all the Bay Area clubs, and it wasn't just Hell's Angels either. There were representatives from other bike clubs in the state, like the Executioners and the Galloping Geoses. *That's when we proudly adopted the name that the AMA shoved on us, the One-Percenters. We sketched a One-Percenter design, a triangle with a "1%" symbol. After drawing it up, George Wethern and I went out and got out tattoos that night. Later we even had patches made.* But the harmony soon ceased. When all the other clubs wanted to be treated as equals, the Hell's Angels ended up leaving the One-Percenters. We didn't feel they were equal, and no matter what, we weren't ever going to treat other clubs the same way we treated ourselves. ...<sup>34</sup> [Emphasis added].

While the Hells Angels later rejected this label, they did so out of a deeply ingrained identity that led them to perceive themselves as better than all other "one-percenters" – that is to say, more powerful than all outlaw motorcycle gangs. Some Hells Angels still wear that patch on their leather vests.

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<sup>34</sup> Ralph "Sonny" Barger, Keith Zimmerman & Kent Zimmerman, *Hell's Angel: The Life and Times of Sonny Barger and the Hell's Angels Motorcycle Club* (New York: HarperCollins, 2001) at 40-41.

Aboriginal street gangs also have either self-labelled or have internalized an organized crime outlaw identity as described by the concept of secondary deviation.

Where does labeling begin? One can readily see that labeling can be very much a result of self-identification. When one decides to join an organization such as the Manitoba Warriors, it is an act of self-labeling. However, when such groups get involved in criminal activities another form of labeling takes over. Societal labeling such as the term “gang” carries with it a cultural definition that is neither positive or desirable.

When members of, say, the Manitoba Warriors or Indian Posse get involved in criminal activities, these societal definitions are automatically applied to them. The fact that these groupings may lack organization or leadership culture of “white” gangs or lack the capacity to be involved in “organized gang crime” is to the general public of little or no meaning. After all, for the general public and their politicians – crime is offensive and needs to be controlled if not stamped out. In essence, “Aboriginal youth gangs” have become by their self-labeling, the enemy to be defeated with the full force of the law and law enforcement.<sup>35</sup>

Whether the above allegations of Ovide Mercredi that the self-label alone results in law enforcement casting its social control net over Aboriginal members of gangs and that Aboriginal gangs such as the Manitoba Warriors are not like other organized crime groups, is debatable. Evidence of the nature of Aboriginal street gangs, and the application of the *Criminal Code* definition of “criminal organization” to the Manitoba Warriors by the Manitoba Court of Queens Bench in *R. v. Pangman*,<sup>36</sup> dispute some of these postulations about lack of organization and leadership. Regardless, one can still conclude that however the act of labelling occurs, whether by self-labelling or by labelling in primary and then secondary deviation, the effects manifest through negative treatment by other segments of society, such as law enforcement institutions and non-Aboriginal non-outlaw community members.

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<sup>35</sup> Ovide W. Mercredi, *Aboriginal Gangs: A Report to the Correctional Service of Canada on Aboriginal Youth Gang Members in the Federal Corrections System* (October 2000) online: <<http://www.csgv.ca/counselor/assets/AboriginalGangs.pdf>> [*Aboriginal Gangs: A Report to the Correctional Service of Canada on Aboriginal Youth Gang Members in the Federal Corrections System*] at 7-8.

<sup>36</sup> *R. v. Pangman*, 2001 MBCA 64, [2001] M.J. No. 217 (Q.L.); and Manitoba Court of Queen’s Bench decisions in *R. v. Pangman*, (1999), 143 Man. R. (2d) 161, [1999] M.J. No. 396 (Q.L.); (1999), 141 Man. R. (2d) 143, [1999] M.J. No. 475 (Q.L.); (2000), 141 Man. R. (2d) 200, [2000] M.J. No. 5; [2000] M.J. No. 31 (Q.L.), (2000), 45 W.C.B. (2d) 155; [2000] M.J. No. 51 (Q.L.), (2000), 45 W.C.B. (2d) 56; (2000), 144 Man. R. (2d) 144, [2000] M.J. No. 60 (Q.L.); (2000), 144 Man. R. (2d) 192, [2000] M.J. No. 123 (Q.L.); (2000), 32 C.R.(5<sup>th</sup>) 272, [2000] M.J. No. 125 (Q.L.); 2000 MBQB 47, [2001] M.J. No. 235 (Q.L.); 2000 MBQB 85, [2000] M.J. No. 300 (Q.L.). This case dealt with the criminal organization provisions as they existed in 1997 prior to the amendments in 2001.

### 3.5.3.2 Evidence of Deviance and Labelling in Relation to Gangs

Empirical evidence relating to labelling theory generally, and youth gangs specifically, supports the assertions that the labelling theory accurately accounts for some of the processes that give rise to an outlaw identity. Some empirical research generally supports the labelling perspective – that is to say, that some individual labels strongly or moderately affect whether an individual will engage in secondary deviance or crime.<sup>37</sup> Some empirical research also demonstrates that public labelling increases secondary deviance, and greater deviance amplification.<sup>38</sup> Further, formal criminal proceedings play a role in embedding deviance.<sup>39</sup> Young persons who received juvenile justice intervention, and thus official deviant or criminal labelling, were significantly more likely to be a gang member after such intervention, than those youths who did not.<sup>40</sup> However, labelling alone within the criminal justice system may not account for gang membership and particularly gang membership by individuals of ethnic minority groups.<sup>41</sup>

Empirical research that links the effects of labelling and deviant associations, also links labelling theory with the concepts of differential association and subculture as they relate to identity. Empirical evidence shows that deviant groups or gangs shelter members from stigma received in social interactions with non-deviants or non-gang members.<sup>42</sup> It shows that association with delinquent peers contributes to criminal embeddedness.<sup>43</sup> It shows

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<sup>37</sup> *The Labeling of Sex Offenders: The Unintended Consequences of the Best Intentional Public Policies*, *supra* note 9 at 31.

<sup>38</sup> Sean Maddan, *The Labeling of Sex Offenders: The Unintended Consequences of the Best Intentional Public Policies* (Lanham: University Press of America, 2008) at 32.

<sup>39</sup> Jón Gunnar Bernburg, Marvin D. Krohn & Craig J. Rivera, “Official Labeling, Criminal Embeddedness, and Subsequent Delinquency: A Longitudinal Test of Labeling Theory” (2006) 43 *J. of Research in Crime and Delinquency* 67 at 69.

<sup>40</sup> Jón Gunnar Bernburg, Marvin D. Krohn & Craig J. Rivera, “Official Labeling, Criminal Embeddedness, and Subsequent Delinquency: A Longitudinal Test of Labeling Theory” (2006) 43 *J. of Research in Crime and Delinquency* 67 at 77. Bernburg, Krohn and Rivera assert that juvenile justice intervention increases gang membership by a factor of 5.2.

<sup>41</sup> Robert M. Gordon, “Criminal Business Organization, Street Gangs and “Wanna-Be” Groups: A Vancouver Perspective” (2000) 42 *Canadian Journal of Criminology* 39 at 55. Gordon asserts that individuals from ethnic minorities may be more often surveyed and arrested, and thus, prosecuted.

<sup>42</sup> “Official Labeling, Criminal Embeddedness, and Subsequent Delinquency: A Longitudinal Test of Labeling Theory”, *supra* note 1 at 82.

<sup>43</sup> *Ibid.* at 71.

that membership in a delinquent gang contributes to criminal embeddedness.<sup>44</sup> Thus, earlier gang membership significantly increases the chance of subsequent gang membership,<sup>45</sup> as well as subsequent delinquency.<sup>46</sup> Such data indicates that labelling individuals augments the breadth of deviant associative ties, and increases deviance and perpetuates deviance.

Evidence of the severe nature of criminal embeddedness and outlaw identity via gang membership is demonstrated by the comments of Indian Posse member Trevor Lacasse who says, “I regret ever picking up a rag.”<sup>47</sup> His comments evince the power of the symbol of the gang bandanna – that is to say, that the rag marks him as a member. His tattoos also permanently mark him, and permanently provide him with an identity and sense of belonging. Lacasse has certain meanings for every tattoo that he has on his body, and in spite of his regret in “picking up a rag”, he will never take them off, such as his “pride” referring to a tattoo of that word along the underside of both of his forearms.<sup>48</sup> He has been asked to take them off, but will never take them off.<sup>49</sup> He is not “heavy into” the gang any more, but he will never take off his tattoos. They are there for life.<sup>50</sup> He explains, “For me to take these off would just be like ...just like putting a knife into the heart, ya know, saying, ‘Fuck that you never had any part of these guys no more’ ...I’m part of them forever.”<sup>51</sup>

Like tattoos, once imposed, labels are difficult to remove. Even when an organized crime outlaw attempts to de-self-label, the process is arduous and may not readily be accepted by members of conventional society or the criminal milieu. Not only is the decision to de-self-label difficult and conflicting, but pressures from the organized crime group may

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<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid.* at 77.

<sup>46</sup> *Ibid.* at 80.

<sup>47</sup> Catherine Bainbridge, Katherine Cisek & CBC Newsworld, *Indian Posse: Life in Aboriginal Gang Territory* VHS (Montreal: Wild Heart Productions Inc., 1998) at 12:27.

<sup>48</sup> *Ibid.* at 34:26.

<sup>49</sup> *Ibid.* at 34:31.

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.* at 34:37.

stymie efforts to extricate oneself. The Ontario Superior Court of Justice in *R. v. Myles*<sup>52</sup> noted this phenomenon:

**14** I then turn to the other change in circumstances, that is, Mr. Myles' alleged resignation from the Hells Angels Motorcycle Club that is said to have occurred on June 15, 2007. There are a number of problems with this assertion. One is that the resignation is not, on Mr. Myles' own evidence, complete. It cannot be completed until Mr. Myles "dates" his Hells Angels tattoo and that cannot be done while he is in a detention facility. Another is the fact that a member who has resigned can apply for re-admission into the Hells Angels, a fact that Mr. Myles admitted. While Mr. Myles contended that this process would take at least two years, I have doubts that it would take an individual, such as Mr. Myles, who has been a member of this, or a predecessor, club for some twenty years, and who has held a senior position within that organization, such a length of time to rejoin his former comrades.

**15** More importantly, however, is the manner in which this resignation came about. While Mr. Myles contends that he had been contemplating this action for a few years, the fact is that he never acted upon it until he had twice been denied his release as a direct consequence of his membership in the Hells Angels Motorcycle Club. He did not act on it in late 2000 when the Hells Angels absorbed most of the members of the Para-Dice Riders, the club of which Mr. Myles was then a member. Instead he decided to accept membership in the Hells Angels even though his former wife urged him not to do so.

**16** Further, Mr. Myles did not resign from the Hells Angels at any later point, even though he knew that his current wife objected to his membership in the Hells Angels as did his father-in-law. Indeed, not only did Mr. Myles not resign from the Hells Angels, he put himself forward for, and was elected to, the position of Vice-President of the Toronto chapter and was re-elected to that same position just last year.

**17** In addition, throughout the time that Mr. Myles says that he was debating giving up his membership in the Hells Angels, the evidence suggests that he was actively engaged in a significant cocaine transaction; that he was involved in attempting to resolve a serious dispute that had arisen regarding another member of the Toronto chapter over a large transaction in GHB; and he was directly involved in questioning the police agent regarding whether he was, in fact, a police agent when suspicions arose regarding that individual. Further, Mr. Myles' home was used in connection with some of these events including being the place where the police agent picked up a kilogram of cocaine and where the questioning of the police agent occurred. Still further, when the police arrested Mr. Myles and searched his house, they found a number of sheets on Hells Angels' members with detailed personal information - the purpose of which, it is suggested, was to ensure that members would not inform on the Hells Angels because the organization would know the whereabouts of members' families.

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<sup>52</sup> [2007] O.J. No. 4985 (Q.L.) (Ont. S.C.J.) [*R. v. Myles*].

18 I do not believe that it would be giving cynicism too much sway in those circumstances to question the genuineness of Mr. Myles' resignation. However, even if Mr. Myles has sincerely and irrevocably severed his association with the Hells Angels Motorcycle Club, I am not convinced that that fact would materially change the analysis that led Madam Justice Wilson to her conclusion that Mr. Myles' detention was justified. Indeed, I believe that Mr. Myles' father-in-law put the issue into its proper context when he said in his evidence that Mr. Myles' resignation from the Hells Angels was "too little, too late, perhaps".

19 In terms of the secondary grounds, just because Mr. Myles is no longer a member of the Hells Angels does not mean that he is still not susceptible to direction at the instance of others who are still members of that club. To conclude otherwise is to ignore the very nature, structure and history of that organization. I would note in that regard that Mr. Myles carefully followed the rules to resign from the Hells Angels. That could be because he remains respectful of the organization or because it [*sic*] fears it. It would also ignore Mr. Myles' statement that he was "conflicted" in his decision to resign, a suggestion that he still feels some considerable degree of attachment to the organization.

The stickiness of negative labels necessitates the adoption of anti-organized crime measures that do not formally label, stigmatize and degrade individuals.

#### 3.5.4 Insights for Anti-Organized Crime Measures According to Deviance and Labelling Theory

The use of labelling theory in conjunction with social constructionism reveals, in part, the reasons that labels embed criminal deviancy. At the very least, such an interlacing of theory brings to light the inherent dangers within the social construction of labels. The crystallization and rigidity of language<sup>53</sup> cement the application of criminally deviant labels to individuals in society, and entrench subsequent negative social interactions between the deviant and non-deviant. The historicity of language<sup>54</sup> leads to stereotyping, and stereotyping often accompanies the application of a label, and potentially a false label

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<sup>53</sup> Peter L. Berger & Thomas Luckmann, *The Social Construction of Reality*, 1<sup>st</sup> ed. (Garden City: Doubleday, 1966) at 36.

<sup>54</sup> *Ibid.* at 35-36 and 55. While Berger and Luckmann use the term "historicity" in relation to "social institutions", similar elements apply to language. Berger and Luckmann describe the merits and demerits of language as it conveys a constructed reality, *ibid.* at 36:

...[L]anguage is capable of becoming the objective repository of vast accumulations of meaning and experience, which it can then preserve in time and transmit to following generations.

that still results in secondary deviance.<sup>55</sup> In the context of organized crime, although gangs have distinctive characteristics, the label of “gang” sweeps diverse groups into one category. For instance, labelling of imprisoned Aboriginal offenders as gang members or non-gang members leads to more discrimination than the usual racism alleged to occur in prison institutions.<sup>56</sup> Aboriginal prisoners labelled as gang members allegedly have less access to and provision of institutional programs.<sup>57</sup> Aboriginal offenders generally also may fail to qualify for short-term release, release to community facilities, or parole more often than non-Aboriginal offenders.<sup>58</sup>

Stereotyping as a negative effect of labelling also prevents the consideration and implementation of proper solutions to the gang problem, and even increases deviancy of gang members who become what others consider them to be:

...The public and researchers commonly stereotype gangs, often assuming there is no variation between them and that all gangs develop the worst behavior displayed by any one. “A gang is a gang is a gang” (Moore, “Gangs” 28) attitude prevails when gangs actually have diverse traditions and organization and vary between city, community, and neighborhood (Hagehorn 167; Miller 282; Monti 9). *This stereotyping is often accompanied by two dangerous side effects. First, when gang members are labeled and treated as though they belong to the most deviant gang, they often act like members of that gang (Huff 313). Secondly, when*

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<sup>55</sup> Jana Marie Grekul & Patti LaBoucane-Benson, *An Investigation into the Formation and Recruitment of Aboriginal Gangs in Western Canada* (Ottawa: Aboriginal Corrections Policy Unit, Public Safety Canada, 2006) [*An Investigation into the Formation and Recruitment of Aboriginal Gangs in Western Canada*] at 23-24; and Robert M. Gordon, “Criminal Business Organization, Street Gangs and “Wanna-Be” Groups: A Vancouver Perspective” (2000) 42 *Canadian Journal of Criminology* 39 at 47-48. Grekul and LaBoucane-Benson describe, *ibid.* at 42, the negative effects of false labelling in the context of aboriginal street gangs:

How does labelling contribute to gang involvement? Let us turn to one of our ex-gang members for his insight on the topic. “The police are not trusted because of a history of racism, like finding gang members, taking off their shoes and leaving them in rival gang territory.” This individual also describes how “police called them a gang so they began to act that way and identifying themselves that way”. It is not a far leap to see how disenfranchised youth labelled as gang members by authorities would fall into that role relatively easily. For how long can one protest one’s innocence (or in this case, non-gang affiliation) before it seems futile to do so and easier to just concede? Considering the larger “battles” these children are faced with such as family abuse, substance abuse, violence, and school problems, it is understandable that fighting a false label may result not only in concession but a “giving in”, particularly when family members or peers are encouraging the young person to in fact join a gang. At any rate, whether directly or indirectly, it appears that labelling plays a key role in the creation and perpetuation of gang involvement.

<sup>56</sup> *Aboriginal Gangs: A Report to the Correctional Service of Canada on Aboriginal Youth Gang Members in the Federal Corrections System*, *supra* note 35 at 7.

<sup>57</sup> *Ibid.*

<sup>58</sup> *Ibid.*

*stereotypes and second guessings are used as the basis for public policy and reform efforts, the wrong treatment is often prescribed to the problem* (Hagehorn 169; Miller 282; Moore, “Gangs” 32).<sup>59</sup> [Emphasis added].

The inability of a socially constructed label to accurately set forth gang differences, necessitates consideration of whether a socially constructed legal definition may capture all gangs by relying on stereotypical assumptions, and thus, will not accurately administer justice, nor deter and prevent gangs from engaging in criminal activities.

The connections between labelling theory and theories of differential association, social constructionism, and social psychology (which will be discussed in Chapter Six next) explain the significance of deviancy and labelling in the creation of otherness and outlaw identities. These connections also suggest the ways in which society maintains and perpetuates a collective conventional identity, and paradoxically, maintains and perpetuates criminally deviant or outlaw identities.

...[L]abelling theory offers the important component of stigmatization by authorities, whether they are parents, teachers, police officers, or others. Negative labels can propel the marginalized youth further into the so-called deviant subculture. Having been rejected by mainstream society, the welcoming arms of their fellow comrades, similarly labelled, seem like the best and perhaps the only choice for support and feelings of belonging. In a sense then, labelling theorists credit social control agents and other authority figures in some instances with the creation, and certainly the perpetuation and solidification of deviant groups and subcultures. The suggestion is that if we could avoid labelling, we could prevent the formation of criminal careers, and for our purposes in this paper, the attractiveness and “staying power” of gangs.<sup>60</sup>

Further, the ongoing demonization of gang and organized crime outlaws makes efforts to understand their origins, and the ways in which society ought to address their outlawry, less clear and more difficult.<sup>61</sup>

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<sup>59</sup> Kristin M. Peterson, *Exploring Anti-Gang Advertising: Focus Group Discussions with Gang Members and At-Risk Youth* (M.A. Thesis, Greenspun School of Communication, University of Nevada, 1994) [unpublished] at 18.

<sup>60</sup> *An Investigation into the Formation and Recruitment of Aboriginal Gangs in Western Canada*, *supra* note 54 at 40.

<sup>61</sup> E.J. Dickson-Gilmore & Chris Whitehead, “Aboriginal Organized Crime in Canada: Developing a Typology for Understanding and Strategizing Responses” (2002) 7 *Trends in Organized Crime* 3 at 19; and Michael C. Chettleburgh, *Young Thugs: Inside the Dangerous World of Canadian Street Gangs* (Toronto: HarperCollins, 2007) at 26. Chettleburgh opines:

The application of deviance and labelling theory to gangs suggests that labelling individuals negatively affects subsequent social interactions between the declared deviants and non-deviants, and casts them out or outlaw them from conventional society. This process can lead those labelled to adopt the assigned deviant, criminal or outlaw identity, and perpetuate their identity through criminal associations with other deviants or outlaws. These phenomena suggest that anti-organized crime approaches ought to avoid formal negative labels and stigmatization in order to prevent potential deviants or outlaws from being ousted from larger society; to maintain or foster positive interactions between perceived deviants or outlaws and members of conventional society; and to reduce the internal cohesion and power of gangs or organized crime outlaws. Criminal law measures may remedy some of these requisites. Civil law and non-legal measures may provide other, better or more effective solutions.

These insights will be examined in Chapter Four, section six “Requisite Five for Anti-Organized Crime Measures”, and section eight “Requisite Seven for Anti-Organized Crime Measures.”

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...Perception is our biggest obstacle to ending gang violence. Demonizing gang members as the evil other, the barbarians at the gate—and therefore requiring the stern hand of our government protectors—will almost certainly cloud our understanding of what to do about the gang problem.

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### 3.6 IDENTITY FORMATION FROM A SOCIAL PSYCHOLOGY PERSPECTIVE

#### 3.6.1 Overview

Social psychology<sup>1</sup> weaves its way into the patchwork of theory pertaining to criminal organization outlaws and identity in the ways that it suggests individuals, singularly, and collectively as a group, form identities<sup>2</sup> in society. Social psychology asserts that identity is constituted from self and society.<sup>3</sup> It is a socially constructed reality.<sup>4</sup> Self is developed through self-objectification which occurs when the self, “as an object among a world of objects”, experiences interaction with other objects.<sup>5</sup> The self is realized or defined through subjectivation based on experiences without the presence of others, or through objectivation based on experiences with others, such as another individual or group.<sup>6</sup> Only this latter category of experience, which deals with events that result in an individual orienting himself to the presence of others, is relevant within social psychology.<sup>7</sup> Group objectifications also can shape the development of self, and occur

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<sup>1</sup> C. Norman Alexander, Jr. & Mary Glenn Wiley, “Situated Activity and Identity Formation” in Morris Rosenberg & Ralph H. Turner, eds., *Social Psychology: Sociological Perspectives* (New York: Basic Books, Inc., 1981) [“Situated Activity and Identity Formation”] at 269. Alexander and Wiley note the broad or amorphous nature of social psychology, and cite G.W. Allport, “The Historical Background of Modern Social Psychology” in G. Lindzey & E. Aronson, eds., *The Handbook of Social Psychology*, Vol. 1 (Reading: Addison-Wesley, 1968) at 3 in order to explain the essence of the theory:

Despite major differences of theory and method there is general subscription to Allport’s definition of social psychology as “...an attempt to understand and explain how the thought, feeling, and behavior of individuals are influenced by the actual, imagined, or implied presence of others”....

<sup>2</sup> Andrew J. Weigert, J. Smith Teitge & Dennis W. Teitge, *Society and Identity: Toward a Sociological Psychology* (Cambridge: Cambridge University, 1986) [*Society and Identity: Toward a Sociological Psychology*] at 53 define “identity” as follows:

*Identity* is a typified self at a state in the life course situated in a context of organized social relationships.

At *ibid.* at 40, referring to Gregory P. Stone, “Appearance and the Self” in Arnold M. Rose, ed., *Human Behavior and Social Processes* (Boston: Houghton Mifflin, 1962), Weigert, Teitge and Teitge explain the term “identity” in this way:

Identity is a “typified” or socially expressed dimension of self (Stone 1962). An individual has one self that becomes situationally typified through a variety of identities. Identities constitutes [*sic*] the “social self,” or self in the context of social action.

<sup>3</sup> *Ibid.* at 32 and 34. In the context of the individual self, the term “I” applies, and the terms “me”, “you”, “he” and “she” reflect the context of self with others. *Ibid.* at 32. A collective identity becomes “we” or “they.” *Ibid.* at 33.

<sup>4</sup> *Ibid.* at 35.

<sup>5</sup> *Ibid.* at 43.

<sup>6</sup> *Ibid.*

<sup>7</sup> “Situated Activity and Identity Formation”, *supra* note 1 at 273.

when a group serves as the reference point or reference reality that defines the individual based on the association of the individual and others in that group.<sup>8</sup>

Similar to social constructionist assertions that social reality affects and shapes the identities of individuals and that individuals have variable and constrained ability to shape their own identities,<sup>9</sup> and similar to the labelling theory which shows the influence of social interaction on identity,<sup>10</sup> the social psychology perspective asserts that the experience and interaction of individuals continuously shapes identity as a social reality.<sup>11</sup> Identity is formed or constructed through social and symbolic interaction or situated activities<sup>12</sup> in relation to objects with meaning, such as others. Acts of bestowal or appropriation of meaningful objects, are met with responsive acts of acceptance or rejection.<sup>13</sup> An individual expresses something about himself to others, and in so doing,

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<sup>8</sup> *Society and Identity: Toward a Sociological Psychology*, *supra* note 2 at 45.

<sup>9</sup> *Ibid.* at 2-3. In contrast, reductionist social constructionists assert that individuals create their own identities.

<sup>10</sup> Sean Maddan, *The Labeling of Sex Offenders: The Unintended Consequences of the Best Intentional Public Policies* (Lanham: University Press of America, 2008) at 23-24.

<sup>11</sup> *Society and Identity: Toward a Sociological Psychology*, *supra* note 2 at 30.

<sup>12</sup> "Situating Activity and Identity Formation", *supra* note 1 at 273. Alexander and Wiley explain that "situated activity" provide the conditions for identity formation:

...Conduct becomes situated activity when it is anchored outside the self and constrained by presumed monitoring. Thus, we define situated activity as conduct in the symbolically defined space and time within which an actor presumes that events are being or might be monitored by another. The monitoring does not have to coincide with the action, as when traces are left or accounts are planned, and ... it does not have to be actual monitoring, merely presumed or potential.

<sup>13</sup> *Society and Identity: Toward a Sociological Psychology*, *supra* note 2 at 31. Weigert, Teitge and Teitge cite George H. Mead, *Mind, Self & Society* (Chicago: University of Chicago Press, 1934) in their description of the process of identity development:

As a totally social production, identity is a humanly constructed, defined, and sustained meaningful object. To be recognizably human, an organism must be interpreted as a meaningful identity; that is, as an object. An "object" is any reality toward which humans symbolically organize their responses and thus give it a meaning (Mead 1934). The object is socially meaningful to the extent that responses by others and by self fit together to reach the goals and embody the intentions of interacting individuals, as well as to represent the group's collective action. Yet human identity is a special meaningful object: It is both totally social and uniquely personal; it results from varying degrees of appropriation by self and/or bestowal by others. The dramatic quality of life flows in part from the endless negotiations of identities as self attempts to appropriate identities that others do not bestow, or others attempt to bestow identities that self does not appropriate.

How is it that identities are selves as "meaningful objects" that individuals can bestow or withhold, and appropriate or reject? The answer to this question derives from the particular reality of human identity. Identity is a definition that transforms a mere biological individual into a human person. It is a definition that emerges from and is sustained by the cultural meanings of social relationships activated in interaction. At the everyday empirical level, identity is available

affects their perception of him,<sup>14</sup> and in turn, he is formed or changed through their reaction or expression to him. As this process repeats and continues, society affects the behaviour of an individual, and in so doing, shapes an individual's identity. Identity, in turn, then affects behaviour.

Unlike other theories discussed in this Chapter, social psychology brings a different perspective to the collection by explaining the process or processes by which individuals internalize and develop an identity – namely, the process of degradation and the act of display. This section will not outline the essential tenets of social psychology, but rather, it will focus on only two concepts within this theory that have relevance to identity formation. Namely, it will explain and apply “degradation” and “display” in relation to organized crime outlaws.

As examination of these concepts in social psychology in this section will reveal the following:

Insight 11. Anti-organized crime measures in Canada should increase positive social and symbolic interaction or situated activities with individuals who are at risk of criminal deviance or outlawry.

Insight 12. Anti-organized crime measures should avoid degradation of organized crime outlaws through social and legal processes.

Insight 13. Anti-organized crime measures should diminish display of negative or violent identities of organized crime outlaws in order to decrease their internal cohesion and the power of their reputation.

### 3.6.2 Identity Formation From a Social Psychology Perspective

#### 3.6.2.1 “Degradation” Within Social Psychology

Within the social psychology is the concept of “degradation ceremony” which bears a marked resemblance to the process of labelling:

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through language, the systems of codes by which humans define self and other. An empirically adequate treatment would have to include the myriad forms available in each historical period for defining selves. We intend “definition” in a broad sense to include nominal as well as qualifying terms. Indeed, the “languages” of gestures and appearances are also included.

<sup>14</sup> “Situating Activity and Identity Formation”, *supra* note 1 at 274.

Garfinkel (1956) outlines *an interaction process in which a negative identity is forcefully imposed on an unwilling recipient*. A young woman claiming innocence is publicly proclaimed guilty of murder at a criminal trial in a court of law and forcefully jailed for life; and adult man is publicly court-martialed, stripped of all privileges, and dismissed from the army on charges of collaborating with the Vietcong against his own country; a young child is publicly denounced for cheating on an English test, accused of violating the standards of the school, and given an F grade in front of his classmates – each of these scenarios represents that Garfinkel calls a “degradation ceremony.”

*A degradation ceremony is “any communicative work between persons, whereby the public identity of an actor is transformed into something looked on as lower in the local scheme of social types ...”* (Garfinkel 1956: 420). If we assume that no normal citizen desires a negative or “lower” identity in the moral ranking, then a degradation ceremony involves the coercive imposition of a demeaning identity on an unwilling recipient. The ceremonial order of human life includes the offering of deference, or appreciation for a person, and the enactment of demeanor, or the expression of the unique valued qualities of a person (Goffman 1967). In a degradation ceremony, the value of a person is negated: A person, like bad money, is depreciated; and he or she is forced to act in a demeaning way, like sitting in a corner, wearing a dunce cap, kneeling obeisantly, or kissing a superior’s foot.

*Degradation ceremonies are not always successful, however. Persons whose identities are being devalued may actually seek to devalue them or, paradoxically, succeed in devaluing the identities of those presiding over the ceremony. In these cases, the ceremony is used by the “victims” to attack the reigning institutional order. By turning the tables, the victims of the ceremony degrade the identities of those presiding over it. ...*<sup>15</sup> [Emphasis added].

In this degradation process, the act of imposing or attempting to impose a morally inferior identity resembles the process of imposing a deviant label within the concept of primary deviance. The acceptance of degradation or the internalization of a societal label during secondary deviance can result in the formation of a new identity, such as a morally inferior, criminally deviant, or outlaw identity. And, like the process of internalization in secondary deviance, the degradation process seemingly contemplates a situation where the individual who is subject to degradation or labeling, rebels against the degradation or labeling and may maintain an adherence to societal values and institutional norms and does not adopt a new identity. As Becker noted, if a person being labelled perceives his judges or labelers as incompetent or illegitimately entitled to do so, he may view *them*

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<sup>15</sup> *Society and Identity: Toward a Sociological Psychology*, supra note 2 at 47-48. Weigert, Teitge and Teitge cite Harold Garfinkel, “Conditions of Successful Degradation Ceremonies” (1956) 61 *American Journal of Sociology* 420.

rather than *himself* as the “outsider.”<sup>16</sup> This situation would again lead to Rotenberg’s assertion that more may be required to make a label, such as “frog” or “prince”, stick.

### 3.6.2.2 “Display” Within Social Psychology

Social reality as it shapes and affects identity in social construction theory, and the concepts of bestowal and acceptance in the theory of social psychology, echo the essence of the concepts of labeling, internalization, and secondary deviance within the labeling theory. All three of these theories recognize the impact of social relationships or interaction on an individual’s sense of self. They propose that an individual will accept, to some degree, what others impose on him as to what or who he is, and what he accepts affects how he navigates within society.

The continuous process of shaping of identity and affecting of future behaviour, further emboldens identity. This effect contributes to an explanation for the generation of an outlaw identity.

To be an identified self is to be a “displayed” self. *Display* means to “fold apart” or “unfold” into meaningful patterns of interaction and symbolic presentation that communicate self. The term is borrowed from ethologists, and its use for the communication of human identity is apt. The kind of communication involved in presenting self for identification is indeed display; it is behavior rendered meaningful as interaction; it is interaction interpreted as symbolic manifestations of self. Humans must appear to one another; they must act toward each other; and they normally engage in a generalized symbolic medium of mutual presentation constituted by language and gesture. Each of these modes of presentation of self follows its own intrinsic logic of display. Each is the object of a number of separate disciplines, and each discipline defines separate objects found nested in its methodological and theoretical paradigms from fashion to metalinguistics.

In addition to the literal content of the message communicated through each of these modalities, identity is simultaneously and necessarily communicated as well. Every moment of our lives can be interpreted as an identity display and probed for the meaning it contains relevant for knowing the identities of the displayer. ...

Displays do not merely communicate identity to others, however. They also communicate identity to self, both through the inner “propriosensation” of kinesthetic and self imagery available to the performer, and through the interactional interpretation made of the display in subsequent responses by others.

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<sup>16</sup> Howard S. Becker, *Outsiders* (New York: Free Press, 1968) at 1-2.

Classical symbolic interaction theory emphasizes the interactive process in the “looking-glass self,” or mirror theory of identity. The mirror theory argues that we are what others’ reflections make us. In addition, however, we are also what we sense ourselves to be in our inner conversation within the private forum of self-consciousness and concomitant self-awareness. *Displays, then, construct identities in the minds, feelings, and responses of others, and simultaneously in the mind, feelings, and actions of self. Identity is produced as a social object by the two processes of subjectivation and objectivation. We construct ourselves as we display ourselves to others. We become what we show ourselves to be to others and self* (see Gecas 1982).

... A person displays an identity because she or he is committed to that identity by self and for others. Commitment refers to a structure of meaning constituting our self experience, *both that which we hold in awareness and that which may be temporarily out of awareness*. Identities are part of this structure of meanings.<sup>17</sup> [Emphasis added].

Based on the foregoing, an individual who displays an identity may have a certain level or degree of commitment to that identity. However, he may not be aware of the extent of the structure of meaning associated with that identity. This temporary lack of awareness suggests that bolstering of the identity may occur through further experience or comprehension related to the meanings derived from the display of and response to that identity.

### 3.6.3 Application of Concepts within Social Psychology to the Identity of Organized Crime Outlaws

The concepts of degradation and display have particular relevance to the formation of outlaw identities. With respect to degradation, Aboriginal street gangs exemplify instances where members, as well as Aboriginal peoples generally, have been subject to negative stereotypes, and cast out of various societal institutions – educationally, politically, socially and economically. As some members of the Indian Posse indicate, such as Trevor Lacasse, membership in a gang provides acceptance and family<sup>18</sup> that may not otherwise be available in conventional societal institutions. The societal disenfranchisement of Aboriginal street gang members amounts to a situation where

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<sup>17</sup> *Society and Identity: Toward a Sociological Psychology*, supra note 2 at 50-51. Weigert, Teitge and Teitge cite Viktor Gecas, “The Self Concept” (1982) 8 Annual Review of Sociology 1.

<sup>18</sup> Catherine Bainbridge, Katherine Cisek & CBC Newsworld, *Indian Posse: Life in Aboriginal Gang Territory* VHS (Montreal: Wild Heart Productions Inc., 1998) [*Indian Posse: Life in Aboriginal Gang Territory*] at 34:13.

“negative identity is forcefully imposed on an unwilling recipient.”<sup>19</sup> Further, the initiation process within Aboriginal street gangs only exacerbates this forceful imposition when gang members physically beat a prospective member to initiate him into the gang.<sup>20</sup>

While the concept of display within social psychology does not specifically make mention of tangible items which communicate identity, an elaboration on the concept would explain the social reaction and interactions that occur during the communication of identity via a meaningful object. In this way, the act of display, and consequent augmentation of identity by display, has particular relevance to gangs or criminal organizations in which members have gang names or insignia. Display of gang insignia has elicited, or been associated with, negative responses by non-gang members or law-abiding members of society. The display of gang insignia instills fear and intimidation, and gang members, such as members of the Hells Angels and other outlaw motorcycle gangs, use or display their names and insignia in order to effect their criminal purposes.<sup>21</sup>

However, according to “display” within social psychology, another purpose exists for, or another consequence occurs as a result of such behaviour. Display directly relates to the development or entrenchment of an identity within an individual when that individual wears a gang insignia or uses a gang name in reference to himself. If such self-objectification occurs in relation to the individual, group-objectification could arguably occur as well – that is to say, that display may also contribute to the maintenance and emboldening of internal cohesion within the gang or self-perceived power of the gang when members collectively wear their insignia and assert their gang name.

Among outlaw motorcycle gangs, the Hells Angels organization exemplifies extreme use of display, and the entrenchment of an organized crime identity. Essentially, they declare who they are to each other. The Hells Angels Motorcycle Corporation owns the

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<sup>19</sup> *Society and Identity: Toward a Sociological Psychology*, *supra* note 2 at 47-48. Weigert, Teitge and Teitge cite Harold Garfinkel, “Conditions of Successful Degradation Ceremonies” (1956) 61 *American Journal of Sociology* 420.

<sup>20</sup> *Indian Posse: Life in Aboriginal Gang Territory*, *supra* note 18. Gang member Trevor Lacasse described recruitment.

<sup>21</sup> *R. v. Wagner*, 2008 CarswellOnt 5093 (Ont. S.C.J.) at paras. 32-34.

“colours” or trademarked patch of the club.<sup>22</sup> Hells Angels take innumerable photographs of themselves with each other in their gang insignia and also without it. Hells Angels clubhouses containing a large number of Hells Angels photos of members in their patches have been observed, along with banners, plaques, and endless types of paraphernalia bearing the Hells Angels name or death head or both. The exterior of Hells Angels clubhouses often have signs with the Hells Angels name or emblems. These clubhouses have significant security systems, such as the East End clubhouse,<sup>23</sup> and limitations as to who may enter. The display of Hells Angels name and insignia within the clubhouse and by one member to another, demonstrates the means or efforts to bolster internal cohesion among the full patch members, “prospects”, “hangarounds”, “official friends”, and associates who have the right or an invitation to attend. This display within the group serves to entrench the Hells Angel outlaw identity collectively.

Hells Angels members also individually demonstrate extreme uses of display, and internalization of the Hells Angels identity. For instance, often Hells Angels have tattoos of the death head.<sup>24</sup> Indeed, like other full patch Hells Angel members, Ronaldo Lising had top and bottom Hells Angel rockers tattooed on the front of his torso, as well as other Hells Angel tattoos on his arms. He filled his basement with countless t-shirts, hats, pieces of jewelry, photos bearing the Hells Angel name or death head or both.<sup>25</sup> Seemingly part of his security system, Lising had three Hells Angels stickers on exterior entrance ways to his house.<sup>26</sup> On a number of occasions in public and in dealings with individuals within the criminal milieu, he wore the Hells Angels emblem, death head earrings, and clothing that revealed his Hells Angel tattoos. The actions of Hells Angel full patch members, Steven Patrick Lindsay and Raymond Lawrence Bonner, also exemplify display and declaration of identity. They wore their Hells Angel emblems on the jackets that they were wearing when they conducted an extortion in association with

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<sup>22</sup> *R. v. Lindsay*, 2005 CanLII 24240, [2005] O.J. No. 2870 (Q.L.) [*R. v. Lindsay*, trial decision] at para. 237.

<sup>23</sup> *R. v. Violette*, 2009 BCSC 1025, [2009] B.C.J. No. 1940 (Q.L.) [*R. v. Violette*] at paras. 66-69.

<sup>24</sup> *R. v. Lindsay*, trial decision, *supra* note 22 at para. 264. Expert and then-Staff-Sergeant Jacques Lemieux testified that Hells Angels members often have tattoos of the death head.

<sup>25</sup> *R. v. Violette*, *supra* note 23 at para. 36.

<sup>26</sup> *Ibid.*

the Hells Angel organization,<sup>27</sup> and thus, sought to elicit a particular response in the person with whom they were coercively interacting. The actions of Hells Angel Randall Richard Potts also show the use of display, and significant entrenchment of the Hells Angel identity. After two and a half years of being “on the program” within the East End Hells Angels Charter, Potts became a full patch member, and was “exceedingly proud of this fact.”<sup>28</sup> He displayed a black version of his patch, and alluded to his membership in the club during his dealings with individuals within the criminal milieu. And, he used the Hells Angels name to conduct a wide range of activities, such as ordering an individual to return a car,<sup>29</sup> attempting to retrieve firearms and grenades,<sup>30</sup> and making dinner reservations. These examples not only reveal proof of theoretical explanations for external and internal declaration of identity by outlaws to produce particular responses in others and themselves. They also reveal some requirements for legislative provisions that seek to counter organized crime.

#### 3.6.4 Insights for Anti-Organized Crime Measures According to Social Psychology

The concepts of “degradation” and “display” within social psychology, and its reinforcement and augmentation of explanations within social construction and labelling theories pertaining to identity formation, internalization, and externalization, are useful in evaluating criminal organization laws in Canada. They suggest that anti-organized crime measures in Canada ought to increase positive social and symbolic interaction or situated activities with individuals who are at risk of criminal deviance or outlawry; avoid degradation through legal processes; and diminish display of negative or violent identities in order to decrease internal cohesion and to reduce the schism between outlaw and conventional norms and values. These theoretical revelations suggest the development of unique methods to counter organized crime, such as through the dilution or tarnishment of gang names and insignia through trademark and copyright laws.

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<sup>27</sup> *R. v. Lindsay*, trial decision, *supra* note 22 at paras. 1085-86.

<sup>28</sup> *R. v. Violette*, *supra* note 23 at para. 65.

<sup>29</sup> *Ibid.* at para. 66.

<sup>30</sup> *Ibid.* at para. 75.

These insights will be examined in Chapter Four, section four “Requisite Three for Anti-Organized Crime Measures”, section five “Requisite Four for Anti-Organized Crime Measures”, section six “Requisite Five for Anti-Organized Crime Measures”, and section seven “Requisite Six for Anti-Organized Crime Measures.”

### **3.6 SUMMARY OF INSIGHTS FOR EVALUATING CRIMINAL ORGANIZATION MEASURES**

This Chapter analysed theoretical concepts within social constructionism, social control, differential association or social learning in groups and subcultures, deviance and labelling, and social psychology. One theory alone cannot account for the creation of organized crime outlaws, and cannot itself explain the purpose and effects of the anti-organized crime measures. Each theory is but a pair of glasses to use to view the world. Each theory fails to account for details that other theories address, but at times, theories have overlapping concepts. Thus, the employment of a variety of theories will likely improve one's vision. This compound lens will illuminate the birth of organized crime outlaws, and facilitate a critique and formulation of requisites for anti-organized crime measures. The lessons learned from these sociological, psychological and criminological theories regarding the causes of organized crime outlaws and their outlawry, will be synthesized into requisites in the introduction to the next chapter of this thesis, Chapter Four. These requisites will inform the evaluation in the next sections of this thesis as to the effectiveness, the justness, and the fairness of organized crime legislation in Canada.

## CHAPTER FOUR SATISFYING THE THEORETICAL REQUISITES FOR ANTI-ORGANIZED CRIME MEASURES

### 4.1 INTRODUCTION: SYNTHESIS OF THE THEORETICAL INSIGHTS FOR ANTI-ORGANIZED CRIME MEASURES

Just as some concepts and assertions within the various sociological and criminological theories overlapped, some of their insights for anti-organized crime measures also overlap or have great similarity with subtle differences. These overlapping or similar insights will be combined together as one requisite. As a result, the following list of requisites will be used in each section of this Chapter to analyse and evaluate the criminal organization laws that presently exist in Canada. The theoretical insights for anti-organized crime measures, as well as the names of the sociological or criminological theories from which these insights were extracted in Chapter Three, are summarized below.

Insight One from social constructionism and Insight Four from social control and bond theory both comment on the fairness, justness, effective and principled nature and of organized crime laws. Thus, these two Insights will be combined to form the new Requisite One in Chapter Four of the thesis:

#### *Requisite One*

*Rooted in Social Constructionism and Social Control and Bond Theory:*

Anti-organized crime measures should calm moral panic and re-establish or maintain social order with substantive rather than hollow criminal measures that legitimize the state.

- a. These measures should either socially construct a legal definition that applies to all organized crime outlaw groups without capturing more than the intended groups, or they should simply proscribe that certain organized crime groups are criminal organizations according to the *Criminal Code*.
- b. These measures should be useful to law enforcement and prosecutions; they must not be overly complex in relation to evidentiary and procedural issues.
- c. These measures should foster belief and commitment to formal societal values, and thus, secure obedience by punishing non-law-abiding societal members, and deterring those who may potentially violate the law.

Insight two, the insights extracted from social constructionism regarding regulation of media, does not overlap with other theoretical concepts analysed in Chapter Three. Thus, Requisite Two remains the same as Insight Two:

***Requisite Two***

*Rooted in Social Constructionism:*

Anti-organized crime measures should fairly restrain or use media, in accordance with principles of freedom of expression, in their public dissemination of information.

- a. These measures should prevent stigmatization, ostracization, and sensationalizing organized crime outlaws through media.
- b. These measures should not incite moral panic via media representations that glorify gang lifestyles, that increase the power of their reputations, and that bolster gang identities.
- c. These measures should use media to launch anti-gang advertising campaigns in order to discourage gang membership; to create new non-criminal identities for these offenders if the offender has a willingness to change; and to sensationalize the powers and victories of law enforcement in order to de-sensationalize organized crime outlawry.

Part of Insight Three from social control and bond theory, and Insight Nine from deviance and labelling theory both comment on the creation and maintenance of pro-social interactions and bonds among law-abiding societal members. Thus, these two Insights will be combined to form Requisite Three in Chapter Four:

***Requisite Three***

*Rooted in Social Control and Bond Theory, and Social Psychology:*

Anti-organized crime measures should foster pro-social bonds among societal members.

- a. These measures should foster bonds through attachment to conventional others; commitment to obeying societal rules; involvement in conventional activities; and belief in a common and conventional value system.

Part of Insight Three from social control and bond theory, Insight Seven from differential association and social learning in subcultures, and Insight Eleven from social psychology all comment on the creation and maintenance of pro-social interactions and bonds between non-deviant (and thus, non-organized crime) members of society and deviant (including organized crime) members of society. Thus, these three Insights will be combined to form Requisite Four in Chapter Four:

***Requisite Four***

*Rooted in Social Control and Bond Theory, Differential Association and Social Learning in Subcultures, and Social Psychology:*

Anti-organized crime measures should maintain or foster positive social and symbolic interactions or situated activities between perceived deviants or outlaws (that is say, individuals who are at risk of criminal deviance or outlawry), and members of conventional society.

- a. These measures should ensure the re-integration and rehabilitation of organized crime offenders.
- b. These measures should provide pro-social learning and pro-social learning environments for organized crime outlaws.
- c. The measures should provide re-educative processes for members who leave or who are incapacitated from their organized crime group, and the presence of a non-outlaw environment in which ex-members can interact with law-abiding members of society.

Insight Five from differential association and social learning in subcultures, and Insight Ten from deviance and labelling theory both comment on the internal cohesion and anti-social relations within a deviant or anti-social group, and the consequent bolstering of that identity. Thus, these two Insights will be combined to form Requisite Five in Chapter Four:

***Requisite Five***

*Rooted in Differential Association and Social Learning in Subcultures, and Deviance and Labelling Theory:*

Anti-organized crime measures should limit and prevent differential association and anti-social learning within the subcultures of outlaws.

- a. These measures should reduce the internal cohesion and power of gangs or organized crime outlaws, and the reinforcement of their identities through ongoing anti-social interactions with one another in order to prevent the perpetuation of their identity and the empowerment of their reputations, for instance. For instance, such measures should ban associations to some degree and in some circumstances.

Insight Six from differential association and social learning in subcultures, and Insight Thirteen from social psychology both comment on the power of gang identities through the use or display of names and insignia. Thus, these two Insights will be combined to form Requisite Six in Chapter Four:

***Requisite Six***

*Rooted in Differential Association and Social Learning in Subcultures, and Social Psychology:*

Anti-organized crime measures should prevent and limit the bolstering of organized crime identities through the use of gang names and insignia in public and in private in order to decrease their internal cohesion and the power of their reputation. For instance, such measures should diminish or ban the display of

names and symbols associated with negative or violent identities of organized crime outlaws.

Insight Eight from deviance and labelling theory, and Insight Twelve from social psychology both comment on the processes by which ostracization occurs for deviant (including organized crime outlaw) members of society. Thus, these two Insights will be combined to form Requisite Seven in Chapter Four:

***Requisite Seven***

*Rooted in Deviance and Labelling Theory, and Social Psychology:*

Anti-organized crime approaches should avoid the imposition of formal negative labels, stigmatization and degradation in social and legal processes in order to prevent potential deviants or outlaws from being ousted from larger society, and thus, deepening the chasm between non-outlaw members of society and outlaw members of society.

## 4.2 REQUISITE ONE FOR ANTI-ORGANIZED CRIME MEASURES

### *Requisite One*

*Rooted in Social Constructionism, and Social Control and Bond Theory:*

Anti-organized crime measures must calm moral panic and re-establish or maintain social order with substantive rather than hollow criminal measures that legitimize the state.

- a. These measures must either socially construct a legal definition that applies to all organized crime outlaw groups without capturing more than the intended groups, or they must simply proscribe that certain organized crime groups are “criminal organizations” according to the *Criminal Code*.
- b. These measures must be useful to law enforcement and prosecutions; they must not be overly complex in relation to evidentiary and procedural issues.
- c. These measures must foster belief and commitment to formal societal values, and thus, secure obedience by punishing non-law-abiding societal members, and deterring those who may potentially violate the law.

### 4.2.1 Overview

The elements within Requisite One require an evaluation of the criminal law and regulatory measures that the Canadian government has implemented in order to target organized crime in Canada. The following questions arise in assessing whether these measures are substantive and effective rather than hollow and ineffective, and will be addressed in this Chapter: Should the state employ pre-existing laws and measures to address organized crime, or should it enact legislation that specifically targets these outlaws and their outlawry? Has the specific legislation enacted by the Canadian government to target organized crime, captured the essence of organized crime outlaws in the *Criminal Code* definition, and how can definitional problems inherent within criminal organization legislation be remedied? Are expanded law enforcement and law enforcement powers necessary and useful in targeting criminal organizations? Can the evidentiary and procedural issues arising from the criminal organization legislation be overcome so as to successfully prosecute organized crime outlaws, without prolonging the administration of justice and undermining essential criminal law principles at an exorbitant expense? Will the criminalization and regulation of activities associated with organized crime provide mechanisms to socially control organized crime outlaws, and are such mechanisms too complex and piecemeal to be useful? Do the criminal organization provisions provide adequate punishment and deterrence of organized crime outlaws? Can

proscription of specific organized crime groups and membership in those groups remedy the definitional, procedural, evidentiary, and sentencing problems that exist within the Canadian criminal organization legislation? This Chapter will answer these questions.

#### 4.2.2 Pre-Existing Laws and Measures Versus Criminal Organization Laws and Measures to Combat Organized Crime

Although organized crime may have existed in some form or another for years, decades, and even centuries, the Canadian government determined in the late 1990s that specific laws were required to combat this perceived social problem, and to calm the moral panic that had risen to a level that the state thought demanded a response. Organized crime outlaws have changed with social conditions, economic opportunity and legal controls, but such outlawry is not new. Organized crime outlawry, like crime generally, is an inherent and normal part of society. Whatever its form, it poses a constant threat to social order, and thus, society has consistently had a state of social mal-order since the entity that is now called “organized crime” or “criminal organizations” came into existence.

Should the state employ pre-existing laws to address organized crime, or should it enact legislation that specifically targets these outlaws and their outlawry?<sup>1</sup> Legal measures have existed to address all types of crime generally, including outlawry, and debate exists as to whether legal measures ought to expand or change as the threat of organized crime increases and the nature of organized crime outlawry evolves to evade law enforcement. Legal measures that existed prior to the declaration of the social problem of organized crime in Canada, that is to say, legal measures that existed prior to the implementation of criminal organization legislation in 1997, still remain relevant to organized crime

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<sup>1</sup> This thesis will use the terms “pre-existing criminal laws” to refer to the body of law that existed and continues to exist and be amended prior to the introduction of criminal organization laws in 1997 and subsequent amendments thereto. It will use the term “criminal organization laws” to refer to the legal provisions that Parliament has enshrined in the *Criminal Code* as well as other statutes and that provincial governments have enshrined in provincial legislation, that have one of the following characteristics:

1. The laws were specifically intended to target or be used for organized crime and organized crime criminals or outlaws; or
3. The laws themselves specifically refer to criminal organizations.

“Criminal organization laws” will not refer to legal provisions that *can* be or *have* been used in relation to organized crime if those laws were not intended to be so used and are used for other types of criminals, such as proceeds of crime legislation and forfeiture laws.

activities. Further, the inherent and entrenched presence of organized crime in society supports the “Business as Usual” model of legislative responses to societal problems.

...The Business as Usual model is based on notions of constitutional absolutism and perfection. According to this model, ordinary legal rules and norms continue to be followed strictly with no substantive change even in times of emergency and crisis. The law in times of war remains the same as in times of peace.<sup>2</sup>

The assertions were made in the context of anti-terrorism. However, some similarities exist between organized crime and terrorism – namely, the act of instilling fear of violence and personal injury or death, as well as the nature and extent of legislative responses to both types of crime. Although organized crime outlawry creates societal disorder and crisis, unlike terrorism, it may not amount to an “emergency” as defined in the *Emergency Act* in that it is not an urgent situation that “seriously endangers the lives, health or safety of Canadians...” and is temporary in nature.<sup>3</sup> In spite of this distinction between terrorism and organized crime, the dilemma regarding the nature and extent of anti-organized crime measures remains similar in principle to that regarding anti-terrorism measures – that is to say, should society employ pre-existing legal measures to deal with a perceived threat, or should it implement specific legal measures that target that perceived threat?

Pre-existing and constitutionally sound criminal laws *should* have the ability and power every day and any day, to adequately re-establish order or peace during times of disorder or emergency, but it may be idealistic to assume so. In spite of this potential limitation, the Business as Usual approach has significant appeal due to its adherence to constitutional standards. Traditional and conventional laws will have likely already been subjected to constitutional scrutiny, and only those laws that have withstood these tests

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<sup>2</sup> Oren Gross, “Chaos and Rules: Should Responses to Violent Crises Always be Constitutional?” (2003) 112 Yale L.J. 1011 [“Chaos and Rules: Should Responses to Violent Crises Always be Constitutional?”] at 1021.

<sup>3</sup> *Emergencies Act*, R.S.C. 1985, c. 22 (4<sup>th</sup> Supp.) [*Emergencies Act*] at s. 3. Section 3 states:  
3. For the purposes of this Act, a “national emergency” is an urgent and critical situation of a temporary nature that  
(a) seriously endangers the lives, health or safety of Canadians and is of such proportions or nature as to exceed the capacity or authority of a province to deal with it, or  
(b) seriously threatens the ability of the Government of Canada to preserve the sovereignty, security and territorial integrity of Canada  
and that cannot be effectively dealt with under any other law of Canada.

will remain. If governments employ lawless or unjust measures in order to target organized crime, they sacrifice precisely the legal rules, principles and norms which they are obliged to protect,<sup>4</sup> and against which outlaws, such as organized crime groups, may be revolting.

The crimes of organized crime groups involve violence and intimidation, and include threats, assaults, extortion, manslaughter, and murder. These are “ordinary” or “pre-existing” criminal offences. The fact that organized crime falls within the parameters of these pre-existing criminal offences leads one to initially conclude that measures that specifically target organized crime are altogether not necessary. In addition, employment of pre-existing sentences for these pre-existing offences seem reasonable. However, the use of pre-existing criminal offences alone is a reactive response to organized crime – that is to say, one must wait for harm in order to address it. And, the reactive versus proactive method of law enforcement and social control sacrifices social order and security to some degree precisely because it waits for a degree of harm to occur – harm so significant that it amounts to a social problem. Pre-existing legal measures alone may not be effective in combating these outlaws.

Some countries, such as Italy, have resorted to passing innumerable criminal laws in a “more is better” approach.<sup>5</sup> A number of justifications exist for the implementation of legal measures that specifically target organized crime. One justification stems from the belief that the battle against organized crime can be fought and won. Another lies in the covert and organized nature of the acts themselves which stymie ordinary or pre-existing investigative methods. A third results from the fact that state governments must respond, and be seen to respond, to threats to societal security. A fourth results from an increasing international pressure or obligation to control organized crime because it has transnational impact and consequences.

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<sup>4</sup> “Chaos and Rules: Should Responses to Violent Crises Always be Constitutional?”, *supra* note 1 at 1022-23.

<sup>5</sup> Umberto Santino, “Law Enforcement in Italy and Europe Against Mafia and Organized Crime” *Centro Siciliano di Documentazione Giuseppe Impastato* (2003) online: Centroimpastato <<http://www.centroimpastato.it/otherlang/mcdonald.php3>> [“Law Enforcement in Italy and Europe Against Mafia and Organized Crime”] at Section 1.1. Santino states that in the battle against the Mafia, the Italian government passed 114 laws from 1982 to 1992.

The distinction between normalcy and emergency remains difficult, if not impossible, to discern.<sup>6</sup> A risk exists that the exception becomes the rule, and emergency measures and extraordinary powers become the norm,<sup>7</sup> such as in Italy where anti-Mafia legislation that was implemented as an emergency response has become dated.<sup>8</sup> Sunset clauses may provide a partial solution. Sunset clauses, such as those employed in some anti-terrorist provisions, provide a pre-determined time to reassess the extraordinariness of situations and ensure what Oren Gross describes as an *assumption of separation*:

...The *assumption of separation* is defined by the belief in our ability to separate emergencies and crises from normalcy, counterterrorism measures from ordinary legal rules and norms. This assumption facilitates our acceptance of expansive governmental emergency powers and counterterrorism measures, for it reassures us that once the emergency is removed and terrorism is no longer a threat, such powers and measures will also be terminated and full return to normalcy ensured. It also assures us that counter-emergency measures will not be directed against us, but only against those who pose a threat to the community.<sup>9</sup> [Emphasis original].

Sunset clauses may work. For instance, the minority government in Canada in 2007 could not renew the investigative hearing and preventive arrest provisions in the anti-terrorism legislation after a five-year sunset clause.<sup>10</sup>

Sunset clauses do not mandate constitutional review, nor do they have safeguards that ensure that the old norms do not become lost among the new. However, they provide some assurance that the dangers posed to civil rights during alleged emergency or extraordinary times do not continue unchecked. They are essential to ensuring that police and prosecutorial powers in the name of national security, such as those powers present in the anti-terrorism provisions, do not permanently derogate, or abrogate, individual rights.

...Security powers, as mentioned, are best understood as extraordinary powers. Indeed, often they are emergency powers, enacted or invoked for deliberately short periods of time in order to react to some exigent circumstance but allowed to

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<sup>6</sup> "Chaos and Rules: Should Responses to Violent Crises Always be Constitutional?", *supra* note 2 at 1022-23.

<sup>7</sup> *Ibid.*

<sup>8</sup> "Law Enforcement in Italy and Europe Against Mafia and Organized Crime", *supra* note 5 at Section 1.1.

<sup>9</sup> "Chaos and Rules: Should Responses to Violent Crises Always be Constitutional?", *supra* note 2 at 1022.

<sup>10</sup> Stanley A. Cohen, "Policing Security: The Divide Between Crime and Terror" (2004) 15 Nat. J. of Const. Law 405 at 448.

expire or cease to be operational after a crisis has passed. Their use or application in the general endeavour of crime control is generally abjured, although, as the recent experience in the United States has shown, exceptions to this general rule do exist. ...<sup>11</sup>

Many anti-terrorist legislative provisions in the *Criminal Code* do not employ sunset clauses to retire emergency powers after a crisis has passed, or they do not employ them routinely and consistently. Further, the legislated twilights of various terrorist provisions are indeterminate in length, and random in choice – a haphazard approach to reviewing laws which significantly impact individual rights and freedoms, and thus, which do not adequately ensure adherence to due process and principles of fundamental justice.

The legislative provisions that specifically target organized crime do not have any sunset clauses in spite of the expansion of investigative powers that will facilitate gathering evidence to be used in prosecutions. Perhaps the lack of such clauses is due to the fact that organized crime does not threaten national security and does not amount to a national emergency pursuant to the *Emergencies Act*. However, sunset clauses are not limited to national security or national emergency provisions. They could be applied to organized crime legislation.

Does the absence of sunset clauses in the criminal organization legislation in Canada indicate a lack of faith on the part of government that the provisions are substantive and effective? If the government believes that its legislation will actually control and reduce organized crime outlaws and their outlawry, then one might expect it to employ sunset clauses in relation to the criminal organization provisions. However, sunset clauses are uncommonly employed, and most *Criminal Code* provisions are implemented without them. Their absence may indicate that the government does not consider the provisions to abrogate individual rights and freedoms to such an extent that the provisions should end after the social crisis has abated or ended. Their absence may indicate that the government expects organized crime to be present in the future to some degree or another, and that it expects that all criminal offences in the *Criminal Code* will be present in the future as well. That is to say, organized crime specifically is part of the societal

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<sup>11</sup> *Ibid.* at 448.

mal-order, and governments may seek to maintain these laws in the long-term in order to socially control organized crime as its violence waxes and wanes. The absence of sunset clauses may indicate that the government has simply not contemplated their use for organized crime provisions. It does not necessarily indicate the substantive or hollow nature of these laws.

Although not employed thus far for criminal organization provisions in the *Criminal Code*, the concept of sunset provisions has the potential to give criminal organization laws substantive teeth while protecting individual rights and freedoms. If criminal organization provisions proscribed certain organizations as criminal and membership in those organizations as criminal, then sunset clauses could be used to limit the abrogation of the freedom of association and other rights, such as freedom of expression, as minimally as possible until the power of these organizations is reduced or decimated. Sunset clauses would provide safeguards to ensure that certain behaviour was criminalized, and certain rights restricted only as long as the social problem of an organized crime group acutely threatened society.

#### 4.2.3 Definitions and Definitional Problems Inherent in Criminal Organization Legislation

##### 4.2.3.1 The Difficulty and Impossibility in Accurately Defining "Organized Crime" and "Criminal Organizations"

Has the specific legislation enacted by the Canadian government to target organized crime captured the essence of organized crime outlaws in the *Criminal Code* definition, and how can definitional problems inherent within criminal organization legislation be remedied? A lack of consensus among academics, legislators, lawyers, police officers, communities, and gang members themselves<sup>12</sup> exists with respect to who or what is a

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<sup>12</sup> Kristin M. Peterson, *Exploring Anti-Gang Advertising: Focus Group Discussions with Gang Members and At-Risk Youth* (M.A. Thesis, Greenspun School of Communication, University of Nevada, 1994) [unpublished] at 46. *Ibid.* at 2, Peterson sought the opinions and responses of gangs and at-risk youth regarding aspects of anti-gang advertising, and showed them several anti-gang television advertisements. *Ibid.* at 25, her three focus group members were age 12 to 17; they were in gangs or were highly predisposed to gang activity; they had committed felony offenses which meant they were at risk of being removed from their homes and placed in correctional institutions; and they were enrolled in non-punitive rehabilitative programs. These individuals did not have a consensus as to what constitutes a "gang."

“gang”, “organized crime” or a “criminal organization.” Canadian Parliament has imposed its definition on society, and as social constructionism teaches, the crystallization of an entity into language may not always capture reality, it may produce negative stereotypes,<sup>13</sup> and it does not adequately allow for evolution of the entity or the definition. The idea of a “gang”, “organized crime”, or a “criminal organization” at its essence includes the concept of a reputation for violence and intimidation in the context of an identifiable group within the criminal subculture or milieu, and when such terms are used in everyday conversation the parties to the conversation may adequately convey and understand their meaning. However, legally defining what societal members may conceptually know to be a “gang”, “organized crime”, or a “criminal organization” remains far different, and likely impossible.

Frederic M. Thrasher’s study of 1 313 juvenile gangs, criminal and non-criminal,<sup>14</sup> totaling over 25 000 members in the slums of Chicago in the 1920s<sup>15</sup> is relevant in considering whether one legal definition can accurately capture the essence and attributes of gangs generally. Thrasher defined juvenile gangs<sup>16</sup> by their spontaneous and unplanned origins;<sup>17</sup> intimate face-to-face relations;<sup>18</sup> collective expressive social behaviours, such as group activities, talks, or festivities;<sup>19</sup> collective traditions;<sup>20</sup> attachment to territories;<sup>21</sup> and collective responses or thinking in relation to hostile or

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<sup>13</sup> These negative stereotypes have advantages and disadvantages for organized crime outlaws. They may increase internal cohesion of conventional societal members and commitment to their social values and norms, but they may also hinder acceptance of and efforts by organized crime outlaws to rehabilitate and reintegrate into society.

<sup>14</sup> Frederic M. Thrasher, *The Gang: A Study of 1,313 Gangs in Chicago* (Chicago: University of Chicago Press, 1927) at 58.

<sup>15</sup> *Ibid.* at 58 and 64.

<sup>16</sup> *Ibid.* at 57. Thrasher states:

The gang is an interstitial group originally formed spontaneously, and then integrated through conflict. It is characterized by the following types of behavior: meeting face to face, milling, movement through space as a unit, conflict, and a planning. As a result of this collective behavior is the development of tradition, unreflective internal structure, *esprit de corps*, solidarity, morale, group awareness, and attachment to a local territory.

<sup>17</sup> *Ibid.* at 50. Thrasher’s study is referred to in subsection four “Application of Concepts within Social Control and Bond Theory to the Identity of Outlaws” of section three “Social Control and Bond Theory” in Chapter Three.

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.* at 55.

<sup>21</sup> *Ibid.* at 57.

conflict forces.<sup>22</sup> “It is as the result of collective action and particularly of conflict that the gang, especially in its solidified form, develops morale.”<sup>23</sup> However, Thrasher opined that each gang is unique:

...[T]he gang is a protean manifestation: no two gangs are just alike; some are good; some are bad; and each has to be considered on its own merits.<sup>24</sup>

Thrasher also asserted that gangs are not permanent, and their membership changes with social, economic, and legal forces.<sup>25</sup>

If the distinctiveness and constant state of change that characterizes juvenile gangs applies to adult gangs, one wonders if any generalizations about gang activities, organization, norms, and rules can be made. Can any set of causes or reasons for the formation of outlaw identities be determined, and thus, can any one legal definition can properly capture the “bad” gangs or criminal organizations? Surely, some basic common features of gangs must exist in order for the term “gang” or “organized crime” or “criminal organization” to implant a particular notion into one’s head and allow for communication about this societal entity. However, these definitional traits, at a simplistic level, seem to focus on what or who members of society ought not to be. Indeed, the *Criminal Code* includes a list of what a criminal organization need not be or have.<sup>26</sup> Further, the essence or traits of gangs seem to relate to conflict, hostility,

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<sup>22</sup> *Ibid.* at 54-55.

<sup>23</sup> *Ibid.* at 55. Thrasher defines morale as “...that quality—of an individual or of a group—of unwavering pursuance of an aim in the face of both victory and defeat.”

<sup>24</sup> *Ibid.* at 5.

<sup>25</sup> *Ibid.* at 35. Thrasher states:

The ganging process is a continuous flux and flow, and there is little permanence in most of the groups. New nuclei are constantly appearing, and the business of coalescing and re-coalescing is going on everywhere in the congested areas. Both conflict and competition threaten the embryonic gangs with disintegration. The attention of the individual is often diverted to some new pal or to some other gang that holds more attractions. When delinquency is detected the police break up the group and at least temporarily interrupt its career. Some new activity of settlement, playground, or club frequently depletes its membership.

<sup>26</sup> *Criminal Code*, R.S.C. 1985, c. C-46 [*Criminal Code*] at s. 467.1. For instance, section 467.1(1) states 467.1 (1) ...It does not include a group of persons that forms randomly for the immediate commission of a single offence.

...(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.

Further, with respect to a charge of participation in the activities of a criminal organization, the *Criminal Code* in subsections 467.11(2) and (3) list what the prosecution need not prove and the court may or may not consider:

difference, distinction, anti-society, and subculture. Defining attributes seem to denote gangs as “the other” or “the outcast” or “the outlaw.” Further, gangs evolve. Notably, the criminal organization provisions in the *Criminal Code* require proof of a group as a “criminal organization” each and every time an indictment is laid, regardless of whether a court has found the particular gang to be a criminal organization on a prior occasion. This legal requirement supports the assertion that gangs are unique from one another, that they are fluid in membership, and that they constantly are in a state of evolution within themselves.

That gangs are unique and different, and thus difficult to define, lends support to an argument for proscription. If the state on behalf of democratic society deems certain gangs to be “bad”, then ought a legal definition to be employed at all? Perhaps a ban on that particular gang, given its organization, its activities, its mandate, and its affects on society, should take place, rather than forcing a cookie-cutter definition on divergent and distinct sub-cultural social organizations. If governments seek to target “gangs” or “criminal organizations” with specific organized crime measures, rather than employing pre-existing measures, then proscription may provide a solution to the problem of legally defining organized crime outlaws. Proscription will be analysed in the section eight “Proscription as a Solution to Definitional, Investigative, Evidentiary, and Prosecutorial Problems within Criminal Organization Legislation” in this Chapter.

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(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.

Canadian *Criminal Code* provisions exemplify the difficulties in applying legal definitions to social constructs of reality through language. The main provisions in the *Criminal Code* that define “criminal organizations” and proscribe offences in relation to criminal organizations are set forth in section 467.1, 467.11, 467.12, and 467.13. The next section will discuss some of the problems within each of these definitional provisions – namely, how they fail to construct a legal definition that applies to all organized crime outlaw groups without capturing more than the intended groups, and how they fail to be useful to law enforcement and prosecutions of organized crime outlaw groups.

#### 4.2.3.2 The Definition of “Criminal Organization” in Section 467.1

The *Criminal Code* presently defines “criminal organization” 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.

(4) The Governor in Council may make regulations prescribing offences that are included in the definition "serious offence" in subsection (1).<sup>27</sup>

The first problem with this definition is its failure to capture the essence of organized crime outlaw groups – that is to say, it does not make legally relevant the attributes or characteristics that set organized crime outlaws apart from other criminal groups. It criminalizes being a group that facilitates or commits “serious” criminal offences, but it

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<sup>27</sup> *Ibid.* at s. 467.1.

does not require any further proof of adopting an identity, posing some sort of challenge to societal order, and using a reputation for violence and intimidation to effect one's ends.

In comparing the Canadian requirements of proof to the American requirements, Don Stuart criticized the old 1997 criminal organization provisions for their overbreadth, and for their inability to target the cohesion that characterizes such groups. His comments apply equally to the present definition in section 467.1:

**22** The Canadian scheme appears to be a much wider version of the United States RICO model. Passed in 1970 as a weapon against organised crime, the Racketeering Influenced and Corrupt Organizations Act requires proof of an "enterprise" and a connected "pattern of racketeering activity." Although the RICO net is itself notoriously wide, there is, in contrast to the Canadian model, a requirement of an ongoing structure of persons associated in time and purpose, organized for consensual decision-making.

**23** It has been suggested that a proper definition of organised crime should embrace the elements of corruption, violence, sophistication, continuity, structure, discipline, ideology, multiple enterprises, involvement in legitimate enterprises and a "bonding" ritual.<sup>28</sup>

The failure to accurately characterize organized crime outlaws by requiring proof of their essential traits means that the state will cast its social control net too widely, and it will capture groups that are transient in their associations and inconsequential or ineffective in their power to intimidate and commit violence against societal members.

A second problem lies in proof of a main purpose – that is to say, that the criminal organization group “has as one of its main purposes or main activities the facilitation or commission of one or more serious offences.” As noted by Stuart, the American legislation specifies the means by which the prosecution may prove an “enterprise” and a “pattern of racketeering activity.” The explicit definition of “pattern of racketeering activity” in the United States *Racketeer-Influenced and Corrupt Organizations Act*<sup>29</sup> or *RICO* may provide a plausible solution. This “pattern” requires proof of at least two

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<sup>28</sup> Don Stuart, “Time to Recodify Criminal Law And Rise Above Law and Order Expediency: Lessons from the Manitoba Warriors Prosecution” (2000) 28 Man. L.J. 89 [“Time to Recodify Criminal Law And Rise Above Law and Order Expediency: Lessons from the Manitoba Warriors Prosecution”] at para. 22.

<sup>29</sup> *Racketeer-Influenced and Corrupt Organizations Act*, 18 U.S.C. §1961 (1970), and amendments thereto [*RICO*], at §1961(1).

predicate acts of “racketeering activity,”<sup>30</sup> and “racketeering activity” itself remains extremely broad and includes a wide variety of criminal offences.<sup>31</sup> The American definition of “enterprise” rather than “criminal organization” is also more inclusive in that it captures any group of individuals who are associated with one another but who may not be a legal entity and may in fact be a legal business.<sup>32</sup> While prosecutors can provide evidence of past criminal acts,<sup>33</sup> the parameters of the definitions in *Racketeer-Influenced and Corrupt Organizations Act* seems to facilitate proof of an organized crime group, and do not mandate such potentially prejudicial evidence.

The Canadian legislation provides few clues as to what evidence would prove a criminal organization. The amorphous wording results in prosecutions having to provide, for each and every prosecution, a vast amount of evidence relating to the nature of an alleged organized crime group – such as proof of a fortified meeting place or clubhouse, rules and regulations, gang insignia and paraphernalia, proof of criminal records of members, criminal acts of members, counter-surveillance conducted by the group on police, and expert evidence regarding past violence committed by members and the history and main purpose of the organization. The fact that such evidence varies significantly from case to case and from group to group only further evinces a problem in legally defining criminal organizations. Whether a group is criminal or not criminal from one day to another ought not to depend on the evidence that a police force can seize and the prosecution can tender on a case by case basis.

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<sup>30</sup> *Ibid.* Notably, Howard Abadinsky in *Organized Crime*, 8<sup>th</sup> ed. (Belmont: Thomson Wadsworth, 2007) [*Organized Crime*] at 297 defines “labor racketeering” and discusses “business racketeering” – two common forms of racketeering employed by organized crime:

Labour racketeering is the infiltration, domination, and use of a union for personal benefit by illegal, violent, and fraudulent means.

Abadinsky asserts, *ibid.* at 315-16, that business racketeering centers around businesses or industries that require a low cash investment, rely on labour, and that are highly competitive because organized crime groups can reduce their costs by controlling labourers and unions, and thus, they can dominate or monopolize an industry.

<sup>31</sup> *RICO*, *supra* note 29 at §1961(1).

<sup>32</sup> Michael Levi & Alaster Smith, “A Comparative Analysis of Organised Crime Conspiracy Legislation and Practice and Their Relevance to England and Wales” *Home Office Online Report 17/02* (December 2002) online: Home Office <<http://rds.homeoffice.gov.uk/rds/pdfs2/rdsolr1702.pdf>> [“A Comparative Analysis of Organised Crime Conspiracy Legislation and Practice and Their Relevance to England and Wales”] at 2.

<sup>33</sup> *Ibid.*

The answer to this second problem – that is to say, the answer to the difficulty in proving that a member of a criminal organization participated in organized crime activities – may lie in the drafting of the indictment itself. For instance, with respect to outlaw motorcycle gangs, such as the Hells Angels, much evidence regarding the general criminal activities of other members of a chapter will be prejudicial and inadmissible to specific criminal charges of one member. Thus, indictments could state that the criminal organization is the group of accused itself – whether or not one of them is a member of the Hells Angels or another outlaw motorcycle gang. That is to say, indictments could charge a number of individuals (three or more) whose acts rather than whose membership in a particular organization, meet the definition of “criminal organization” in section 467.1 of the *Criminal Code*. Thus, the Hells Angels would not be indicted as the criminal organization, and only its member would be so indicted as being in a criminal organization with the other non-Hells Angels members and accused.

In *R. v. Speak*,<sup>34</sup> the indictment charged that two criminal organizations existed in relation to a drug trafficking conspiracy. First, the accused Speak, who was a Hells Angels member, was charged with having trafficked in association with a criminal organization, namely, the Hells Angels.<sup>35</sup> Second, the other three accused, one of whom was a Hells Angel member and the other two who were not Hells Angels members, were charged with having trafficked in association with a criminal organization, namely, themselves as a group and not the Hells Angels.<sup>36</sup> Lastly, the accused Speak was also charged with having trafficked in association with the non-Hells Angels group as a criminal organization.<sup>37</sup> The Ontario Superior Court of Justice held that no evidence existed to prove that the substantive offences of drug trafficking by Speak were committed in association with the Hells Angels criminal organization.<sup>38</sup> However, the Court held that Speak had committed such offences in association with the non-Hells Angels criminal organization comprised of the other co-accused. This approach to drafting and prosecuting indictments would invoke the more serious penalties associated with

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<sup>34</sup> *R. v. Speak*, [2005] O.J. No. 5880 (Q.L.), (2005), 70 W.C.B. (2d) 782 (Ont. S.C.J.).

<sup>35</sup> *Ibid.* at para. 40.

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.* at para. 43.

<sup>38</sup> *Ibid.*

committing offences in connection with criminal organizations. However, it would fail to capture the essence and workings of outlaw motorcycle gangs and other outlaws who use the power of their reputations to commit crimes, and it would fail to formally declare or denounce such groups as organized crime in society. Rather, it would treat the accused almost as a group within the outlaw group, and ignore the power of the outlaw group and the outlaw group identity.

A third problem with the *Criminal Code* definition lies in the inclusion of the term “material benefit.” The benefit to organized crime outlaw groups is not always material. It can be using a reputation for violence and intimidation to effect one’s ends, and thus, maintaining and perpetuating that reputation for other organized crime group members to benefit in their illegal pursuits. The 1997 definition of “criminal organization” did not include the term “material benefit”, and “benefit” referred only to the benefit of the act of the accused to the organization. “Benefit” was defined in *R. v. Leclerc*<sup>39</sup> as “...[a]dvantage, material or moral gain derived from something.”<sup>40</sup> The broader term of “benefit” in the 1997 definition more accurately captures the benefit that accrues to a criminal organization as a result of the actions of those who participate in and contribute to it, and should replace the term “material benefit” in the present section 467.1.

A fourth problem with the *Criminal Code* definition lies in the possible interpretations for the term “organized.” The Supreme Court of Canada in *R. v. Venneri*<sup>41</sup> asserted that courts should utilize a flexible approach to defining “organization”, and avoid checklists as well as stereotypical concepts of sophisticated crime groups:

**27** Some trial courts have found that very little or no organization is required before a group of individuals are potentially captured by the regime: see *R. v. Atkins*, 2010 ONCJ 262 (CanLII); *R. v. Speak*, 2005 CanLII 51121 (Ont. S.C.J.). Others, properly in my view, have held that while the definition must be applied “flexibly”, structure and continuity are still important features that differentiate criminal organizations from other groups of offenders who sometimes act in concert: see *R. v. Sharifi*, [2011] O.J. No. 3985 (QL) (S.C.J.), at paras. 37 and 39; *R. v. Battista*, 2011 ONSC 4771, No. 08-G30391, August 9, 2011, at para. 16.

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<sup>39</sup> *R. v. Leclerc*, [2001] R.J.Q. 747, [2001] Q.J. No. 426 (Q.L.) (Que. Ct. (Crim. and Pen. Div.)) [*R. v. Leclerc*].

<sup>40</sup> *Ibid.* at para. 283.

<sup>41</sup> 2012 SCC 33, [2012] S.C.J. No. 33 (Q.L.) [*R. v. Venneri*].

28 In *R. v. Terezakis* (2007), 223 C.C.C. (3d) 344 (B.C.C.A.), Mackenzie J.A. explained in these terms the need for flexibility in applying the statutory definition of "criminal organization":

The underlying reality is that criminal organizations have no incentive to conform to any formal structure recognized in law, in part because the law will not assist in enforcing illegal obligations or transactions. That requires a flexible definition that is capable of capturing criminal organizations in all their protean forms. [para. 34]

29 I agree with Mackenzie J.A. that a flexible approach favours the objectives of the legislative regime. In this context, flexibility signifies a purposive approach that eschews undue rigidity. That said, by insisting that criminal groups be "organized", Parliament has made plain that some form of structure and degree of continuity are required to engage the organized crime provisions that are part of the exceptional regime it has established under the *Code*.

30 Qualifying "organized" in s. 467.1 by "however" cannot, as a matter of language or logic, be taken to signify that no element of organization is required at all. "Organized" necessarily connotes *some form* of structure and co-ordination, as appears from the definition of "organized" in the *Shorter Oxford English Dictionary on Historical Principles* (6th ed. 2007), vol. 2:

Formed into a whole with interdependent parts; coordinated so as to form an orderly structure; systematically arranged. [Emphasis original; p. 1023.]

In French, the definitions in *Le Grand Robert de la langue française* (electronic version) are consistent with this: it defines the noun "*organisation*" as the [TRANSLATION] "[a]ction of organizing (something); the result of such an action" and the verb "*organiser*" as "[t]o give a specific structure or composition, order, or method of functioning or administration to".

31 "However" and "organized" -- the two words read together, as they are written -- are complementary and not contradictory. Thus, the phrase "*however organized*" is meant to capture differently structured criminal organizations. But the group must nonetheless, at least to some degree, be organized. Disregarding the requirement of organization would cast a net broader than that intended by Parliament.

...

38 Care must be taken, however, not to transform the shared attributes of one type of criminal organization into a "checklist" that needs to be satisfied in every case. None of these attributes are explicitly required by the *Code*, and a group that lacks them all may nonetheless satisfy the statutory definition of "criminal organization".

...

40 It is preferable by far to focus on the goal of the legislation, which is to identify and undermine groups of three or more persons that pose an elevated threat to society due to the ongoing and organized association of their members. All evidence relevant to this determination must be considered in applying the definition of "criminal organization" adopted by Parliament. Groups of individuals that operate on an *ad hoc* basis with little or no organization cannot be said to pose the type of increased risk contemplated by the regime.

41 Courts must not limit the scope of the provision to the stereotypical model of

organized crime -- that is, to the highly sophisticated, hierarchical and monopolistic model. Some criminal entities that do not fit the conventional paradigm of organized crime may nonetheless, on account of their cohesiveness and endurance, pose the type of heightened threat contemplated by the legislative scheme.<sup>42</sup> [Emphasis original].

This guidance from the Supreme Court of Canada may assist courts in applying the definition of “criminal organizations”, but the *Criminal Code* provisions contain many more difficulties not addressed by the Court.

#### 4.2.3.3 The Participation in and Contribution to a Criminal Organization in Section 467.11

The *Criminal Code* prohibits the participation in and contribution to a criminal organization in section 467.11:

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 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.<sup>43</sup>

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<sup>42</sup> *Ibid.* at paras. 27-31, 38, 40 and 41.

<sup>43</sup> *Criminal Code*, *supra* note 26 at s. 467.11.

The convoluted wording of section 467.11 means that the prosecution need not prove that the accused did indeed enhance the ability of the criminal organization to facilitate or commit an indictable offence. The accused may have a lack of knowledge that he did indeed enhance this ability of the criminal organization, and still be convicted of an offence.

This section also makes proof of an offence very difficult because the prosecution must prove that the actions of the accused could enhance “the ability of the criminal organization to facilitate or commit an indictable offence.” The prosecution need not prove actual enhancement, but proof of possible enhancement still remains problematic since some criminal organizations do not commit criminal offences themselves or know about offences committed by their members. Rather, individual members use the reputation of the criminal organization to commit criminal offences. Further, the type of enhancement is not specified. The use of violence by a criminal organization member could indeed enhance the ability of other members or of the criminal organization itself to commit an indictable offence later due to the perpetuation of its reputation for violence and intimidation. While this type of enhancement is very significant to maintaining the power of a criminal organization, proof of any use of a gang name or insignia would then amount to such enhancement – that is to say, the section would be very broad. And, without mandating proof that the actions of the accused did indeed enhance the power of a criminal organization makes the connection of one aspect of the offence to the other too tenuous.

#### 4.2.3.4 Commission of a Criminal Offence in Connection with a Criminal Organization in Section 467.12

The *Criminal Code* creates an offence of committing a criminal offence in connection with a criminal organization in section 467.12:

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.

(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.<sup>44</sup>

These provisions essentially re-criminalize a number of pre-existing offences by creating a criminal offence where another offence was committed in connection with a criminal organization. For instance, the possession of explosive substances is an offence,<sup>45</sup> as is the possession of explosive substances in connection with a criminal organization.<sup>46</sup> The criminal organization provisions have deemed a murder to be in the first degree regardless of whether it was planned and deliberate, if the killing was done in connection with a criminal organization, or if it was done while committing or attempting to commit an indictable offence in connection with a criminal organization.<sup>47</sup> In addition, the government has criminalized drive-by shootings,<sup>48</sup> and has proscribed an aggravated sentence for such shootings when they are done in connection with a criminal organization.<sup>49</sup> This legislation requires not only proof of the substantive or predicate offence, but also proof of a criminal organization, as well as proof of connection of the predicate offence to the criminal organization. However, the provisions are silent as to what will amount to “benefit”, “direction” and “association.” These additional proof requirements render the criminal offences more complex, and demand additional resources from law enforcement and prosecution services.

#### 4.2.3.5 Instructing a Criminal Offence in Connection with a Criminal Organization in Section 467.13

The *Criminal Code* creates the offence of instructing a criminal offence in connection with a criminal organization:

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.

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<sup>44</sup> *Ibid.* at s. 467.12.

<sup>45</sup> *Ibid.* at s. 82.

<sup>46</sup> *Ibid.* at ss. 82(2).

<sup>47</sup> *Ibid.* at s. 231.

<sup>48</sup> *Ibid.* at s. 244(1).

<sup>49</sup> *Ibid.* at ss. 244(2) and 244.2.

(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

(c) the accused knew the identity of all of the persons who constitute the criminal organization.<sup>50</sup>

Due to its connection requirement, this section suffers from similar problems that exist in section 487.12, but the primary concern with this section has been its potential violation of section 7 of the *Charter* in relation to fault requirements. Don Stuart set forth these concerns prior to the passage of the 2002 amendments to the criminal organization provisions:

41 It can be seen that knowledge is expressly not required to be proved of the crime to be facilitated or committed or of the identity of the members of the criminal organization. That is a knowledge requirement that has no real meaning and points to absolute responsibility which is unconstitutional where the liberty interest is at stake. So too it is express that no crime need to have been facilitated or committed by the criminally organization or even made more likely. Even the Backgrounder [The Department of Justice Backgrounder "Highlights of the Organized Crime Bill" (5 April 2001)] acknowledges the "provisions could target anyone (not just members)." Contrast the focus in conspiracy jurisprudence on a meeting of the minds on a common purpose. As Justice Dickson put it in *Cotroni, Papalia* [(1979), 45 C.C.C. (2d) 1 (S.C.C.) at 17-18]:

The word "conspire" derives from two Latin words, con and spirare, meaning "to breathe together". To conspire is to agree ... There must be evidence beyond a reasonable doubt that the alleged conspirators acted in concert in pursuit of a common goal.

42 Hopefully Courts will intervene when the new definition is challenged, as it inevitably will be, on the basis of violation of the act and fault requirements required under section 7 of the Charter of Rights and Freedoms. Even if the new laws survive Charter challenge the blunderbuss laws will do no credit to the Canadian justice and will lead to injustice.<sup>51</sup>

Indeed, Canadian courts have heard challenges to section 467.13 as well as sections 467.1 and 467.12 for vagueness and overbreadth pursuant to section 7 of the *Charter*.

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<sup>50</sup> *Ibid.* at s. 467.13.

<sup>51</sup> "Time to Recodify Criminal Law And Rise Above Law and Order Expediency: Lessons from the Manitoba Warriors Prosecution", *supra* note 28 at paras. 41-42.

However, the fault requirements in section 467.13<sup>52</sup> as well as 467.12<sup>53</sup> have been upheld by a number of appellate courts. Further, the similar and previous provision in the 1997 version of section 467.1 which used the term “in association with” has also been upheld by the Quebec Court of Appeal.<sup>54</sup>

#### 4.2.3.6 Reasons for Definitional Problems in the *Criminal Code* Provisions

These definitional problems in sections 467.1, 467.11, 467.12 and 467.13 of the *Criminal Code* may result from the nature of defining and applying definitions of crime. Social construction teaches, or perhaps confirms, that definitions of crimes do not result from consensus as to the existence of a social problem, and they reflect one group’s perception of a social problem. Thus, definitions of crime are not clear, not necessarily accurate, and consequently, not always fair and just. Indeed, the criminal organization provisions suffer all of these problems.

One recalls the nature of defining crime according to Quinney’s theory on the social reality of crime in section two “Social Constructionism” in Chapter Three:

PROPOSITION 1 (DEFINITION OF CRIME): *Crime is a definition of human conduct that is created by authorized agents in a politically organized society.*<sup>55</sup>

The problems associated with defining “criminal organization” and the actions of the members of these organizations may result in failure to properly legislate fault requirements due to a desire to capture the “other” – the less powerful groups in society that contravene or contradict conventional values and norms – and to remedy the social problem by subjecting the “other” to legal sanctions.

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<sup>52</sup> *R. v. Terezakis*, 2007 BCCA 384, [2007] B.C.J. No. 1592 (Q.L.) leave to appeal to S.C.C. refused, [2007] S.C.C.A No. 487 (Q.L.); and *R. v. Smith*, 2006 SKQB 132, [2006] S.J. No. 184 (Q.L.) [*R. v. Smith*].

<sup>53</sup> *R. v. Lindsay*, 2009 ONCA 532, [2009] O.J. No. 2700 (Q.L.) at paras. 28-33, leave to appeal to S.C.C. refused, [2007] S.C.C.A. No. 540 (Q.L.) and [2007] S.C.C.A. No. 541 (Q.L.); and *R. v. Smith*, *supra* note 50. The Ontario Court of Appeal held that the law was not overbroad because the adverse effect of legislation on individuals subject to it was not grossly disproportionate to the state interest the legislation sought to protect or achieve, and the law was not impermissibly vague because there existed a basis for legal debate and coherent judicial interpretation.

<sup>54</sup> *R. v. Couture*, 2007 QCCA 1609, [2007] J.Q. no. 13091 (Q.L.) leave to appeal to S.C.C. refused, [2008] S.C.C.A No. 58 (Q.L.).

<sup>55</sup> Richard Quinney, *The Social Reality of Crime* (Boston: Little, Brown and Company, 1970) at 15.

Indeed, one may also recall that powerful groups or segments in society apply criminal definitions:

PROPOSITION 3 (APPLICATION OF CRIMINAL DEFINITIONS): *Criminal definitions are applied by the segments of society that have the power to shape the enforcement and administration of criminal law.*<sup>56</sup>

Relaxation or lack of fault requirements in statutory definitions of organized crime acts may result from the social pressure or political desire to implement legal measures that seem to offer solutions to organized crime as a social problem. However, while the criminal organization provisions in the *Criminal Code* may have withstood *Charter* scrutiny, the complex and onerous proof requirements may lead them to being employed in only the clearest and strongest of cases, and not for every alleged criminal organization. Thus, they may not combat organized crime as intended or to the degree intended, and the application of any criminal definition simply will not be used and will not matter.

While even in a democracy such as Canada, criminal definitions remain constructed by the powerful segments of society and imposed on the less powerful segments, the application of a criminal definition need not fail for this reason. If the government seeks to combat organized crime by using specific criminal provisions rather than proscription or rather than by using pre-existing or ordinary *Criminal Code* provisions, then it will need to include in its definition of “criminal organization” the essential attributes of organized crime outlaw groups. It will need to set forth these essential traits that characterize organized crime outlaw groups, and not simply define as criminal the acts common to those groups. It would also need to specify the nature of proof that would be required to show a main purpose or main activity of facilitating or committing one or more serious offences, and to legislate exceptions to evidentiary rules in order to make such proof admissible or more easily admissible in criminal trials. For instance, if proof of a main purpose or activity is based on past criminal convictions by any or all members of the alleged criminal organization, then evidentiary rules would need to be re-written or

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<sup>56</sup> *Ibid.* at 18.

relaxed in order to allow the admissibility of such evidence. In some, and perhaps few instances, proof of such a main purpose or main activity may not exist based on past activities or actions committed by the group due to the recent origins of the group or due to little known history of the group, and thus, such evidentiary accommodations need not be made since the substantive offences themselves will have to provide proof of the main purpose or activity.

If the government chooses to combat organized crime using specific criminal provisions, it also need not specify that the main purpose or main activities of the commission of the serious offence would likely result in a “material” benefit. Such inclusion removes the benefits that accrue to organized crime groups from the maintenance and perpetuation of their reputation for violence and intimidation. The government also need not specify that the offences be “serious offences” since while most organized crime outlaw groups do indeed commit offences which amount to “serious offences”, a designation based on the number of years in prison excludes other serious or indictable criminal offences that outlaw groups could specialize in or form to commit. While the specification of “serious offences” may be an effort to only target organized crime groups that pose a significant threat to society, this requirement disallows law enforcement from targeting organized crime outlaw groups that have not yet risen to such levels, but still commit crimes connected to their outlaw groups.

All of these difficulties and technicalities in constructing a definition of “criminal organization” that can be proven in a criminal trial and that does not capture individuals who are not organized crime outlaws, strengthen the arguments for proscription or for simply using pre-existing or ordinary *Criminal Code* offences to target organized crime outlawry. Time and resources that are spent on administering justice for ill-defined “criminal organizations” are time and resources not spent on administering justice for crimes – including those committed by organized crime outlaws – using pre-existing *Criminal Code* offences.

#### 4.2.4 Expanded Law Enforcement Personnel and Law Enforcement Powers

... *The existence of organized crime, in fact, depends on the way in which the criminal law is enforced and administered. In order to continue its operations, organized crime must maintain some amount of immunity from the law.*<sup>57</sup> [Emphasis added].

Are expanded law enforcement personnel and law enforcement powers necessary and useful in targeting criminal organizations? Instead of legislating new investigative powers for police in relation to organized crime outlaws as the Canadian government created in the various criminal organization provisions in the *Criminal Code*, federal, provincial and municipal governments across the country could simply increase resources to increase investigations.<sup>58</sup> Canada, like other countries targeting organized crime,<sup>59</sup> has indeed done so. It has increased law enforcement personnel and created special units in order to specifically target organized crime outlaws.<sup>60</sup> Further, some provinces in Canada have made health care workers agents of the state in criminal investigations. For instance, to facilitate law enforcement investigations of organized crime activity, Manitoba, Saskatchewan, Alberta and British Columbia have passed legislation that requires health care facilities and emergency medical employees to disclose gunshot and stab wounds that are not self-inflicted or unintentionally inflicted, to local police as soon

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<sup>57</sup> *Ibid.* at 269. *Ibid.* at 269-70, Quinney refers to Marshall B. Clinard and Richard Quinney, *Criminal Behavior Systems: A Typology* (New York: Holt, Rinehart and Winston, 1967) at 386-87, and asserts that immunity from the law may manifest through evasion from law enforcement; political power and influence; public toleration; ineffective legislation; infiltration of legitimate business enterprises.

<sup>58</sup> "Time to Recodify Criminal Law And Rise Above Law and Order Expediency: Lessons from the Manitoba Warriors Prosecution", *supra* note 28 at para. 34. Stuart opined:

Biker violence in Quebec and elsewhere may well require considerably more police investigative resources to gather evidence but no new laws are needed or likely to be effective.

<sup>59</sup> *Serious Organised Crime and Police Act 2005* (U.K.), 2005, c. 15, and amendments thereto [*Serious Organised Crime and Police Act 2005* (U.K.)] at ss. 1-5. In its the *Serious Organised Crime and Police Act 2005*, the United Kingdom created the Serious Organised Crime Agency in order to prevent and detect serious organized crime. Section 2(1) of the *Serious Organised Crime and Police Act 2005* states:

2 Functions of SOCA as to serious organised crime

(1) SOCA has the functions of—

- (a) preventing and detecting serious organised crime, and
- (b) contributing to the reduction of such crime in other ways and to the mitigation of its consequences. ...

<sup>60</sup> Canada has a number of police forces that specifically combat organized crime. For instance, the Combined Forces Special Enforcement Unit of the Royal Canadian Mounted Police, various gang task forces, and the Organized Crime Agency of British Columbia. Some of these units preceded the criminal organization legislation in 1997. Many municipal police forces have also created gang or organized crime units.

as is reasonably practicable to do so.<sup>61</sup> Ontario, Nova Scotia and Quebec have similar legislation, but only require reporting if the wound results from a gunshot.<sup>62</sup>

From a social control perspective, the presence of law enforcement and the increase of its powers to target an outlaw group, reinforce attachment, belief and commitment of conventional societal members to their values and norms, encourages their law-abiding behaviour, and maintains internal cohesion among these members. However, increased expenditures on investigations do not necessarily provide police with the types of tools needed to penetrate organized crime outlaw groups. The cohesive and insulated nature of criminal organizations renders infiltration extremely difficult if not impossible, and their reputations for violence and intimidation make witnesses afraid to cooperate with police investigations. The British Columbia Court of Appeal noted this predicament in *R. v. Payne*.<sup>63</sup> In that case, the offender Payne was a member of a criminal organization when he cut off the finger of Shawn Giesbrecht who was a drug “salesperson” for the organization. The crime was committed because Giesbrecht owed a drug debt to the criminal organization, and Payne sought to make an example out of him and maintain discipline and control over other “sales staff.”<sup>64</sup> The Court found such membership to be an aggravating factor pursuant to section 718.2(a)(iv), and noted the significance and negative effects of witness intimidation in relation to the administration of justice:

...Criminal conduct that makes victims afraid to report crimes to police and makes witnesses afraid to cooperate with police in the investigation of crimes subverts the rule of law and must be checked by an exemplary sentence.<sup>65</sup>

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<sup>61</sup> *Gunshot and Stab Wound Mandatory Disclosure Act*, S.A. 2009, c. G-12 at s. 3; *The Gunshot and Stab Wounds Mandatory Reporting Act*, C.C.S.M. 2008, c. 21 at s. 2; *The Gunshot and Stab Wounds Mandatory Reporting Act*, S.S. 2007, c. G-9.1 at s. 3; and Bill 12, *Gunshot and Stab Wound Disclosure Act*, 2<sup>nd</sup> Sess., 39<sup>th</sup> Leg., British Columbia, 2010 (assented to 3 June, 2010), S.B.C. 2010, c. 7.

<sup>62</sup> *Mandatory Gunshot Wounds Reporting Act*, 2005, S.O. 2005, c. 9 at s. 2; *Gunshot Wounds Mandatory Reporting Act*, S.N.S. 2007, c. 30 at s. 3; and “New B.C. Anti-Gang Law Will Make It Mandatory for Health Workers to Report Gunshot, Stabbing Injuries” *The Province* (11 December 2010), online: <<http://www.theprovince.com/news/anti+gang+will+make+mandatory+health+workers+report+gunshot+stabbing/3963672/story.html>>.

<sup>63</sup> *R. v. Payne*, 2007 BCCA 541, [2007] B.C.J. No. 2391 (Q.L.), aff’d 2006 BCSC 1651, [2006] B.C.J. No. 2885 (Q.L.) [*R. v. Payne*].

<sup>64</sup> *Ibid.* at para. 46.

<sup>65</sup> *Ibid.* at paras. 45 and 48.

Historically, evidence against most organizations, such as the Mafia and La Cosa Nostra, has been obtained through organized crime members who have left the group or are disenchanted with the group, and who become police informants or agents of the state:

Given the difficulty of securing testamentary evidence against mafia members, the fight against mafia-type organizations has always significantly relied upon the encouragement of defection. In Italy, the evidence of defectors has not only led to the judicial convictions of many mafia affiliates but also contributed to a better understanding of the structure of the Sicilian Cosa Nostra and to the shattering of the image of the impeccable 'man of honour'. Mafia defectors are former members who leave the organization in exchange for more lenient judicial treatment and a tailor-made protection programme intended to provide protection, financial assistance and, in some cases, a new identity. ...<sup>66</sup>

Indeed, criminal charges and criminal organization charges involving members of organized crime outlaw groups in Canada often rely on evidence provided by an informant or a defector from the organized crime group,<sup>67</sup> or through surveillance and the interception of private communications. While this evidence amounts to that of an unsavory witness, evidence such as police surveillance and private communication intercepts can be used to confirm such testimony and reinforce the case for the Crown. Infiltration by undercover police officers has occurred,<sup>68</sup> but requires extreme personal commitments and sacrifices, and therefore, is rare. As a result, the expansion of law enforcement powers, such as in obtaining wiretaps, would facilitate police investigations that will result in the laying of criminal charges against organized crime outlaw suspects.

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<sup>66</sup> Stefano Maffei & Isabella Merzagora Betsos, "Crime and Criminal Policy in Italy: Tradition and Modernity in a Troubled Country" (2007) 4 *European J. of Criminology* 461 at 471.

<sup>67</sup> *R. v. Leclerc*, *supra* note 39 at paras. 37, 45 and 46; *R. v. Violette*, 2009 BCSC 1557, [2009] B.C.J. No. 2262 (B.C. S.C.); and CBC News Online, "Top Hells Angel Arrested in Montreal" (1 November 2010) online: CBC News <<http://www.cbc.ca/canada/montreal/story/2010/11/01/hells-angels-arrested.html>>; and Paul Cherry, "SharQC Takes Bite Out of Hells Angels" (17 April 2009) *The Gazette* online: <<http://www.montrealgazette.com/news/SharQc+takes+bite+Hells+Angels/1498885/story.html>>. The main witness for the prosecution in *R. v. Violette* was Michael Plante who had achieved the status of official friend in the East End chapter of the Hells Angels. The witness providing evidence against the accused in *R. v. Leclerc*, Peter Paradis, had achieved the status of prospect in the Rock Machine outlaw motorcycle gang. In Operation SHARQC, with the assistance of evidence from a past Sergeant-at-Arms turned informant, police arrested more than 123 people, 111 of whom were full-patch members of the Hells Angels and have yet to be tried.

<sup>68</sup> Joseph D. Pistone & Richard Woodley, *Donnie Brasco: My Undercover Life in the Mafia* (New York: New American Library, 1988); William Queen, *Under and Alone: The True Story of the Undercover Agent Who Infiltrated America's Most Violent Outlaw Motorcycle Gang* (New York: Random House, 2005); and Jay Dobyns and Nils Johnson-Shelton, *No Angel: My Harrowing Undercover Journey to the Inner Circle of the Hells Angels* (New York: Three Rivers Press, 2009). Queen spend years undercover, and became a full-patch member and Vice President of the Mongols motorcycle club. Jay Dobyns spent years undercover, and became a gunrunner and hitman for the Hells Angels.

Canada, like other countries targeting organized crime, has indeed expanded law enforcement powers.<sup>69</sup> The ability to obtain search warrants and production orders has been increased by the 1997 legislation due to increased protections that now exists in the *Criminal Code* for confidential informants.<sup>70</sup> Further, the criminal organization provisions in the *Criminal Code* have relaxed the requirements for judicial authorization to intercept private communications. For instance, applications under various sections of the *Criminal Code* for judicial authorization in relation to criminal organization investigations need not demonstrate investigative necessity;<sup>71</sup> and an authorizing judge may extend the time that that the Attorney General or Minister for Public Safety and Emergency Preparedness must give notice to the persons intercepted and notice of the

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<sup>69</sup> *Serious Organised Crime and Police Act 2005* (U.K.), *supra* note 59; *Organized Crime*, *supra* note 30; and “Law Enforcement in Italy and Europe Against Mafia and Organized Crime”, *supra* note 5 at Section 1.1. According to Santino, during approximately the last decade, Italy has again increased law enforcement by creating the Direzione Investigativa Anti-mafia or Antimafia Investigative Administration, as well as the Direzione Nazionale Antimafia or Superprocura: National Antimafia Administration, in order to combat organized crime.

In the United Kingdom, officers of the Serious Organised Crime Agency with powers and privileges of any police, customs or immigration officer anywhere within the territory of England, Wales, Scotland and Northern Ireland, as well as adjacent waters, *Serious Organised Crime and Police Act 2005* (U.K.), *supra* note 59 at ss. 46-49. In addition, the provisions enhance the powers of arrest, *ibid.* at s. 110; reduce pre-requisites for search warrants for premises, *ibid.* at ss. 113-14; increase powers to stop and search individuals, *ibid.* at s. 115; facilitate taking DNA samples, photographs, fingerprint, and footwear impressions of suspects, *ibid.* at ss. 116-19. Further, this legislation mandates that the chief officers or constables of other law enforcement agencies in Great Britain or Northern Ireland cooperate with the Serious Organised Crime Agency by apprising the Agency of relevant information about crime; and it imposes a duty on every police officer, customs officer, armed forces member and coastguard member to assist the Agency in its functions, *ibid.* at ss. 36 and 37. In turn, the Agency must keep law enforcement agencies abreast of information relevant to criminal investigations, *ibid.* at s. 3.

The United States has historically resorted to increasing law enforcement agencies in order to combat outlaws and organized crime. For instance, during the “Wild West”, the federal government established the United States Marshals Service in 1789, *Organized Crime*, *supra* note 30. at 368. Prior to Prohibition, in 1791, the Prohibition Bureau evolved from the imposition of tax on alcoholic beverages. After Prohibition, the Prohibition Bureau became the Alcohol Tax Unit, and subsequently, with an expansion of its jurisdiction over firearms, arson and explosives, it became the Bureau of Alcohol, Tobacco, Firearms and Explosives or ATF, *ibid.* at 370-71. The Department of Treasury—Internal Revenue Service or IRS collects revenues for the federal government, and in so doing, has access to information that assist law enforcement agencies dealing with organized crime, *ibid.* at 371. Congress expanded the ability of the IRS in 1982 to facilitate cooperation between it and law enforcement, *ibid.* The Department of Homeland Security or DHS originated from the anti-terrorist goals within the *Homeland Security Act* of 2002, in order to co-ordinate activities of the Immigration and Custom Enforcement or ICE agency, the Coast Guard, and the Secret Service, *ibid.* at 371-72. This Department of Homeland Security also administers the United States Secret Service which investigates money and credit card counterfeiting, and the Postal Inspection Service which investigates the use of mail to further racketeering and smuggling of controlled substances, *ibid.* at 376.

<sup>70</sup> *Criminal Code*, *supra* note 26 at s. 487.3.

<sup>71</sup> *Ibid.* at ss. 185(1.1) and 186(1.1).

covert entry pursuant to such an authorization to a period not exceeding three years rather than the usual 90 days.<sup>72</sup> Since 1993, police had preventative powers in that they could obtain judicial authorizations without having to demonstrate investigative necessity in urgent circumstances to prevent serious harm to any person or property,<sup>73</sup> and while this section was used to obtain evidence for gang prosecutions, the British Columbia Supreme Court has held that this section violates section 8 of the *Charter*, is not saved by section 1 of the *Canadian Charter of Rights and Freedoms*,<sup>74</sup> and is of no force and effect pursuant to section 52 of the *Constitution Act, 1982*.<sup>75</sup> The Ontario Superior Court of Justice has also held that this section violates section 8 of the *Charter*, but is constitutional because its overbreadth could be remedied by severance and the absence of notice can be read down.<sup>76</sup> At a micro-level, the interception of private communications of organized crime outlaws since the passage of the 1997 legislation has facilitated law enforcement. It has contributed evidence used to arrest and prosecute a number of organized crime outlaws in Canada.<sup>77</sup> However, from a macro-level perspective, in spite of increased law enforcement power, organized crime outlaw groups still exist, and acts of violence and intimidation by their members still occur in this country.

The expansion of law enforcement powers generally has had inconsistent success in the overall suppression of organized crime in other countries as well. At various points in history, the United States has used its numerous organized crime agencies to increase law

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<sup>72</sup> *Ibid.* at ss. 185(3), 196, 487.01(5.1) and (5.2).

<sup>73</sup> *Ibid.* at s. 184.4.

<sup>74</sup> *R. v. Tse*, 2012 SCC 16, [2012] S.C.J. No. 16 (Q.L.), aff'g 2008 BCSC 211, [2008] B.C.J. No. 1764 (Q.L.) (B.C.S.C.) [previously *R. v. Six Accused Persons*, 2008 BCSC 212, [2008] B.C.J. No. 293 (Q.L.) (B.C.S.C.)] [*R. v. Tse*]; and *R. v. Sipes*, 2009 BCSC 285, [2009] B.C.J. No. 421 (Q.L.) [*R. v. Sipes*]. Section 1 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 [*Charter*] states:

The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

<sup>75</sup> *Constitution Act, 1982*, R.S.C. 1985, App. II., No. 44, Schedule B, s. 52. Section 52 states:

The Constitution of Canada is the Supreme Law of Canada and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

<sup>76</sup> *R. v. Pangman*, 2000 MBQB 85, [2000] M.J. No. 300 (Q.L.) (Man. Q.B.); *R. v. Pereira*, 2008 BCSC 184, [2008] B.C.J. No. 2779 (Q.L.); *R. v. Tse*, *supra* note 74; *R. v. Sipes*, *supra* note 74; *R. v. Riley* (2008), 60 C.R. (6<sup>th</sup>) 105, [2008] O.J. No. 2887 (Q.L.) (Ont. S.C.J.) [*R. v. Riley*]; *R. v. Riley* (no. 2), [2008] O.J. No. 2889 (Q.L.) (Ont. S.C.J.) [*R. v. Riley* (no.2)]; and *R. v. Deacon*, [2008] O.J. No. 5756 (Ont. S.C.J.) [*R. v. Deacon*].

<sup>77</sup> *R. v. Riley*, *supra* note 76; *R. v. Riley* (no. 2), *supra* note 76; and *R. v. Deacon*, *supra* note 76.

enforcement in relation to specific organized crime groups and their activities. An extensive law enforcement initiative using organized crime legislation has led to a number of convictions of organized crime members and associates under *RICO* occurred in the 1960s,<sup>78</sup> in the 1980s<sup>79</sup> and again in the 1990s.<sup>80</sup> Italy created the Alto Commissario or High Commissioner in 1982 in order to coordinate the government fight against the Mafia. However, this effort became useless and was revoked in 1992 – notably the same year in which the assassinations of two criminal justice officials, Candidate for Superprocuratore or General Attorney Giovanni Falcone, and Judge Paolo Borsellino, as well as their families and bodyguards, occurred.<sup>81</sup> In the 2000s, the Italian government deployed thousands of military and police officers into Naples in order to

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<sup>78</sup> Organized crime convictions in the United States rose from 14 in 1960 to 373 in 1963. Attorney General Robert F. Kennedy increased funds and manpower for the Justice Department; assigned a special team of prosecutors to assume conduct of the entire process of investigating and prosecuting racketeer cases; implemented a coordinated program involving all 26 federal law enforcement agencies that were tasked with investigating organized crime in 1960; and eventually successfully lobbied Congress for an expansion of federal powers in the fight against organized crime. This data was obtained from the Robert F. Kennedy Exhibit, John F. Kennedy Library and Museum, Boston, Massachusetts.

<sup>79</sup> Antonio Nicaso & Lee Lamothe, *Angels, Mobsters & Narco-Terrorists: The Rising Menace of Global Crime Empires* (Mississauga: John Wiley & Sons Canada, 2005) [*Angels, Mobsters & Narco-Terrorists: The Rising Menace of Global Crime Empires*] at 54. Nicaso and Lamothe cite the following statistics to demonstrate this law enforcement initiative:

Coordinated attacks on America's La Cosa Nostra in the 1980s led one United States Attorney in Massachusetts to dub the decade "the gold age of law enforcement." By the mid-1980s there were more than 3,500 convictions of organized crime figures and associates, with \$15 million in fines levied and \$387 million in assets, drugs, and other contraband seized. Across America special organized crime task forces were formed; throughout a network of 26 cities these units, often working with anti-drug task forces, besieged LCN [La Cosa Nostra] operations. The number of FBI agents mandated to fight organized crime was increased by 20 percent, and U.S. Attorneys began using the Racketeer Influenced and Corrupt Organizations Act—RICO—against criminal organizations. Under RICO, offenders found guilty received sentences of up to 20 years and \$25,000 fines. RICO allowed prosecutors to pull diverse crime together into a single case to show a pattern of racketeering enterprises. Funding was increased for wiretapping and room probe operations; this led to an increase in informants who essentially convicted themselves through their own conversations.

<sup>80</sup> *Ibid.* at 56. Nicaso and Lamothe cite the following statistics to demonstrate the FBI law enforcement initiative of 1996 called Operation Button Down:

By the end of the first year, Button Down officers had indicted and/or convicted a total of 4 bosses, 3 underbosses, 3 *consigliere*, 46 *capos*, 48 soldiers, and 331 associates and seized more than \$116 million. And by December 1998 another 53 LCN [La Cosa Nostra] members and associates were indicted or convicted in labor racketeering cases, including indictments against the Gambino and Genovese Families. In total, 3 bosses, 1 underboss, 1 *consigliere*, 20 *capos*, 26 soldiers, and 270 associates were arrested.

The Button Down office was involved in cases involving LCN activities across America, including Las Vegas, Buffalo, New York, Youngstown, and Pittsburgh. In all, almost 1,000 LCN members and their associates were charged. According to the FBI, the effect of Button Down is in the numbers: active Families in the U.S. were reduced from a whopping 24 to nine.

<sup>81</sup> "Law Enforcement in Italy and Europe Against Mafia and Organized Crime", *supra* note 5 at Section 1.1.

combat the extreme violence resulting from gang wars. In spite of increased law enforcement, increased arrests, increased public outrage over the death of innocent civilians, the Camorra continued to operate their usual criminal enterprises, and adapted to the police presence by sending members overseas to generate income to support the neighbourhoods in Naples.<sup>82</sup> Some observers of the wars assert that the violence and deaths will only end when one gang achieves supremacy over the others.<sup>83</sup> That is to say, law enforcement has limited ability to suppress gang wars. Rather, it may exert only peripheral control, and its presence largely attempts to calm moral panic.

Ideally, both expansion of enforcement powers and an increase in police officers should occur if the state seeks to arrest and prosecute organized crime outlaw groups. However, the decimation of an organized crime group does not permanently oust all outlaws from an area or territory. New groups rise to fill or seize the vacated and lucrative territory,<sup>84</sup> and resilient groups re-emerge, as evidenced by the recovery of Sicilian Mafia from law enforcement in the 1980s.<sup>85</sup> Indeed, as a result of American law enforcement efforts in the 1980s and 1990s that targeted organized crime using *RICO*, non-La Cosa Nostra organized crime groups, such as Albanian groups, emerged in the some industries in their place.<sup>86</sup> In Canada, the convictions and incapacitation of significant crime figures in British Columbia has not rid society of organized crime outlawry and violence. This phenomenon suggests that social control in the form of law enforcement and prosecutions does not address the larger societal issues that create and perpetuate organized crime. From a social constructionist perspective, little utility results from expending resources for a revolving practice – that is to say, if arrests, prosecutions, and convictions cannot solve the problem of organized crime, then perhaps criminal laws as anti-organized crime measures and specifically criminal laws that are tailored to target organized crime, are not the answer, or are not the whole answer. The increased presence of police may make the

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<sup>82</sup> *Angels, Mobsters & Narco-Terrorists: The Rising Menace of Global Crime Empires*, *supra* note 79 at 69.

<sup>83</sup> *Ibid.* at 70.

<sup>84</sup> *Ibid.* at 57; and Stephen Schneider, *Iced: The Story of Organized Crime in Canada* (Mississauga: John Wiley & Sons Canada, 2009) [*Iced: The Story of Organized Crime in Canada*] at 479 and 501.

<sup>85</sup> *Angels, Mobsters & Narco-Terrorists: The Rising Menace of Global Crime Empires*, *supra* note 79 at 33.

<sup>86</sup> *Ibid.* at 57.

public think the state is responding to the problem of organized crime – that is to say, it may legitimate the state – but over time the public will realize that this technique alone is not the solution. It is somewhat hollow.

#### 4.2.5 Criminalization and Regulation of Activities Associated with Organized Crime

Will the criminalization and regulation of activities associated with organized crime socially control organized crime outlaws? Are such measures too complex and piecemeal to be useful? Federal and provincial governments in Canada have implemented a variety of laws to stymie the efforts of organized crime outlaws. Some of these laws are peripheral, and they hinder the *legal* activities of organized criminals that assist them in their *illegal* pursuits. Such technique of targeting organized crime is not new or unique. For instance, in Italy, in order to reduce the extreme violence in Naples resulting from gang wars and then associated vendettas, in the early 2000s, the Italian government sought to ban motor scooters to reduce the mobility of Camorra gunmen.<sup>87</sup> These laws may effect small and yet significant changes to organized crime behaviour, but these piecemeal measures do not pierce the real reasons for the power of organized crime groups. Thus, criminalization of activities – illegal and legal activities – of organized crime outlaws lack substance and effectiveness. However, social constructionism suggests that from the state’s perspective, more important than the actual effectiveness of the solution to the problem of organized crime violence in society, is the short-term legitimacy of the state and the law as a social control mechanism.

As referred to in section two “The Birth of Criminal Organization Legislation in Canada” in Chapter One of this thesis, the Canadian federal government criminalized various acts if they were done in connection with a criminal organization.<sup>88</sup> Recently, British Columbia has criminalized the possession of body armour and armoured vehicles or

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<sup>87</sup> *Ibid.* at 69.

<sup>88</sup> *Criminal Code*, *supra* note 26 at ss. 82(2) criminalizes the possession of explosive substances in connection with a criminal organization; section 231 deems a murder to be in the first degree regardless of whether it was planned and deliberate, if the killing was done in connection with a criminal organization, or if it was done while committing or attempting to commit an indictable offence in connection with a criminal organization; and drive-by shootings and proscribed an aggravated sentence for such shootings when they are done in connection with a criminal organization.

vehicles with after-market compartments in an effort to target gang violence.<sup>89</sup> Other provinces have followed suit.<sup>90</sup> Further, the British Columbia government has contemplated legislation to prevent the chips from one casino from having value and being used in another casino in order to stymie this compact method of currency used by some organized crime outlaws in their illegal transactions and in money laundering.<sup>91</sup>

The criminalization of activities associated with organized crime, or the statutory connection of already existing criminal offences to organized crime, essentially attempts to criminalize organized crime generally without specifically proscribing organized crime groups themselves. It also demonstrates the employment of extreme social control measures by the state in order to respond to a social problem. For example, shootings of organized crime members' vehicles, houses and clubhouses is a social problem. They have occurred since gang wars began in Canada, and in the last few years in the Metro Vancouver area of British Columbia, have risen to unprecedented levels.<sup>92</sup> These shootings occur in neighbourhoods and public places. The moral panic that ensues from seemingly random shootings and the risk to the lives of the innocent seemed to demand some sort of state response. The state did not simply increase law enforcement, prosecution and criminal justice system resources to increase arrests and prosecutions of organized crime outlaws, and employ pre-existing ordinary criminal laws, such as attempted murder;<sup>93</sup> discharging a firearm with intent to wound, maim or disfigure (prior

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<sup>89</sup> *Body Armour Control Act*, S.B.C. 2009, c. 24; and *Armoured Vehicle and After-Market Compartment Control Act*, S.B.C. 2010, c. 8.

<sup>90</sup> *Body Armour Control Act*, S.A. 2010, c. B-4.8; *Body Armour Control Act*, S.N.S. 2011, c. 2; and *The Body Armour and Fortified Vehicle Control Act*, S.M. 2010, c. 12. These Saskatchewan and Nova Scotia Acts are not yet in force.

<sup>91</sup> CBC News Online, "B.C. Moves to Control Casino Chips" (10 January 2011), online: CBC News <<http://www.cbc.ca/canada/british-columbia/story/2011/01/10/bc-casino-chips-rules.html>>; and CBC News Online, "B.C. to Move Against Casino Money-Laundering" (7 January 2011), online: CBC News <<http://www.cbc.ca/canada/british-columbia/story/2011/01/07/bc-casinos-money-laundering-regulations.html>>.

<sup>92</sup> City of Surrey Community Impact Statement Letter from Mayor Dianne L. Watts & Chief Superintendent W. Fraser MacRae, (undated). Mayor Watts of the City of Surrey and Chief Superintendent MacRae of the Royal Canadian Mounted Police Surrey Detachment state that "...there has been a 55% increase in firearms-related homicides from 2007 to 2008 in the Metro Vancouver area." In 2009 in Metro Vancouver, they state that there were 39 confirmed firearms-related homicides. In Surrey alone, they state that a 20% increase in confirmed (through persons, property damage, and/or shell casings) shots fired incidents occurred in 2008 as compared to 2007.

<sup>93</sup> *Criminal Code*, *supra* note 26 at ss. 230 and 463.

to the October 2, 2009 amendments connecting this offence to a criminal organization);<sup>94</sup> unauthorized possession of a prohibited or restricted firearm;<sup>95</sup> and unauthorized possession of a firearm in a motor vehicle.<sup>96</sup> Rather, the Canadian government enshrined a number of new criminal laws. However, no evidence existed or exists to show that investigations and prosecutions require the majority of these specific organized crime measures to incapacitate organized crime outlaws. Debate as to whether any criminal organization laws were required to tackle the problem of organized crime in society did not occur when the Canadian government consulted police, provincial and federal governmental officials, the legal community, private industry, and academics.<sup>97</sup> These approaches by federal and provincial governments again suggest that the state is attempting to calm moral panic by being seen to pass laws that are intended to combat organized crime. However, ineffective and useless laws amount to hollow solutions.

Canadian provinces have also passed laws to regulate criminal organization activities or activities of their members. For instance, some provinces have legislated powers for the state to interfere with business endeavours of organized crime members through the suppression and publication of information about members in order to combat the activities of organized crime and organized crime members. Criminal organizations have numerous businesses and companies in order to launder illegally obtained money. For example, by the mid 1980s, the Hells Angels had over 40 registered companies.<sup>98</sup> The Hells Angels corporation may not have owned these companies so much as individuals within the corporation owned them. These non-criminal law measures did not exist prior to the *Criminal Code* criminal organization legislation. They seek to reduce the economic and social support of the community for labeled organized crime outlaws. They seek to limit the economic viability of businesses associated with criminal organizations or criminal organization members, and thus, reduce their economic power within society.

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<sup>94</sup> *Ibid.* at s. 244.

<sup>95</sup> *Ibid.* at ss. 91, 92 and 95.

<sup>96</sup> *Ibid.* at s. 94.

<sup>97</sup> "Time to Recodify Criminal Law And Rise Above Law and Order Expediency: Lessons from the Manitoba Warriors Prosecution", *supra* note 28 at para. 14.

<sup>98</sup> *Iced: The Story of Organized Crime in Canada*, *supra* note 84 at 399.

In Saskatchewan, *The Criminal Enterprise Suppression Act*,<sup>99</sup> allows a court to cancel any licence held by an individual who owns or manages a business and who is a member of a criminal organization; to prohibit that individual from owning or managing a business for a specified period of time; and to prohibit the Liquor and Gaming Authority from approving a licence for any premises owned or used by the business.<sup>100</sup> Similarly, *The Civil Remedies Against Organized Crime Act*<sup>101</sup> in Manitoba allows a police chief to apply to a court to cancel various business licences that are essential to operating a business, if those licences are held by members of criminal organizations.<sup>102</sup>

Further, both Saskatchewan and Manitoba governments have used civil rights legislation that empowers a court to require the owner of a property to ensure that the property is used in a way that does not adversely affect the community or neighbourhood. These legislative efforts may also be used to target criminal organization activities. *The Safer Communities and Neighbourhoods Act*,<sup>103</sup> of Saskatchewan empowers a court to make a community safety order against a property if there is proven “a reasonable inference that it is being habitually used for a specified use and ... the community or neighbourhood is adversely affected by the activities.”, and those activities pose “a serious and immediate threat to the health, safety and security of one or more occupants of the property or persons in the community or neighbourhood.”<sup>104</sup> A “specified use” includes activities

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<sup>99</sup> S.S. 2005, c. C-46.1.

<sup>100</sup> *Ibid.* at s. 4.

<sup>101</sup> S.M. 2002, c. 56, C.C.S.M. c. C107 [*The Civil Remedies Against Organized Crime Act*]; and Manitoba Justice, *Project Gang-Proof: A Handbook For Families and Community Members*, 2<sup>nd</sup> ed. (2004), online: Manitoba Government <<http://www.gov.mb.ca/justice/safe/gangproof/ganghandbook2004.pdf>> [*Project Gang-Proof: A Handbook For Families and Community Members*] at 38.

<sup>102</sup> *The Civil Remedies Against Organized Crime Act*, *supra* note 101 at s. 4.

<sup>103</sup> S.S. 2004, C.S-0.1 as amended by S.S., 2005, c. 41; and 2006, c.R-22.0001 [*The Safer Communities and Neighbourhoods Act* of Saskatchewan].

<sup>104</sup> *Ibid.* at s. 8. Section 8 states:

8 (1) The court may make a community safety order if:

(a) it is satisfied that:

(i) activities have been occurring on or near the property named in the application that give rise to a reasonable inference that it is being habitually used for a specified use; and

(ii) the community or neighbourhood is adversely affected by the activities; or

(b) it is satisfied that the activities about which an application is made are a serious and immediate threat to the health, safety and security of one or more occupants of the property or persons in the community or neighbourhood.

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that are traditionally believed to be associated with organized crime groups, such as illegally selling liquor, drug dealing, prostitution in a bawdy house, and “the commission or promotion of a criminal organization offence, [or] ... the accommodation, aid, assistance or support of any nature of a gang or criminal organization or any of its activities or the facilitation of any of its activities.”<sup>105</sup> Since its proclamation, reported cases indicate that courts have generally refused to grant community safety orders.<sup>106</sup> However, in *Saskatchewan (Director of Community Operations) v. Li*,<sup>107</sup> and

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(3) A community safety order may:

- (a) require any or all persons to vacate the property on or before a date specified by the court, and enjoin any or all of them from re-entering or reoccupying it;
- (b) terminate the tenancy agreement or lease of any tenant of the property on the date specified pursuant to clause (a);
- (c) require the director to close the property from use and occupation on a specified date and keep it closed for up to 90 days;
- (d) limit the order to part of the property about which the application was made, or to particular persons;
- (e) make any other provision that the court considers necessary for the effectiveness of the community safety order, including, but not limited to, an order of possession in favour of the respondent.

<sup>105</sup> *The Safer Communities and Neighbourhoods Act* of Saskatchewan, *supra* note 103 at ss. 4(1)(f).

Subsection 4(1)(f) states:

4(1) ... (f) "specified use" means, in relation to property, the use of property for:

- (i) the use, consumption, sale, transfer or exchange of a substance mentioned in section 90 of *The Alcohol and Gaming Regulation Act, 1997*, in contravention of that Act and the regulations made pursuant to that Act;
- (ii) the use, consumption, sale, transfer or exchange of beverage alcohol, as defined in *The Alcohol and Gaming Regulation Act, 1997*, in contravention of that Act and the regulations made pursuant to that Act;
- (iii) the use or consumption as an intoxicant by any person of an intoxicating substance, or the sale, transfer or exchange of an intoxicating substance if there is a reasonable basis to believe that the recipient will use or consume the substance as an intoxicant, or cause or permit the intoxicating substance to be used or consumed as an intoxicant;
- (iv) the possession, growth, use, consumption, sale, transfer or exchange of a controlled substance, as defined in the *Controlled Drugs and Substances Act (Canada)*, in contravention of that Act;
- (v) child sexual abuse or activities related to child sexual abuse;
- (vi) prostitution or activities related to prostitution;
- (vi.1) the commission or promotion of a criminal organization offence;
- (vi.2) the accommodation, aid, assistance or support of any nature of a gang or criminal organization or any of its activities or the facilitation of any of its activities; or
- (vii) any other prescribed use; ....

<sup>106</sup> *Saskatchewan (Director of Community Operations) v. Li*, 2007 SKQB 114, [2007] S.J. No. 153 (Q.L.)

[*Saskatchewan (Director of Community Operations) v. Li*] at para. 3.

<sup>107</sup> *Ibid.*

*Saskatchewan (Director of Community Operations) v. Mercer*,<sup>108</sup> the Saskatchewan Court of Queen's Bench did grant such orders.<sup>109</sup>

Similarly, *The Safer Communities and Neighbourhoods Act*<sup>110</sup> in Manitoba allows a court to make a community safety order if an activity “negatively affects the safety or security of one or more persons in the community or neighbourhood” or “interferes with the peaceful enjoyment of one or more properties in the community or neighbourhood.”<sup>111</sup> Further, the *Fortified Buildings Act*<sup>112</sup> of Manitoba designates a fortified building as a threat to public safety if public safety concerns exist.<sup>113</sup> These provincial statutes attempt to reduce organized crime activities and maintain conventional societal values for communities. Since its proclamation in July 2001, applications for community safety orders were sought in three cases in Manitoba, although 340 other complaints were

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<sup>108</sup> 2007 SKQB, [2007] S.J. No. 390 (Q.L.).

<sup>109</sup> *Ibid.* at paras. 1 and 6-8; and *Saskatchewan (Director of Community Operations) v. Li*, *supra* note 106 at paras. 7-10.

<sup>110</sup> *The Safer Communities and Neighbourhoods Act*, S.M. 2001, c. 6, C.C.S.M. c. S5 [*The Safer Communities and Neighbourhoods Act* of Manitoba] at s. 6(1); and *Project Gang-Proof: A Handbook For Families and Community Members*, *supra* note 101 at 38.

<sup>111</sup> *Ibid.*; and *ibid.* Sections 1(2) and 6(1) and (2) of *The Safer Communities and Neighbourhoods Act* of Manitoba state:

- 1(2) For the purposes of this Act, a community or neighbourhood is adversely affected by activities if the activities
  - (a) negatively affect the safety or security of one or more persons in the community or neighbourhood; or
  - (b) interfere with the peaceful enjoyment of one or more properties in the community or neighbourhood, whether the property is privately or publicly owned.
- 6(1) The court may make a community safety order if it is satisfied that
  - (a) activities have been occurring on or near the property that give rise to a reasonable inference that it is being habitually used for a specified use; and
  - (b) the community or neighbourhood is adversely affected by the activities.
- 6(2) Subject to subsection (3), the court may include in a community safety order
  - (a) a provision requiring any or all persons to vacate the property on or before a date specified by the court, and enjoining any or all of them from re-entering or re-occupying it;
  - (b) a provision terminating the tenancy agreement or lease of any tenant of the property on the date specified under clause (a);
  - (c) a provision requiring the director to close the property from use and occupation on a specified date and keep it closed for up to 90 days; and
  - (d) any other provision that it considers necessary to make the order effective, including, but not limited to, an order of possession in favour of the respondent.

<sup>112</sup> S.M. 2002, c. 3, C.C.S.M. c. F153.

<sup>113</sup> *Ibid.*; and *Project Gang-Proof: A Handbook For Families and Community Members*, *supra* note 101 at 38.

resolved out of court.<sup>114</sup> The employment of civil statutes reduces the standards of proof required to obtain court orders, and thus, may assist communities in their efforts. However, whether these civil proceedings are frequently used and have their desired effects in the long term remains to be seen.

Should governments seek to interfere with or suppress business endeavours of organized crime outlaws, then they should consider empowering law enforcement to publish the names of individuals who are members of criminal organizations; the names of members of entities that courts have determined to be criminal organizations; as well as the titles and ownership of those members, for instance that they are directors of particular companies and businesses. Such publication would inform the public as to whom they are supporting as consumers. In a similar vein, if an entity has been convicted of a criminal offence, legislation regulating business and incorporation could be amended in order to prevent companies from continuing to operate. Although such measures may circuitously chip away at the one aspect of power of organized crime outlaws, these piecemeal efforts do not directly target the essence of power of criminal organizations and their members, and they will not be consistently applied. From a labelling and social psychology perspective, the stigmatization of these organized crime outlaws only widens the gap between them and conventional law-abiding citizens, and further prevents pro-social interactions. Individuals who are business owners and also revealed to be organized crime outlaws may have fewer pro-social relations with conventional societal members and more anti-social relations with non-conventional societal members and outlaws. Such stigmatization only entrenches outlaw identities.

The criminalization and regulation of certain acts associated with organized crime activity does not mean that the police and prosecutors can prove these new offences; nor that such proof will not require complex and lengthy legal arguments; nor that such proof will not have economic costs that prohibit the use of such provisions. As a result, these specific organized crime measures may not be used although they exist for the purpose of

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<sup>114</sup> *Manitoba (Aboriginal and Community Law Enforcement, Director) v. Manaigre*, 2009 MBQB 113, [2009] M.J. No. 153 (Q.L.) at para. 4.

combating criminal organizations. The state can declare that they have put forth a remedy to the problem of organized crime violence, but police, prosecutors and the courts may have real difficulties using these measures. Consequently, in the long-term, such measures may actually produce a negative impact on the legitimacy of these laws and the state when the public eventually comes to realize that these laws did not, or were not used to, combat organized crime outlaws.

#### 4.2.6 Problems Administering Justice in Criminal Organization Trials

Can the evidentiary and procedural issues arising from the criminal organization legislation be overcome so as to successfully prosecute organized crime outlaws, without prolonging the administration of justice and undermining essential criminal law principles at an exorbitant expense? The Manitoba Warriors trial exemplifies one of the first of many very costly changes to administering justice for alleged criminal organizations. Twenty months of pre-trial motions occurred.<sup>115</sup> There were 32 guilty pleas to trafficking in cocaine, and only two guilty pleas by minor participants to participation in a criminal organization.<sup>116</sup> The prosecution withdrew the other criminal organization charges for a plea bargain with other accused.<sup>117</sup>

**30** The cost of building the courthouse was \$3.7 million and the additional costs of this trial have been estimated at well over \$7 million. The money spent on the special measures taken in this case would have been far better spent on crime prevention programmes targeted at Aboriginal peoples and general police investigative deployment. This show trial is a monument to state folly, both in terms of the expedient passage of the anti-gang laws and their use in Manitoba. Roland Penner, a former Attorney-General for Manitoba, has described it as "politically motivated, expensive and constitutionally invalid." Professor David Deutscher suggests it was "too complex, with too many accused and too many charges to have a chance of success."

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**32** Prosecutors should have treated this case as a routine drugs conspiracy trial with discretion exercised to target only the major participants. The trial judge should have granted severance for lesser participants far earlier than the date at which it was clear the trial had unraveled. At worst this was overarching state

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<sup>115</sup> "Time to Recodify Criminal Law And Rise Above Law and Order Expediency: Lessons from the Manitoba Warriors Prosecution", *supra* note 28 at para. 29.

<sup>116</sup> *Ibid.*

<sup>117</sup> *Ibid.*

action based on false stereotypes that these Aboriginal people were dangerous to themselves and everyone else.<sup>118</sup>

The Manitoba Warriors trial resulted in 170 years of sentences being imposed overall, although the longest sentence was 4.5 years for trafficking in cocaine.<sup>119</sup> Whether or not the security provisions of the courthouse were necessary to conduct trial proceedings remains difficult to judge. When such proceedings in such facilities do not give rise to security or safety breaches, one cannot definitively assert that such measures were warranted as no other comparison exists. Further, even if breaches did occur, human error rather than the nature of the facilities may be to blame. The point is that overwhelming security provisions portray to the public and to the accused that the accused are organized crime outlaws to be feared.

Subsequent criminal organization prosecutions have been no different than the Manitoba Warriors proceedings, and perpetuate the message to the public that their moral panic is justified and that the individuals charged are indeed individuals to be feared. Exorbitant expenditures for courthouse and courtroom security, prosecutorial and judicial salaries, law enforcement wages, witness protection costs and expenses, legal aid funding, and the expenditure of these resources in one area as opposed to for usual investigations and trials, have characterized other large and complex criminal cases across Canada, and will continue to do so. For instance, in the case of *R. v. Violette*,<sup>120</sup> pre-trial *voir dire*s took approximately a year to complete, and the jury sat from September 2008 to July 2009. Four prosecutors worked almost exclusively on this case for three and a half years, and three of the four accused had two lawyers in court representing them each day. Additional Sheriffs were assigned to the courtroom for safety and security purposes, and a contingent of police officers were present to protect the police agent while he testified for months. The police agent received in excess of one million dollars plus stipends for his participation throughout the investigation and court proceedings. While all accused were convicted of various counts in the 28 count indictment, none were convicted of criminal

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<sup>118</sup> *Ibid.* at paras. 30 and 32.

<sup>119</sup> *Ibid.* para. 29.

<sup>120</sup> 2009 BCSC 1557. As this trial was heard by a jury, no citation exists to review the nature of the case. However, this citation for the sentencing decision for accused Potts and Punko refers to its breadth and complexity.

organization charges. The prosecutions arising from Project SHARQc also are expensive due to a 2.9 million dollar police agent,<sup>121</sup> a team of prosecutorial staff, and extensive court resources over a lengthy period of time. Some charges have been stayed because the Quebec justice system could not handle the size and complexity of the case and delays prevent the accused from having fair trials.<sup>122</sup> Justice is not only blind, but sports a huge price tag.

Physical challenges to administering justice in a safe manner (or in a manner perceived to be safe) and the cost of lengthy complex cases are not the only problems with criminal organization trials. A number of evidentiary hurdles associated with formally defining criminalizing organized crime into statutory law, as evidenced by the Canadian jurisprudence. These evidentiary hurdles hinder efforts to prosecute and convict individuals, and thus, these legal measures lose their social control value. For instance, traditional rules of evidence may also be inadequate to prove the new legal concept of a criminal organization. While exceptions to the hearsay rule exist in order to admit statements and acts of co-conspirators against one another if that evidence was made in furtherance of the conspiracy, no such hearsay exceptions exist for criminal organizations and their members. Rather, hearsay rules limit or circumscribe the inclusion of evidence of other members' criminal acts to prove the "main purposes or main activities"<sup>123</sup> of the group which is alleged to be a "criminal organization."

As discussed in the previous section, the federal government has criminalized the act of committing a criminal offence in connection with a criminal organization, and has created a number of these specific types of offences. For instance, the provisions criminalize the possession of explosive substances in connection with a criminal organization,<sup>124</sup> and deem a murder to be in the first degree regardless of whether it was planned and

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<sup>121</sup> CBC News Online, "Hells Angels Informer Will Earn Millions for Crackdown Help" (23 April 2009) *CBC News* online: CBC News <<http://www.cbc.ca/news/canada/montreal/story/2009/04/23/montreal-hellsangels-informer-0423.html>>.

<sup>122</sup> CBC News Online, "Quebec to appeal release of 31 accused bikers" (01 June 2011) *CBC News* online: CBC News <<http://www.cbc.ca/news/canada/montreal/story/2011/06/01/quebec-sharqc-stay-proceedings-appeal.html>>. Defence counsel alleged that the case may require ten years to complete the prosecutions of all accused.

<sup>123</sup> *Criminal Code*, *supra* note 26 at s. 467.1(b).

<sup>124</sup> *Ibid.* at ss. 82(2).

deliberate, if the killing was done in connection with a criminal organization, or if it was done while committing or attempting to commit an indictable offence in connection with a criminal organization.<sup>125</sup> In addition, the government has criminalized drive-by shootings, and has proscribed an aggravated sentence for such shootings when they are done in connection with a criminal organization.<sup>126</sup> This legislation requires not only proof of the offence of discharging the firearm, but also proof of a criminal organization, as well as proof of connection of the predicate offence to the criminal organization. Thus, the enforcement and prosecution of this new law require not only comprehensive and significant evidentiary proof, but also significant resources.

Further, significant prejudices can occur in relation to criminal organization trials because evidence may be admitted at trial in order to prove the existence of a criminal organization, but that evidence may be irrelevant to the predicate offences, and may also be prejudicial in nature. Prejudice can also occur from the amount of evidence required to prove the existence of a criminal organization, and the connection of the predicate offence to that organization.<sup>127</sup> These evidentiary hurdles result in *voir dire*s that last weeks or months, and thus, delay justice and result in significant expense.

These evidentiary and procedural failures also mean that true criminal organization members can escape the branding and social tarnishing of the outlaw label, and that they may relish in the emboldening of their reputation as bad, but untouchable. Law-abiding citizens will have less confidence in the declaration of social norms and values as espoused by the law, and thus, less reason to conform. Thus, these evidentiary and procedural problems within criminal organization laws will not adequately prevent the challenges to social disorder that they seek to eradicate.

These are but a few of the problems that plague the administration of justice for criminal organization trials in Canada. The brevity of this discussion does not reflect the time-

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<sup>125</sup> *Ibid.* at s. 231.

<sup>126</sup> *Ibid.* at s. 244.2.

<sup>127</sup> *R. v. Violette*, 2008 BCSC 422, [2008] B.C.J. No. 2781 (Q.L.) at para. 116. The Court in this *voir dire* in *R. v. Violette* adopted the term “piling on” as used by Defence Counsel, and held that prejudice may result from the cumulative effect of individual pieces of admissible evidence.

consuming, complicated, expensive, and sometimes unsolvable nature of these problems. It makes the point that the criminal organization provisions in the *Criminal Code*, and their implementation in the social and political climate of the day, cannot be used to effectively administer justice. These provisions cannot substantively and fairly try and decide whether a social group is indeed an organized crime outlaw group or a “criminal organization.”

#### 4.2.7 Punishment and Deterrence

##### 4.2.7.1 New Punitive Provisions for Criminal Organization Outlaws

Do the criminal organization provisions provide adequate punishment and deterrence of organized crime outlaws? In 1997, the Canadian government augmented sentencing provisions in relation to organized crime offenders<sup>128</sup> and continued to do so in subsequent amendments to the *Criminal Code*. The sentencing principles provide that an offence “...committed for the benefit of, at the direction of or in association with a criminal organization,” is an aggravating factor in sentencing an offender.<sup>129</sup> Further, specific sections of the *Criminal Code* proscribe greater punishments for offences committed in connection with a criminal organization than pre-existing offences or offences not committed in connection.<sup>130</sup> Parliament has made its position clear to the judiciary: criminal organization offenders warrant more punitive sentences. In so doing it has made its position clear to the public: their moral panic is warranted because criminal organization offenders are fearsome, and unlike “others” – unlike other societal members and other criminals.

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<sup>128</sup> *Criminal Code*, *supra* note 26 at ss. 82(2); 718.2(a)(iv); and 467.14.

<sup>129</sup> *Ibid.* at s. 718.2(a)(iv). Section 718.2(a)(iv) states:

718.2 A court that imposes a sentence shall also take into consideration the following principles:

- (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,
- ...
- (iv) evidence that the offence was committed for the benefit of, at the direction of or in association with a criminal organization, ...

shall be deemed to be aggravating circumstances;

<sup>130</sup> *Ibid.* at ss. 82(2), 231, 244(2) and 244.2.

The criminal law proscribes and sentencing courts have imposed more punitive sanctions for criminal organization offenders in order to denounce, deter and incapacitate such offenders, and to limit the furtherance of the reputation for violence and intimidation. The British Columbia Court of Appeal stated the following when sentencing an offender in *R. v. Payne*:<sup>131</sup>

46 First is the appellant's motive. The appellant cold-bloodedly amputated Mr. Giesbrecht's finger to punish him for failing to pay a small drug debt owed to the criminal organization and to make of him a deterrent example to other "salespersons" in the organization. This was not a crime of passion or impulse - it was simply business. The appellant used this extreme violence as a management tool to maintain discipline amongst and control over the sales staff who worked under him. Thus, the purpose of the violence was to further the financial interests of a criminal organization that is involved in an industry that spreads misery and death to vulnerable members of our society, that drains the resources of our public health care system, and that spawns collateral criminal activity of staggering proportions. That the appellant was found to be a member of a criminal organization and that he committed the offence for the benefit of and in association with the criminal organization is an aggravating circumstance by virtue of s. 718.2(a)(iv) of the *Criminal Code*. This factor distinguishes this case from *R. v. Jordan, supra*, where there was no finding that the offender acted on behalf of a criminal organization, and for that reason, all else being relatively equal, it warrants a more severe sentence.

47 Next is the appellant's moral blameworthiness. The depth and endurance of his moral degradation is illustrated by his remark, made one year after he mutilated Mr. Giesbrecht, that if Mr. Holtz were his employee he would cut his finger off for being "short" in his payment. Further, the appellant deliberately chose a vulnerable drug addict as his salesman and callously put him at risk of suffering beating and mutilation by feeding his addiction at the same time as he was holding him responsible for selling the drugs and collecting and remitting the money. As well, he put the severed portion of Mr. Giesbrecht's finger in a box for display to others who might be tempted to transgress the organization's rules. It is difficult to comprehend such barbarous behaviour. It calls out for denunciation and demands a strong punitive sentence.<sup>132</sup>

Such an approach is not new with respect to targeting organized crime outlaws.<sup>133</sup>

However, these laws, like other laws that increase the length of incarceration, are subject to continued debate as to whether more punitive sanctions effect deterrence and

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<sup>131</sup> *R. v. Payne, supra* note 63.

<sup>132</sup> *Ibid.* at paras. 46 and 47.

<sup>133</sup> "A Comparative Analysis of Organised Crime Conspiracy Legislation and Practice and Their Relevance to England and Wales", *supra* note 31 at 4. In the United States, *RICO* has also created a higher sentencing regime in relation to racketeering activities.

denunciation of offenders, and thus, whether they reduce recidivism and crime generally. Sentencing principles generally provide for more punitive sanctions for more severe crimes and more violent and prolific criminals. Although the *Criminal Code* now specifically refers to committing offences for a criminal organization as an aggravating factor and has increased some penalty provisions, the individualization in sentencing and pre-existing common law ranges of sentences may have sufficed to appropriately sentence an offender. Further, from a social constructionist perspective such specific provisions declare that organized crime offenders are indeed to be feared more than other offenders – societal moral panic is warranted. From a deviance and labelling perspective, such declaration further stigmatizes individuals who are sentenced as organized crime members, and further entrenches their deviant or outlaw identity.

#### 4.2.7.2 Difficulties in Evaluating the Deterrent Value of Sentences for Organized Crime Outlaws

In spite of efforts by the government to more severely punish criminal organization offenders, a number of problems exist in deterring these offenders and in evaluating any deterrent effect of laws that specifically target them. The effectiveness of sentences in deterring criminal organization outlaws cannot be judged by arrest, convictions, and length of punitive sanctions imposed on organized crime members. According to insights gained from social control theory and bond theory, it must be gauged by conformity to societal norms. The concept of deterrence assumes significant relevance within criminal organization legislation, but general deterrence of the general public may be more significant than specific deterrence of convicted offenders.

The strength of official deterrence—force of law—is measured according to two dimensions: risk versus reward. *Risk* involves the ability of the criminal justice system to detect, apprehend and convict the offender. The amount of risk is weighed against the potential rewards. Both risk and reward, however, are relative to one's socio-economic situation. In other words, the less one has to lose, the greater is the willingness to engage in risk. ...And the greater the reward, the greater is the willingness to engage in risk. ...<sup>134</sup> [Emphasis original].

Organized crime outlaws may not be individuals who have little to lose, and thus, would have greater willingness to engage in the risk of organized crime activities. They may be

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<sup>134</sup> *Organized Crime*, *supra* note 32 at 23.

those whose reward is particularly lucrative, and worth a significant risk. In addition, if the application of laws only produces a low risk due to the lack of sufficient enforcement or the lack of punitive consequences, then, as demonstrated by anti-Prohibitionists, organized crime outlaws will assume such risk in pursuit of their rewards. Thus, deterrence of these outlaws may be difficult to effect with penal laws.

#### 4.2.7.3 The Need to Consider the Impact of Outlaw Identities in Sentencing

A second problem with effecting deterrence via criminal organization legislation is that the utilitarian equations within the concept of deterrence fail to account for the significance of identity, as espoused by insights gained from labelling theory and social psychology. Even with many arrests and convictions, specific deterrence may not occur for criminal organization members who are convicted of criminal offences due to the significant development and entrenchment of their outlaw identity. Incapacitation alone in institutional settings with other organized crime offenders, may not provide sufficient pro-social interactions to instill conventional societal values and behaviours. The difficulty at this point in time is assessing the recidivism rate of the organized crime outlaws who have been convicted and sentenced to incarceration, since many such outlaws remain in custody due to the newness of the legislation, due to its rather recent implementation, and due to the length of sentences that are imposed for the serious crimes usually committed by organized crime outlaws.

With respect to general deterrence, increased penalties for organized crime outlaws may have some value for law-abiding non-members and associates of criminal organizations, but again, difficulties arise in assessing the effectiveness of general deterrence, since one cannot measure criminal acts that did not occur. From a social control perspective and labelling, however, one expects that social cohesion among conventional law-abiding societal members would increase as the criminal “others” are punished more harshly – that is to say, they are denounced as even “more bad”, and thus, are more distinguished from law-abiding groups.

#### 4.2.7.4 Sentences that Specifically Target Organized Crime Offenders Lack Fairness and Justness

A third problem with increasing the punitive sanctions for organized crime outlaws is the lack of fairness and justness of such laws. From a social control perspective, organized crime sentencing measures must secure obedience by punishing societal members who violate the law, and deterring those who may potentially violate the law. From a social constructionism perspective, unfair and unjust laws will delegitimize the law, and thus, will not effect specific or general deterrence. No one will be deterred from committing organized crime offences, and no one will want to follow the laws of society if those laws are perceived to be unfair, unjust, and thus, violations of individual rights and freedoms.

Under the present legislative provisions, criminal organization offenders who are sentenced for an offence under section 467.11, 467.12 or 467.13 must serve that sentence consecutively to any other punishment imposed for an offence arising out of the same event or series of events, and consecutively to any other sentence to which the person is subject at the time of that the sentencing.<sup>135</sup> In addition, criminal organization provisions increased the liability to imprisonment for possession of explosive substances from five years to 14 years if possession is in connection with a criminal organization.<sup>136</sup> It mandates that sentences for offences that are in connection with a criminal organization be served consecutively to sentences for all other offences.<sup>137</sup> An amendment to the *Corrections and Conditional Release Act* in 1999 also made sentences more punitive for organized crime offenders by mandating that inmates convicted of an organized crime offence could not have access to the accelerated parole review available to some offenders after they have served one sixth of their sentence.<sup>138</sup>

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<sup>135</sup> *Criminal Code*, *supra* note 26 at s. 467.14.

<sup>136</sup> *Ibid.* at ss. 82(2).

<sup>137</sup> *Ibid.* at s. 467.14.

<sup>138</sup> Dominique Valiquet, "Bill C-14: An Act to Amend the Criminal Code (Organized Crime and Protection of Justice System Participants)" (16 March 2009), online: Parliament of Canada <[http://www2.parl.gc.ca/Sites/LOP/LegislativeSummaries/Bills\\_ls.asp?lang=E&ls=c14&source=library\\_prb&Parl=40&Ses=2#c95](http://www2.parl.gc.ca/Sites/LOP/LegislativeSummaries/Bills_ls.asp?lang=E&ls=c14&source=library_prb&Parl=40&Ses=2#c95)>. Amendments in 1999 to the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 at s. 125, prevented inmates convicted of organized crime offences from having access to accelerated parole review which some offenders may seek after service of one-sixth of their sentence.

The sentencing provisions for organized crime offenders are unfair and unjust because they treat these offenders as status offenders – that is to say, they punish criminal organization outlaws simply for being such an outlaw and simply for belonging to a criminal organization. The Canadian government has not proscribed as illegal those organized crime groups or membership in those groups, and thus, has not criminalized their state of being or simple existence, yet its imposition of more punitive sanctions for organized crime offenders does just that.

For instance, an individual who possesses explosives is liable to imprisonment for a term not exceeding five years,<sup>139</sup> but an individual who possesses explosives in connection with a criminal organization is liable to imprisonment for a term not exceeding fourteen years.<sup>140</sup> The organized crime offender may be punished more harshly because of who or what he is. The distastefulness of status offences has long been recognized and legislated against.<sup>141</sup> The Ontario Court of Appeal in *R. v. Budreo*<sup>142</sup> has expressed the unconstitutionality of status offences in its review of section 810.1 of the *Criminal Code* regarding judicial preventative measures for potential sexual offenders, and whether this section violated the principles of fundamental justice as required in section 7 of the *Charter*<sup>143</sup> because it may have created a status offence; whether the section was impermissibly broad; and whether it was impermissibly vague. The Court concluded that

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<sup>139</sup> *Criminal Code*, *supra* note 26 at ss. 82(1).

<sup>140</sup> *Ibid.* at ss. 82(2).

<sup>141</sup> For instance, since *The Criminal Code, 1892*, S.C. 1892 Vict. 55-56, c. 29 at ss. 187, 190 and 207, Canada had criminalized being a common prostitute, a bawdyhouse keeper or inmate, or a frequenter of houses of ill-repute, as well as vagrants. It also criminalized activities in which prostitutes may engage during the exercise of their trade. As a result of a declaration by the Royal Commission on the Status of Women in Canada, *Report of the Royal Commission on the Status of Women in Canada*, (Ottawa: Information Canada, 1970) that the *Criminal Code* treated women who engaged in prostitution inequitably, without consideration for their socio-economic plight, and with no regard for their rehabilitation, in 1972, the government criminalized in the *Criminal Code*, S.C. 1972, c. 13, at s. 195.1, the public nuisance of the action of soliciting, rather than the state of being a common prostitute.

One of the important advances of the *Young Offenders Act*, S.C. 1980-81-82, c. 110 was to end status offenders for youth, as stated in Canada, Parliament, House of Commons, *Debates*, No. 15 (17 May 1982) [*House of Commons Debates*, (17 May 1982)] at 17487 (Svend Robinson).

<sup>142</sup> (2000), 142 C.C.C. (3d) 225, [2000] O.J. No. 72 (Q.L.) (Ont. C.A.), leave to appeal refused (2000), 271 N.R. 197, [2000] S.C.C.A. No. 542 (Q.L.) [*R. v. Budreo*].

<sup>143</sup> *Ibid.* at paras. 21-23. The Crown acknowledged that section 810.1 deprived the appellant of his liberty, and thus, the Ontario Court of Appeal restricted its attention to whether that deprivation accorded with the principles of fundamental justice. Section 7 of the *Charter*, *supra* note 74 states:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

section 810.1 is not overbroad<sup>144</sup> and not void for vagueness,<sup>145</sup> and read down the mandatory requirement that a provincial court judge “shall” hold a hearing on receipt of an information to obtain a section 810.1 recognizance, to a permissive “may”.<sup>146</sup> The Court declared that status offences contravene the principles of fundamental justice, but differentiated section 810.1 from status offences because it does not create an offence, and contains preventative rather than punitive measures.<sup>147</sup>

The act of defining someone as criminal for who they are rather than what they did, is not only distasteful, unfair and unjust, but socially damaging according to deviance and labelling theory and the concept of “degradation” in social psychology. As the discussion in section six “Deviance and Labelling Theory” and section seven “Identity Formation From a Social Psychology Perspective” in Chapter Three reveals, the imposition of a stigmatizing social label on an individual based on their status in society results in negative social perceptions of (such as abhorrence, intimidation and fear) and negative social interactions with the individual labelled. These negative experiences can lead to an individual internalizing the label and engaging in acts to confirm and perpetuate it. Thus, creating a status offence for members of criminal organizations formally and powerfully applies a negative societal label, and may entrenches the outlaw identity associated with that label.

#### 4.2.7.5 Criminal Organization Sentences Require Adequate Proof of Fault Requirements

The fourth problem relates to the third problem regarding criminal organization offences as status offences. Individuals who are not formally charged with criminal organization offences, nor proven to have committed them as set out in the *Criminal Code* provisions, are being treated as status offenders – that is to say, they are being sentenced as criminal organization members who have committed crimes in relation to that organization. At

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<sup>144</sup> *R. v. Budreo*, *supra* note 142 at para. 47. The Court held that the section “...strikes a reasonable balance between the liberty interest of the defendant and the state’s interest in protecting young children from harm.”

<sup>145</sup> *Ibid.* at para. 54.

<sup>146</sup> *Ibid.* at paras. 57-59.

<sup>147</sup> *Ibid.* at paras. 24-26.

sentencing hearings, the Crown must prove facts that establish aggravating factors beyond a reasonable doubt as such facts have a “critical effect” on the length of a sentence – they support or justify a lengthier or more punitive sentence.<sup>148</sup> In spite of this fact, courts have not required proof of a criminal organization or commission of an offence connected to that organization when imposing sentences that use the connection to a criminal organization pursuant to section 718.2(a)(iv)<sup>149</sup> as an aggravating factor.<sup>150</sup> Some courts have held that proof of membership only in a “gang” and not necessarily a “criminal organization” and without proof of any connection to the offence, may also justify a greater sentence to deter other gang members.<sup>151</sup>

For instance, in *R. v. Lights*,<sup>152</sup> the Ontario Court of Justice did not make a formal finding of a “criminal organization”, or a finding that an offence was committed for the benefit of, at the direction of or in association with a criminal organization as required by section 718.2(a)(iv). However, the Court found that the accused was a member of a gang, and that his “gang activity” was an aggravating factor that mandated a more punitive sentence:

**58** The troubling question in this case is whether the offences can properly be characterized as gang violence, in the sense that these were so-called “missions” carried out by the Rascalz as a gang. The evidence establishes beyond a reasonable doubt that they were. A number of the other individuals involved in both sets of offences have been identified as members of the Rascalz. The offences committed were the type of “missions” described in the evidence of Detective Constable Russell as being characteristic of the Rascalz. Section 718.2(a)(iv) of the *Criminal Code* requires that a court shall treat as aggravating “evidence that the offence was committed for the benefit of, at the direction of or in association with a criminal organization.” Violence committed by groups, an aggravating factor recognized at common law (see *Regina v. A.O.*, *supra*), is

<sup>148</sup> *R. v. Gardiner*, [1982] 2 S.C.R. 368, (1982), 68 C.C.C. (2d) 477 at paras. 38, 111 and 112.

<sup>149</sup> Section 718.2(a)(iv) of the *Criminal Code*, *supra* note 26, states:

- 718.2 A court that imposes a sentence shall also take into consideration the following principles:
- (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing, ...
  - (iv) evidence that the offence was committed for the benefit of, at the direction of or in association with a criminal organization....

<sup>150</sup> *R. v. Bogor*, 2006 CarswellOnt 7076, [2006], O.J. No. 3589 (Q.L.) (Ont. S.C.J.) at para. 3; and *R. v. Wharry*, 2007 ABQB 462, 207 CarswellAlta 923 at paras. 42-47.

<sup>151</sup> *R. v. Dhak*, 2003 BCCA 595, 2003 CarswellBC 1173 at para. 17; *R. v. Lights*, 2007 ONCJ 173, 2007 CarswellOnt 2498 [*R. v. Lights*] at para. 58; and *R. v. Bailey*, 2005 CarswellOnt 7706 (Ont. C.J.) at para. 2.

<sup>152</sup> *R. v. Lights*, *supra* note 151.

considered to be more serious when committed by members of a gang. Whether the Rascalz fit within the formal definition of a "criminal organization" under s. 467.1 of the *Criminal Code* (and I suspect they do), the evidence proves beyond a reasonable doubt that both sets of offences involved gang activity. Even without s. 718.2(a)(iv), it is appropriate to treat this feature of the offences as an aggravating factor on sentence. Crimes committed by street gangs must be severely punished in order to deter this type of activity, and to assure the public that the courts are properly concerned with imposing just sentences that contribute to and foster public safety.<sup>153</sup>

The offender Lights was a young person sentenced as an adult to eight years imprisonment minus two years credit for "dead time." His offences were very serious,<sup>154</sup> and he did not receive a probation order. However, this decision of the Ontario Court of Justice suggests that evidentiary findings to satisfy the anti-organized crime provisions of the *Criminal Code* are not required in order to determine that certain circumstances involving an alleged member of an alleged criminal organization warrant a more severe sentence. That is to say, the common knowledge of "gang activity" or gang violence is sufficient to act as an aggravating circumstance, and to increase a sentence for an offender.

Similarly, in *R. v. Payne*,<sup>155</sup> the offender was a member of what the trial judge asserted was, and the appellate court referred to as, a "criminal organization" and the judge and the court clearly accepted the connection of his offence to that criminal organization.<sup>156</sup> They made such findings in spite of the fact that no criminal organization charges had been laid, and thus, no formal and specific proof or legal argument took place that the offence was committed for the benefit of, at the direction of or in association with a criminal organization as set forth in section 467.12 of the *Criminal Code*.<sup>157</sup>

**59** The judge found that the appellant was a member of a criminal organization, not a crime in itself, but a circumstance that put the appellant at "the threshold of potential criminal sanction" (*R. v. Terezakis*, 2007 BCCA 384, [2007] B.C.J. No. 1592 (QL) at para. 58). I do not read the reasons of the sentencing judge as

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<sup>153</sup> *Ibid.* at para. 58.

<sup>154</sup> *Ibid.* at paras. 70-71. As a result of two separate incidents, Lights was sentenced for aggravated assault, use of a firearm, break and enter, breach of recognizance times two, breach of probation, robbery with a firearm, possession of prohibited weapon with ammunition, and possession of unauthorized weapon.

<sup>155</sup> *R. v. Payne*, *supra* note 63.

<sup>156</sup> *Ibid.* at paras. 46 and 47.

<sup>157</sup> *Ibid.* at paras. 1-3.

making a finding that the aggravated assault was committed for the benefit of, at the direction of or in association with a criminal organization. In my view, he was not required to make such a finding to impose the sentence he gave.

**60** The appellant was not charged under s. 467.12 of the *Criminal Code* - committing an offence for the benefit of a criminal organization. Section 718.2(a)(iv) of the *Criminal Code* is engaged when there is evidence that an offence was committed for the benefit of, at the direction of or in association with a criminal organization. In this case, there clearly was such evidence. For example, in paras. 14 and 15, the judge said:

[14] These individuals and their organization, as I stated previously, have openly cultivated an atmosphere and a reputation for extreme violence.

They have, on the evidence at this trial, already engaged in the chopping off of fingers, violent beatings, and other forms of extreme violence.

[15] The subject of such violence is an open topic of discussion amongst those associated with the organization, and the discussions of violence and the trophies they take, in the form of fingers and videos, appear to be the means by which they strive to maintain discipline and control of their organization.

**61** Parliament has made it clear that criminal conduct undertaken in association with criminal organizations is to be condemned and discouraged. For example, the commission of an offence under s. 467.12 carries a maximum sentence of 14 years, which, pursuant to s. 467.14, is to be served consecutive to any other sentence imposed for an offence arising out of the same event or series of events. Parliament has directed that evidence supporting such an offence is an aggravating circumstance to be taken into account when sentencing for other offences.<sup>158</sup>

This appellate court decision allows Parliament to guide the application of these aggravating factors. It ignores the lack of an appropriately applied fault element in attributing a more punitive sanction for an offender than he might otherwise be entitled. And, it does not consider whether punishment of this offender in particular, as well as offenders who have been proven beyond a reasonable doubt to have committed offences in connection with criminal organizations, are punished for their states of being. As stated above, this court is not alone in doing so.

In contrast to the decision in *R. v. Payne*, but without commenting on criminal organization offences as status offences, the Nova Scotia Provincial Court in *R. v. Nguyen*,<sup>159</sup> held that in spite of some evidentiary foundation laid at the trial that the accused was a "...an established leadership role in a sophisticated, well planned and well

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<sup>158</sup> *Ibid.* at paras. 59-61.

<sup>159</sup> *R. v. Nguyen*, 2007 NSPC 69, [2007] N.S.J. No. 481 (Q.L.).

organized marihuana production operation,”<sup>160</sup> the Court could not conclude beyond a reasonable doubt that the offender Nguyen was connected to a national or international “crime organization,” as defined in the *Criminal Code*.<sup>161</sup> The Court considered *R. v. Payne*, and distinguished it on the basis that the trial Judge found and the appellate Court noted the presence of a connection of the substantive offence to the criminal organization.<sup>162</sup> The Court then stated the proper procedure and evidentiary foundation for applying aggravating factors at the sentencing of a criminal organization offender:

**22** ...[I]t would appear that *Marsden*, ... [2004 MBCA 121, 187 Man.R. (2d) 298 at para. 13] stands for the proposition that to be an aggravating factor the impugned activity must be gang sanctioned or be related to gang membership. Moreover, while hearsay evidence is permitted at sentencing, along with its relevancy, it must be credible, trustworthy and reliable. *R. v. Gardner* (1982), 68 C.C.C. (2d) 477 (S.C.C.). Here, the finding of guilt was not predicated upon the assumption that the crimes were carried out in concert and association with an organized network of the criminal underground. The findings were that it was a local group activity and no more. Thus, in my view, any submission of aggravating circumstances, must comply with the same evidentiary rules as facts proved beyond a reasonable doubt and supporting the conviction. See: *R. v. Ly*, [1992] N.J. No. 354 (Nfld. C.A.), *Criminal Code*, s. 724(3)(e).

**23** Hence, in the circumstances, as I have found, there was no evidence that established, beyond a reasonable doubt, a pattern common to Nova Scotia and other places; that the crimes were committed by the same group of individuals in other places with an association with any identified criminal group; an inextricable link between the group's activity in Nova Scotia and other national or international crime groups; or that the accused crimes were committed in the company of members of a crime organization known to the police to specialize in marihuana grow operations. Therefore, I do not think that it is sufficient, at a sentencing hearing where the evidential rules are relaxed to present some opinion evidence that the accused activities, without proof beyond a reasonable doubt, falls within the ambit of the *Criminal Code*, s. 467.1 and therefore engages the *Criminal Code*, s. 718.2(a)(iv). All the same, in my opinion, the testimony of Det. Constable Fisher, at the sentencing hearing is relevant only to the extent that it suggests some context to an otherwise presented vacuous and bland activity and it has amplified, from his experience and knowledge, some of the Court's trial findings and conclusions, and no more.

**24** Further, in my view, this opinion evidence did not establish, beyond a reasonable doubt, a connection between the accused and any known national or international criminal groups. It also did not establish beyond a reasonable doubt

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<sup>160</sup> *Ibid.* at paras. 17 and 18.

<sup>161</sup> *Ibid.* at paras. 17 and 19.

<sup>162</sup> *Ibid.* at para. 20.

that the group in which the accused was found to be associated was known to the police as a criminal group or network that had established a pattern of operation across the nation or internationally. Therefore, given the principle of parity in sentencing for similar offences and offenders, Fisher's opinion evidence, in my view, cannot be given the weight in order to magnify unduly the gravity and serious nature of the same offences committed in the same set of circumstances by similar offenders.<sup>163</sup>

This decision correctly applies section 718.2(a)(iv) of the *Criminal Code*, and guards against punishing non-status or unproven status offenders as status offenders. However, the decision does not address the fact that the *Criminal Code* provisions still maintain punishment for organized crime offenders as status offenders.

#### 4.2.8 Proscription as a Solution to Definitional, Investigative, Evidentiary, and Prosecutorial Problems within Criminal Organization Legislation

##### 4.2.8.1 Advantages of Criminalizing Specific Criminal Organizations and Membership in Those Criminal Organizations

Can proscription of specific organized crime groups and membership in those groups remedy the definitional, procedural, evidentiary, and sentencing problems that exist within the Canadian criminal organization legislation? Statutory proscription of certain groups, formal criminal code definitions of certain groups, and the criminalization of the activities of these groups, exemplify legal measures that are not “ordinary” or pre-existing in that they are meant to respond to a particular social problem within society – the problem of organized crime. In 1997 and again in 2000, relatively early in the implementation of criminal organization legislation in Canada, then Ministers of Justice and Attorneys General of Canada, Allan Rock and his successor Anne MacLellan, considered and dismissed the idea of proscription of membership in criminal organizations.<sup>164</sup> To date, formal proscription has not occurred. However, it is legally

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<sup>163</sup> *Ibid.* at paras. 22-24. Notably, the Ontario Superior Court of Justice also applied the aggravating factor in section 718.2(a)(iv) after it had determined beyond a reasonable doubt that the downtown Toronto Chapter of the Hells Angels was a criminal organization, as per *R. v. Maddigan*, 2008 CarswellOnt 8798 (Ont. S.C.J.) at para. 18.

<sup>164</sup> Canada, Parliament, House of Commons, *Debates*, No. 160 (21 April 1997) at 10013 (Hon. Allan Rock); and *R. v. Beauchamp* (2009), 68 C.R. 6<sup>th</sup> 293, [2009] O.J. No. 3006 (Q.L.) (Ont. S.C.J.) at para. 64.

possible to implement, and after numerous difficult, lengthy, and failed prosecutions, Parliament ought to reconsider proscription if it continues its attempt to pursue criminal organizations by imposing criminal organization legislation rather than pre-existing criminal law provisions.

The first legislative provisions that criminalized “participation in a criminal organization”<sup>165</sup> and that defined “criminal organization” amounted to proscription in that any person who is a member of a criminal organization would most likely, if not be obliged to, participate in or contribute to that organization. Further, the breadth of the provisions captured many groups of criminals – organized crime outlaws as well as loosely associated individuals committing crime.

15 The centrepiece, explained the ministers, was a new offence of "participation in a criminal organization." *This criminalised mere membership in a criminal organisation* and laid the groundwork for the targeted use of new investigative tools to be directed against criminal organisations. ...

16 The new crime in s.467.1(1) of participation in a criminal organisation or "gangsterism" as the media now calls it, extends criminal responsibility beyond the already wide net for accessories or conspirators. Under s.467.1(2) there must be a mandatory consecutive sentence and double criminality for a participant in a criminal organisation who is a party to an offence committed in association with that organisation. *The major flaw is that it is not narrowly targeted and sets up a potentially severe and unjust law of guilt by association for those acting in loose groups of five or more.*

17 The linchpin is the definition of "criminal organization" inserted into the Criminal Code definition, section 2.

"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 an indictable offence under this or any other Act of Parliament for

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<sup>165</sup> *Criminal Code, supra* note 26 at s. 467.1 as it existed in 1997. This old section stated:

Every one who:

- a) participates in or substantially contributes to the activities of a criminal organization knowing that any or all of the members of the organization engage in or have, within the preceding five years, engaged in the commission of a series of indictable offences under this or any other Act of Parliament for each of which the maximum punishment is imprisonment of five years or more, and
- b) is a party to the commission of an indictable offence for the benefit of, at the direction of or in association with the criminal organization for which the maximum punishment is imprisonment of five years or more is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

which the maximum punishment is imprisonment for five years or more, and

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

*This definition extends far beyond a cohesive gang committed to violence. This legislation does not just reach such broadly structured gangs as the Mafia, the Hell's Angels or the Triads. It could certainly be applied to low level members of a highly organised gang, to those only very loosely associated in crime and to those who have never been violent. Only one of the group has to have committed a series of offences within five years. There is no requirement of gang continuity.*<sup>166</sup>  
[Emphasis added].

Proscription of specific organized crime groups and membership in these groups would have remedied some of the problems with the early criminal organization legislation. Proscription would have only infringed the freedom of association of actual declared organized crime outlaws, and not the freedom of association of loosely associated criminal groups that may not identify as organized crime outlaws and that commit criminal acts on occasion rather than consistently engage in a criminal enterprise.

Parliament declared that the current organized crime legislation does not specifically proscribe certain groups as criminal organizations, and does not formally criminalize membership in those groups.<sup>167</sup> However, the wording of section 467.11 still remains as

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<sup>166</sup> "Time to Recodify Criminal Law And Rise Above Law and Order Expediency: Lessons from the Manitoba Warriors Prosecution", *supra* note 28 at paras. 15-17.

<sup>167</sup> *Criminal Code*, *supra* note 26 at ss. 467.1, 467.11, 467.12 and 467.13. Of particular note is section 467.11:

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 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;

close to proscription as legislation could be. It criminalizes participation in or contribution to a criminal organization if the accused has the purpose of enhancing the ability of the criminal organization to facilitate or commit an indictable offence. The convoluted wording of the provision regarding participation in and contribution to a criminal organization makes it difficult to understand and prove, and thus, difficult to discern if indeed proscription has taken place. The difficulty in proving an offence under this section because of its wording<sup>168</sup> provides reason for Parliament to employ formal proscription. Not only is such an offence difficult to prove, it also essentially criminalizes membership in criminal organizations without candidly doing so.

In Italy, the state introduced the crime of Mafia association in 1982.<sup>169</sup> Courts in the United States have struck down proscription of membership, and unlike Canada,<sup>170</sup> have ruled that freedom of assembly includes assembly for a criminal purpose.<sup>171</sup> In spite of the fact that conspirators, parties, and accessories after the fact have ill-intent in their groups and assemble or associate in order to commit a criminal offence, they can commit criminal offences while being subject to criminal penalties but without being constitutionally prevented from assembling or associating. Criminal organizations differ from these groups, however. Criminal organizations consistently associate in order to commit serious criminal offences, and thus, consistently pose a threat of violence and

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- (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.

<sup>168</sup> This issue was discussed above under section three of this Chapter under the heading “3. Definitions and Definitional Problems Inherent in Criminal Organization Legislation.”

<sup>169</sup> “Law Enforcement in Italy and Europe Against Mafia and Organized Crime”, *supra* note 5 at Section 1.1.

<sup>170</sup> Michael A. 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 [“Outlawing the Outlaws: Importing R.I.C.O.’s Notion of ‘Criminal Enterprise’ into Canada to Combat Organized Crime”] at para. 52. The Supreme Court of Canada has held that freedom of association in section 2(d) of the *Charter* only includes association for a lawful purpose. Moon cites *Lavigne v. Ontario Public Service Employees Union (OPSEU)*, [1991] 2 S.C.R. 211; *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313; and *Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner)*, [1990] 2 S.C.R. 367.

<sup>171</sup> “Outlawing the Outlaws: Importing R.I.C.O.’s Notion of ‘Criminal Enterprise’ into Canada to Combat Organized Crime”, *supra* note 170 at para. 52. Moon cites D.R. Truman, “The Jets and Sharks are Dead: State Statutory Responses to Criminal Street Gangs” (1995) 73 Wash. U. L.Q. 683 at 716; and A.A. Molina, “California’s Anti-Gang Street Terrorism Enforcement and Protection Act: One Step Forward, Two Steps Back?” (1993) 22 S.W. U.L. Rev. 457 at 469.

intimidation within society. If criminal organizations have as their main purpose or activity the facilitation of and participation in criminal activities, then freedom of assembly or association ought not to apply to them in order to proactively extinguish their power, rather than waiting until they have committed serious criminal offences and reacting to their violence in spite of knowing in advance their essence and identity of being an organized crime outlaw and committing outlawry. Prevention of organized crime violence and intimidation in society through proscription of organized crime groups for a specified period of time should be not only constitutionally legal, but also politically reasonable and publicly acceptable. Proscription of specific criminal organizations, and of membership in these organizations, is constitutionally possible in Canada whether or not it violates freedom of association in the *Charter*,<sup>172</sup> but Parliament must have the political ability and desire to implement this perhaps unpopular method of social control via the criminal law.

Proscription of organizations has taken place in relation to terrorism provisions to the extent that certain organizations, but not membership in those organizations, are proscribed as terrorist organizations.<sup>173</sup> However, unlike organized crime, terrorism amounts to a social or national emergency, and thus, may warrant or necessitate proscription. The *Emergencies Act*<sup>174</sup> declares four types of emergencies: public welfare emergencies; public order emergencies; international emergencies; and war emergencies.<sup>175</sup> While ongoing organized crime violence may threaten public welfare and public order in a broad sense at various times and to varying degrees, it does not satisfy the definitions in the *Emergencies Act*.<sup>176</sup> It falls short of a “national emergency”

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<sup>172</sup> *Charter*, *supra* note 74 at s. 2(d). Section 2(d) states:

2. Everyone has the following fundamental freedoms:

...

(d) freedom of association.

<sup>173</sup> *Criminal Code*, *supra* note 26 at s. 83.01 and 83.05; and *Order Recommending that Each Entity Listed as of July 23, 2004, in the Regulations Establishing a List of Entities Remain a Listed Entity*, S.I./2004-155, schedule (*Criminal Code*). The schedule to this Regulation lists the entities declared to be terrorist organizations. Section 83.01 of the *Criminal Code* defines “terrorist group” and includes in the definition an association to such groups.

<sup>174</sup> *Emergencies Act*, *supra* note 3.

<sup>175</sup> *Ibid.* at Parts I-IV.

<sup>176</sup> *Ibid.* at ss. 5 and 16. Section 5 states:

“public welfare emergency” means an emergency that is caused by a real or imminent

that “seriously endangers the lives, health or safety of Canadians...”,<sup>177</sup> and that allows the Canadian government to invoke emergency or extraordinary powers – particularly because such violence could be dealt with under the *Criminal Code*. Notably, like a sunset clause, the type of state of emergency under the *Emergencies Act* dictates when the emergency is terminated. Further, Parliament has the power to revoke the declaration of a state of emergency,<sup>178</sup> and to renew the term of the state of emergency.<sup>179</sup> The notwithstanding clause could play a similar role with respect to proscription of organized crime groups.

Parliament could, in theory, proscribe criminal organizations and membership in such organizations as illegal by invoking the notwithstanding clause in section 33 of the *Charter*.<sup>180</sup> Parliament has the parliamentary sovereignty to pass any law.<sup>181</sup> The

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- (a) fire, flood, drought, storm, earthquake or other natural phenomenon,
  - (b) disease in human beings, animals or plants, or
  - (c) accident or pollution

and that results or may result in a danger to life or property, social disruption or a breakdown in the flow of essential goods, services or resources, so serious as to be a national emergency.

Section 16 states:

"public order emergency" means an emergency that arises from threats to the security of Canada and that is so serious as to be a national emergency;

"threats to the security of Canada" has the meaning assigned by section 2 of the Canadian Security Intelligence Service Act.

<sup>177</sup> *Ibid.* at s. 3. Section 3 states:

3. For the purposes of this Act, a "national emergency" is an urgent and critical situation of a temporary nature that

- (a) seriously endangers the lives, health or safety of Canadians and is of such proportions or nature as to exceed the capacity or authority of a province to deal with it, or
- (b) seriously threatens the ability of the Government of Canada to preserve the sovereignty, security and territorial integrity of Canada

and that cannot be effectively dealt with under any other law of Canada.

<sup>178</sup> *Ibid.* at ss. 58 and 59.

<sup>179</sup> *Ibid.* at s. 60.

<sup>180</sup> *Charter*, supra note 74. Section 33 states:

33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

(3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

(4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).

(5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

notwithstanding clause allows Parliament to expressly declare that legislation shall apply notwithstanding specific rights and freedoms in the *Charter*.<sup>182</sup> It must expressly declare the validity of its statute notwithstanding a *Charter* right; it must expressly make reference to both the impugned statute and the *Charter* right that is being infringed.<sup>183</sup> Parliament can do so after a judicial decision that declares the legislation to infringe the *Charter*,<sup>184</sup> or prior to judicial deliberation, and therefore public deliberation, if Parliament anticipates that the legislation will indeed infringe the *Charter*.<sup>185</sup> Given that levels of organized crime violence can escalate quickly, waiting months or years for constitutional review by the judiciary may not best address legislation targeted at organized crime outlaws.

The notwithstanding clause essentially would enable Parliament to evade arguments, for a period of time, that assert that criminal proscription of organized crime outlaw groups and membership in these groups violates the freedom of association. After five years, the legislation is of no force or effect, and Parliament must re-enact the provisions. Instead of relying on the five-year provision, Parliament could also specify a sunset clause such as existed in some of the anti-terrorist provisions. Sunset clauses less than five years would reduce the risk or extent of public condemnation of proscription, and require a more timely review of the “crisis” or social problem. The separation of “crisis” or social

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<sup>181</sup> Richard Albert, “Advisory Review: The Reincarnation of the Notwithstanding Clause” (2008) 45 *Alberta Law Review* 1037 [“Advisory Review: The Reincarnation of the Notwithstanding Clause”] at para. 44.

<sup>182</sup> Tsvi Kahana, “Understanding the Notwithstanding Mechanism” (2002) 52 *University of Toronto Law Journal* 221 [“Understanding the Notwithstanding Mechanism”] at 222. *Ibid.* at 231, section 33 does not empower Parliament to override democratic rights in sections 3 to 5; mobility rights in section 6; or language rights in sections 16 to 23.

<sup>183</sup> “Advisory Review: The Reincarnation of the Notwithstanding Clause”, *supra* note 181 at para. 45.

<sup>184</sup> *Ibid.* at para. 45 and 58.

<sup>185</sup> *Ibid.* at para. 58; and “Understanding the Notwithstanding Mechanism”, *supra* note 182 at 265-66.

Richard Albert in “Advisory Review: The Reincarnation of the Notwithstanding Clause”, states:

58 ... Consider the understood pre-conditions for Parliament to invoke the notwithstanding mechanism: (1) *in the course of litigation, a court must interpret a Charter provision in a certain way, or Parliament must have reason to believe that a court will interpret a Charter provision in a certain way*; (2) *Parliament must disagree with the court's actual or anticipated interpretation*; (3) *Parliament must muster a majority to act on this disagreement*; and (4) *Parliament must, in full view and subject to public criticism, propose a bill expressly rejecting the court's interpretation. The notwithstanding process is consummated only after the bill has successfully navigated the parliamentary law-making trajectory.* This leaves no doubt about the momentous quality of the Clause -- something that becomes apparent in light of the direct confrontation setting Parliament against the judiciary. [Emphasis added].

problem from “normalcy” or some sense of social order ensures that individual rights and freedoms are not infringed for longer than the acute social disorder or moral panic associated with the “crisis” or social problem lasts.

However, the notwithstanding clause exists because of the lack of consensus regarding rights and freedoms to enshrine in the *Charter* at its inception.<sup>186</sup> While the rights and freedoms in the *Charter* have become largely accepted and expected since their enshrinement, a lack of consensus existed when the *Charter* was passed. Unlike these rights and freedoms, the notwithstanding clause has not become largely accepted and expected, and its power to override constitutional constraints for the legislature have become unpalatable. It has rarely been invoked,<sup>187</sup> has been delegitimized,<sup>188</sup> and may result in significant negative political repercussions.<sup>189</sup> Section 33 has problems due to an acceptance of judicially imposed constitutional constraints on Parliament:

First, the constitutional text of the Clause places the legislature in the unpalatable position of suspending the Charter itself rather than a judicial interpretation of the Charter. This conflates a Charter right with a judicial interpretation of that right, with grave consequences for the moral authority of the legislature. Second, the Clause creates the presumption that judicial decision-making is constitutionally correct and that legislative deliberation fails to reach a comparable standard of legitimacy. This is a weak presumption that rests on even weaker premises.<sup>190</sup>

The constraints on Parliament limit its ability to effectively address social problems that may amount to social crises or that may result in social disorder. The consequent reluctance of Parliament to enshrine into law provisions that a court may declare to violate certain rights and freedoms occurs even when those violations target a minority of individuals who pose a threat to societal order and who cause moral panic. While these problems are not fatal to the use of the section, they have currently “doomed” the section to “constitutional purgatory.”<sup>191</sup>

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<sup>186</sup> “Understanding the Notwithstanding Mechanism”, *supra* note 182 at 223.

<sup>187</sup> “Advisory Review: The Reincarnation of the Notwithstanding Clause”, *supra* note 181 at para. 13. Albert asserts that the clause has been invoked only 17 times since its inception.

<sup>188</sup> *Ibid.* at paras. 44-45.

<sup>189</sup> *Ibid.* at para. 12.

<sup>190</sup> *Ibid.* at para. 3.

<sup>191</sup> *Ibid.* at para. 4.

In spite of political reluctance to use the notwithstanding clause for proscription, this anti-organized crime measure may actually be effective. Sociological descriptions of the behaviour of social groups within subcultures,<sup>192</sup> suggest that unless the law targets associations themselves, it will do little to dismantle gang identities and organized crime activities. Indeed, lessons learned from differential association or social learning within subcultures demonstrate that the law ought to limit associations with organized crime outlaw groups because such associations teach new members organized crime normative behaviour, perpetuate the power of the group, and reinforce their identities through ongoing anti-social interactions with one another within their outlaw groups. Thus, the requisites of some criminological and sociological theory suggest that anti-organized crime responses should indeed ban organized crime associations to some degree and in some circumstances, such as through proscription.

Further, proscription ensures that only those groups that pose a threat to societal order and cause moral panic, as deemed so by Parliament, are captured within criminal organization legislation. Thus, the social control net would not be cast too widely so as to capture small loosely-associated groups of individuals who are not long-term outlaws and who do not pose a significant threat to society and societal order.

#### 4.2.8.2 Problems With Proscription of Criminal Organizations and Membership in Criminal Organizations

Many problems and dangers exist within the concept of statutory proscription of certain groups, or within formal definitions that criminalize the actions of these groups as “organized crime.” First, from a labelling and social psychology perspective, proscription neatly labels, via the black letter of the law, members of organized crime as deviant and criminal in society. It preserves the power of labelling in the executive branch of government, and limits judicial and constitutional review of unfairly imposed labels.

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<sup>192</sup> Marvin E. Wolfgang and Franco Ferracuti, *The Subculture of Violence: Towards an Integrated Theory in Criminology* (London: Tavistock, 1967) at 102. As noted in Part V, Chapter Four: Differential Association and Social Learning Within Groups and Subcultures, normative behaviours of a culture or a subculture become crystallized into rules.

Second, proscribed labels attribute certain characteristics to organized crime members, and in turn, members may internalize those aspects of their identity. Indeed, social constructionism advises that language, including the language of the law, stabilizes and crystallizes experiences,<sup>193</sup> in order for members of society to understand the reality of everyday life.<sup>194</sup> However, in so doing, it also constructs reality<sup>195</sup> – it constructs criminal organizations, especially if it formally proscribes them in law. The dangerousness of this construction lies in the history-laden descriptors of language, its longevity, and its resistance to change. The concept of “gangs” and the gang image illustrate this power. The term “gang” is fraught with preconceptions and typifications,<sup>196</sup> and it instills fear. The power of this construction is evidenced not only by the fact that gang members use the name and insignia of an organized crime group to effect their purposes, but also by the fact that various groups, such as law enforcement agencies and criminal justice departments, employ or insert the “gang metaphor” into discourse in order to bolster or legitimize their social problem and their existence, and thus, influence the allocation of resources.<sup>197</sup>

A third problem with proscription stems from a lack of any guidelines to determine when a social problem warrants state intervention. And, because proscription is a measure to be used sparingly due to its extensive power, how does one evaluate not only the beginning but also the end of the social problem, social disorder, or social crisis? How does one determine when the acute violence and intimidation and social threat posed by criminal organizations to the social order have reduced to a declared tolerable level? How does one evaluate a level of violence? Does one consider whether moral panic has perceivably subsided, and when social order or mal-order has been re-established? The creation of an

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<sup>193</sup> Peter L. Berger & Thomas Luckmann, *The Social Construction of Reality*, 1<sup>st</sup> ed. (Garden City: Doubleday, 1966) at 36.

<sup>194</sup> *Ibid.* at 35.

<sup>195</sup> *Ibid.* at 36. Berger and Luckmann state:

...[L]anguage is capable of becoming the objective repository of vast accumulations of meaning and experience, which it can then preserve in time and transmit to following generations.

<sup>196</sup> *Ibid.* at 32. Berger and Luckmann state: “The social reality of everyday life is thus apprehended in a continuum of typifications, which are progressively anonymous as they are removed from the ‘here and now’ of the face-to-face situation.”

<sup>197</sup> Ronald Burns, Carol Y. Thompson, & Robert L. Young, “Representing Gangs in the News: Media Constructions of Criminal Gangs” (2000) 20 *Sociological Spectrum* 409 at 428-29.

advisory review body comprised of judicial and legislative officials may assist with such assessments, and provide some solution to this problem.<sup>198</sup> A review to determine whether proscription of criminal organizations and their membership violated rights and freedoms in the *Charter* could occur with the implementation of the proscription laws, and thus, may assist in assessing any change in circumstances from when the laws were first passed. Alternatively, a strictly legislative body, such as the Governor in Council on the advice of the Minister of Public Safety and Emergency Preparedness does pursuant to

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<sup>198</sup> "Advisory Review: The Reincarnation of the Notwithstanding Clause", *supra* note 181 at paras 7-9 and 78. Albert advocates a revitalization of the notwithstanding clause through the creation of an advisory review body, and mandates legal reform only when there exists unanimity in a Supreme Court judgment about a *Charter* violation:

7 ... Advisory review reincarnates the spirit of the notwithstanding clause into a new judicial-legislative institutional relationship that recasts the marriage of parliamentary sovereignty and constitutional democracy. Its immediate ambition is to fulfill the unfulfilled functions of the notwithstanding clause. Its larger ambition is to conciliate courts and legislatures, reformers and traditionalists, activists and minimalists, and liberals and conservatives.

8 The new model of advisory review clothes legislative decision-making in a presumption of constitutional correctness. Constitutional review consequently becomes purely advisory insofar as the new model endows the legislature with the discretion to decide whether to bring its impugned legislative enactment into conformity with the court judgment. The new model does not compel the legislature to adopt a judicial decision that recommends either revisions to or invalidation of its legislative enactment, but nonetheless recognizes that the legislature will face public pressure to do so. This first wrinkle to the current model of judicial review relocates the locus of constitutional decision-making in the legislature.

9 But the new model of advisory review also guards against the peril of majority rule, which remains the lynchpin of parliamentary sovereignty. Advisory review concedes that a court ruling on constitutional rights may sometimes be so compelling as to justify binding the legislature to heed that judgment. Perhaps the legislature has so flagrantly overstepped its bounds that the judiciary issues a decision whose force leaves the legislature with no palatable political option but to revise or repeal its impugned law. Those special instances are unanimous Supreme Court judgments. They are exceptional because judges are political actors holding dissimilar political beliefs. Judicial unanimity -- which represents the aggregation of divergent political views -- conveys an undeniable force of reason that demands corrective action. The new model of advisory review obliges the legislature to cede only when the judiciary issues a unanimous *Charter* opinion invalidating or revising a legislative enactment.

Further, Albert states:

78 Under the new model of advisory review, the judiciary retains the authority to review legislation for *Charter* infirmity. But this constitutional review becomes only advisory. What was once judicial review -- authorizing the judiciary to compel the legislature to act in conformity with its judgment--is now advisory review. The judiciary is still summoned to assess the constitutionality of legislation, but its decisions are no longer binding. The legislature is not required to revise its impugned legislation consistent with a judicial decision. This fosters judicial deference to legislative choice, which meshes with the effort to relocate the locus of constitutional decision-making in the legislature.

the anti-terrorism provisions,<sup>199</sup> could assess change in the status of proscription for entities.

Fourth, if legally defining what societal members may conceptually know to be a “gang”, “organized crime”, or a “criminal organization” results in different and divergent concepts, and may be impossible to achieve, then how can Canadian Parliament know what groups to proscribe? The whole set of circumstances of a group in society must be considered by a Minister or legislative body responsible for criminalizing a particular group. Not every criminal organization group will have the same attributes, characteristics, rules and regulations, ways of conducting its criminal enterprises, and power. However, the provisions that establish due process and judicial review regarding proscription of terrorist groups could be implemented with respect to criminal organizations. The Governor in Council on the recommendation of the Minister for Public Safety, or Solicitor General, or both, could determine which entities amount to criminal organization groups. Like the terrorism provisions, such a determination could be reviewed every two years, notice could be given to the proscribed entity, and a procedure for challenging such proscription and obtaining judicial review of it could be established<sup>200</sup> in order to provide checks and balances on the powers of the executive

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<sup>199</sup> *Criminal Code*, *supra* note 26 at s. 83.05.

<sup>200</sup> *Ibid.* Section 83.05 makes the following provision:

83.05 (1) The Governor in Council may, by regulation, establish a list on which the Governor in Council may place any entity if, on the recommendation of the Minister of Public Safety and Emergency Preparedness, the Governor in Council is satisfied that there are reasonable grounds to believe that

(a) the entity has knowingly carried out, attempted to carry out, participated in or facilitated a terrorist activity; or

(b) the entity is knowingly acting on behalf of, at the direction of or in association with an entity referred to in paragraph (a).

(1.1) The Minister may make a recommendation referred to in subsection (1) only if he or she has reasonable grounds to believe that the entity to which the recommendation relates is an entity referred to in paragraph (1)(a) or (b).

(2) On application in writing by a listed entity, the Minister shall decide whether there are reasonable grounds to recommend to the Governor in Council that the applicant no longer be a listed entity.

(3) If the Minister does not make a decision on the application referred to in subsection (2) within 60 days after receipt of the application, he or she is deemed to have decided to recommend that the applicant remain a listed entity.

(4) The Minister shall give notice without delay to the applicant of any decision taken or deemed to have been taken respecting the application referred to in subsection (2).

(5) Within 60 days after the receipt of the notice of the decision referred to in subsection (4), the

branch of government. Such provisions could be created in relation to criminal organizations. However, in its report on organized crime, the Standing Committee on Justice and Human Rights evaluated “listing” criminal organization and noted concerns about the transparency of the “listing” process.<sup>201</sup>

A further problem with proscription or “listing” is noted by the Standing Committee on Justice and Human Rights in its report – namely, that membership and names of some organized crime groups are always changing, and thus, a list would always be incomplete and outdated.<sup>202</sup> In the end, the Standing Committee recommended that options other than “listing” be explored and implemented.<sup>203</sup>

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applicant may apply to a judge for judicial review of the decision.

(6) When an application is made under subsection (5), the judge shall, without delay

(a) examine, in private, any security or criminal intelligence reports considered in listing the applicant and hear any other evidence or information that may be presented by or on behalf of the Minister and may, at his or her request, hear all or part of that evidence or information in the absence of the applicant and any counsel representing the applicant, if the judge is of the opinion that the disclosure of the information would injure national security or endanger the safety of any person;

(b) provide the applicant with a statement summarizing the information available to the judge so as to enable the applicant to be reasonably informed of the reasons for the decision, without disclosing any information the disclosure of which would, in the judge's opinion, injure national security or endanger the safety of any person;

(c) provide the applicant with a reasonable opportunity to be heard; and

(d) determine whether the decision is reasonable on the basis of the information available to the judge and, if found not to be reasonable, order that the applicant no longer be a listed entity.

(6.1) The judge may receive into evidence anything that, in the opinion of the judge, is reliable and appropriate, even if it would not otherwise be admissible under Canadian law, and may base his or her decision on that evidence.

(7) The Minister shall cause to be published, without delay, in the Canada Gazette notice of a final order of a court that the applicant no longer be a listed entity.

(8) A listed entity may not make another application under subsection (2), except if there has been a material change in its circumstances since the time when the entity made its last application or if the Minister has completed the review under subsection (9).

(9) Two years after the establishment of the list referred to in subsection (1), and every two years after that, the Minister shall review the list to determine whether there are still reasonable grounds, as set out in subsection (1), for an entity to be a listed entity and make a recommendation to the Governor in Council as to whether the entity should remain a listed entity. The review does not affect the validity of the list.

(10) The Minister shall complete the review as soon as possible and in any event, no later than 120 days after its commencement. After completing the review, he or she shall cause to be published, without delay, in the Canada Gazette notice that the review has been completed. ...

<sup>201</sup> Canada, House of Commons, Standing Committee on Justice and Human Rights, *The State of Organized Crime*, 41<sup>st</sup> Parl., 1<sup>st</sup> sess. (March 2012) at 19 and 20.

<sup>202</sup> *Ibid.* at 20.

<sup>203</sup> *Ibid.* at 22. The Standing Committee suggested a number of alternatives to “listing”, such as allowing a trial judge to take judicial notice of decisions in which a particular group has been found to be a “criminal

#### 4.2.9 Evaluations and Recommendations

The criminal organization provisions in the *Criminal Code* were enacted in 1997 as a result of moral panic to a perceived social problem, and the hasty efforts of the Canadian government to deal with this problem on the eve of a federal election. History repeated itself in 2000. These circumstances demonstrate how laws are created pursuant to a social constructionist perspective. Such circumstances lend suspicion to the effectiveness of the legislative response, and indeed, legal analyses of various aspects of the provisions demonstrate that the problems and defects within the measures make them ineffective or less effective than they ought to be. The definitional problems associated with criminal organization legislation cause lengthy prosecutions, unwieldy evidentiary and procedural arguments, and expensive pre-trial and trial proceedings. The employment of pre-existing criminal law measures to combat organized crime outlawry would not have resulted in many of these difficulties. A change in investigatory and prosecutorial policy rather than amendments to the law would have been more substantive. By creating criminal organization laws, Parliament calmed moral panic in the short-term, but the ineffectiveness of these provisions will not rid society of the social problem of organized crime, and will not reinstate social order or social mal-order. Essentially, these provisions are hollow.

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organization”; empowering trial judges to determine whether a group meets the definition of “criminal organization” prior to trial; or allowing experts to provide affidavit evidence as proof of a group as a “criminal organization.” However, each of these suggestions is fraught with difficulties. For instance, taking judicial notice of a prior court’s decision means that the later or second court is relying on evidence that may be different and ordinarily inadmissible in its own proceeding. Although the empowering trial judges to determine whether a group is a “criminal organization” prior to trial may spare the jury from considering the complicated definition in the *Criminal Code*, much of the evidence used to prove the existence of the criminal organization likely also would be used to prove the connection of the predicate offence to the criminal organization, and thus, little time would be spared as this evidence would still have to be presented to the jury. The suggestion of removing this finding of fact from the jury seems to be an effort to seek to have the judiciary align or be consistent its decisions about certain groups rather than to have each court base its decisions on the evidence that is admissible and presented in the prosecution. The suggestion of relying on affidavits does little to abbreviate the time required to deal with expert evidence. That is to say, arguments will still take place and evidence will still have to be called regarding the expertise of the expert, the parameters of the expert opinion, and the bases for the opinion (such as the reliance on informant information and on inadmissible information). Expert reports, though not in affidavit form but likely with similar content, are already created by experts and disclosed to the defence prior to *voir dire*s on expert evidence.

Criminal law provisions can indeed assist in combating organized crime outlaws and outlawry. However, the state should look the problem in the eye. Provisions that are convoluted, lengthy, and unfair or prejudicial to the accused also violate individual rights and freedoms by bits and pieces. Individually those violations may withstand *Charter* scrutiny, but collectively they risk violating or undermining principles of fairness and justice on which the Canadian legal system is based. If Parliament believes that organized crime poses a significant societal threat and if it seeks to reduce organized crime outlaws and outlawry as well as its societal effects, then it ought to do so explicitly and candidly. Proscription essentially does what Parliament seeks to do – outlaw the outlaws. No proof exists that criminalization of membership in and criminal organizations themselves would reduce organized crime, but it may well have an equal chance of success or failure as the current legislative provisions. Over a decade has past since the first organized crime provisions were implemented, and gang wars and social unrest continue to plague areas of the country. This bold and perhaps unpalatable legal option is rarely employed, but it could be.

In order to address the organized crime problem head on and not risk any infringements of the rights and freedoms in the *Charter*, Parliament should employ pre-existing criminal laws and measures in order to combat organized crime outlaws and outlawry rather than legislating new provisions that seek to define “criminal organizations” and criminalize their activities. Due to the oft impenetrable nature of organized crime groups, Parliament could enact specific criminal laws and measures in order to expand law enforcement powers so that they evolve as organized crime outlawry evolves in its evasive techniques. However, Parliament should only do so if it does not resort to the use of a definition of “organized crime outlaw group” or “criminal organization” in order to specify when these unique and expanded investigative powers can be employed. Alternatively, because moral panic and social order or mal-order may necessitate some state action, this thesis recommends proscription in order to remove inconsistencies in judicial declarations as to what groups constitutes a criminal organization, and in order to rid the *Criminal Code* of its convoluted and over-inclusive definition that is unwieldy to prove – that is to say, in order to ensure consistency and timeliness in the administration of justice.

Based on the analysis of *Requisite One* and the foregoing conclusions, this thesis makes the following recommendations:

***Recommendation One:*** *Parliament should employ pre-existing Criminal Code and other statutory provisions in order to enforce the law against organized crime outlaws and organized crime outlaw groups.*

***Recommendation Two:*** *Parliament should have expanded, and continue to expand as necessary, law enforcement powers in relation to organized crime outlaw investigations.*

***Recommendation Three:*** *Parliament should proscribe the specific groups that it deems criminal organizations.*

## 4.3 REQUISITE TWO FOR ANTI-ORGANIZED CRIME MEASURES

### *Requisite Two*

#### *Rooted in Social Constructionism:*

Anti-organized crime measures must fairly restrain or use media, in accordance with principles of freedom of expression, in their public dissemination of information.

- a. These measures must prevent stigmatization, ostracization, and sensationalizing organized crime outlaws through media.
- b. These measures must not incite moral panic via media representations that glorify gang lifestyles, that increase the power of their reputations, and that bolster gang identities.
- c. These measures should use media to launch anti-gang advertising campaigns in order to discourage gang membership; to create new non-criminal identities for these offenders if the offender has a willingness to change; and to sensationalize the powers and victories of law enforcement in order to de-sensationalize organized crime outlawry.

### 4.3.1 Overview

Legal protections for the media reinforce their power to report as they choose and about subjects they choose. Limited regulations and restrictions on media reporting allow the media to sensationalize organized crime violence, to stigmatize organized crime groups, and to incite moral panic among conventional non-outlaw citizens. In these ways, the media can contribute to fostering and perpetuating organized crime.

Legal constraints may limit the ability of the media to construct social reality through its portrayal of a set of circumstances, and thus reduce this power to sensationalize.

However, legislative attempts to constrain media reports other than via court imposed publication bans regarding criminal proceedings would violate the freedom of expression in the *Charter*. This section of Chapter Four will outline legal and non-legal regulation and protection of the media. It will set forth initiatives that use the media for anti-organized crime initiatives that do not violate the freedom of expression, such as through educative advertising campaigns in communities to reduce organized crime membership.

## 4.3.2 Regulation and Protection of Media

### 4.3.2.1 Legal Regulation and Protection of Media

To some extent, the new criminal organization measures protect media more than they restrain it. For instance, preventative judicial restraint measures in the current criminal organization provisions allow courts to impose recognizances for individuals who may commit an offence involving intimidation of a criminal justice participant or journalist.<sup>1</sup> Further, the government in Canada created a specific offence criminalizing conduct that intentionally provokes a state of fear in journalists in order to impede them from reporting information about a criminal organization.<sup>2</sup> Anyone who so “invokes a state of fear” or intimidates a journalist, commits an indictable offence and is liable to imprisonment for up to 14 years.<sup>3</sup> This legislation implies that organized crime groups know that the media can influence public opinion, and that they will intimidate media in order to obtain the influence they so desire. In some circumstances, these groups may desire no publicity or only publicity that disseminates acts of social altruism. In other circumstances, they may desire media reports that reinforce their power in order to further their reputation for violence and intimidation, and thus, their ability to conduct criminal endeavours.

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<sup>1</sup> *Criminal Code*, R.S.C. 1985, c. C-46 at s. 810.01(1)-(3) and (4).

<sup>2</sup> *Ibid.* at s. 423.1. Section 423.1 states:

423.1 (1) No person shall, without lawful authority, engage in conduct referred to in subsection (2) with the intent to provoke a state of fear in

- (a) a group of persons or the general public in order to impede the administration of criminal justice;
- (b) a justice system participant in order to impede him or her in the performance of his or her duties; or
- (c) a journalist in order to impede him or her in the transmission to the public of information in relation to a criminal organization.

(2) The conduct referred to in subsection (1) consists of

- (a) using violence against a justice system participant or a journalist or anyone known to either of them or destroying or causing damage to the property of any of those persons;
- (b) threatening to engage in conduct described in paragraph (a) in Canada or elsewhere;
- (c) persistently or repeatedly following a justice system participant or a journalist or anyone known to either of them, including following that person in a disorderly manner on a highway;
- (d) repeatedly communicating with, either directly or indirectly, a justice system participant or a journalist or anyone known to either of them; and
- (e) besetting or watching the place where a justice system participant or a journalist or anyone known to either of them resides, works, attends school, carries on business or happens to be.

(3) Every person who contravenes this section is guilty of an indictable offence and is liable to imprisonment for a term of not more than fourteen years.

<sup>3</sup> *Ibid.* at s. 423.1(3).

Freedom of expression largely prevents control of the media and stifling its accounts of “news.” Although statutory laws may seek to protect media in some instances, in other instances the common law hinders their news-making abilities, and limits their civil rights and remedies by empowering courts to ban publication of criminal proceedings.<sup>4</sup> In the United States, the *Racketeer-Influenced and Corrupt Organizations Act* makes specific provision for courts to exercise their discretion and close court proceedings in order to protect “the rights of affected persons.”<sup>5</sup> Publication bans in Canada and closed proceedings in the United States seek to prevent sensationalism, and perhaps exaggeration, of the power of gang names and insignia. Time steals media’s thunder; delayed reporting of court cases in particular may lessen the impact that inciting events have on the administration of justice, as well as on societal fears and panic. Some courts in Canada have indeed exercised their common law power to gag media in order to protect the administration of justice, and specifically, the interests of the accused in obtaining fair trial.<sup>6</sup> However, as mentioned in section two “Social Constructionism” in Chapter Three, the criminal justice system failed or could not do so in relation to the *R. v. Pangman* trial.<sup>7</sup> The media only increased the panic associated with the Manitoba Warriors, and inflamed a sense of “otherness” in relation to the accused gang members who were charged.

Notably, the employment of publication bans and closed courtrooms have been imposed in order to protect the administration of justice rather than to prevent the portrayal of organized crime outlaws in a fashion that may empower them individually or as a group. How can the law breathe life into the insights from social constructionism that the media must not incite moral panic through depictions that glorifies gang lifestyles, that increase

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<sup>4</sup> *Toronto Star Newspapers v. Canada Ltd.*, 2010 SCC 21, [2010] S.C.J. No. 21 (Q.L.) in which the Supreme Court recently banned the publication of proceedings at bail hearings so as to protect the right of the accused to a fair trial; and *Dagenais v. Canadian Broadcasting Corp.*, 1994 CanLII 39, [1994] 3 S.C.R. 835 at para. 36.

<sup>5</sup> *Racketeer-Influenced and Corrupt Organizations Act*, 18 U.S.C. §1961 (1970), and amendments thereto [*RICO*] at §1968.

<sup>6</sup> *R. v. Violette*, 2008 BCSC 1154, [2008] B.C.J. No. 2769 (Q.L.); and *R. v. Giles*, 2008 BCSC 1900, [2008] B.C.J. No. 2830 (Q.L.).

<sup>7</sup> In section two “Social Constructionism” in Chapter Three, *R. v. Pangman* is discussed under section two “Application of Concepts within Social Constructionism to the Identity of Outlaws and the Creation of Criminal Organization Laws”, at subsection two “Social Construction of Organized Crime Outlaw Identities”, at sub-subsection three “Social Construction of Organized Crime Outlaw Identities Via Media.”

the power of their reputations, and that bolster gang identities? The first inclination may be to muzzle the media. However, government should not constrain or limit the media in their reporting of organized crime, other than to protect the administration of justice through publication bans. Restraints on the media to prevent sensationalization of organized crime may also prevent the dissemination of important factual information as well. Media is one of the primary methods of educating the public about organized crime; dissuading individuals from participating in organized crime outlawry; and conveying information to the public about the successes and failures of various anti-organized crime measures. Without information regarding governmental efforts to address the organized crime problem, the public may not be aware of any difficulties with the anti-organized crime measures, such as the criminal law, and will not seek to evaluate the laws and lobby for further changes.

Laws that protect and slightly restrain media in their dissemination of information to the public demonstrate the endless effort to balance rights to freedom of expression with rights of accused persons to fair trials. Efforts to work with the media in its portrayal of organized crime outlaws rather than to impose legal restrictions on them, may reduce sensationalism and prevent increasing outlaw cohesion without violating the *Charter*. The media can be used to prevent individuals from joining organized crime groups, and thus reduce their power, through anti-gang education and advertising.

#### 4.3.2.2 Non-Legal and Self-Regulation of the Media

Non-legal attempts to use and regulate the role of media in relation to crime reporting generally have occurred. A holistic or comprehensive approach where the media works in conjunction with groups in society that seek to implement anti-organized crime measures, *is possible*.

The cooperative efforts of the British Columbia Gang Task Force and two media outlets, the Canadian Broadcasting Corporation [CBC] and *The Vancouver Sun*, exemplify circumstances where the media regulates its portrayals of organized crime in conjunction with law enforcement. In an effort to thwart the “mimicking of the gang behaviour” in

elementary school-age children and to prevent youth from being attracted to and entering into criminal organization lifestyles, the Task Force, the CBC and *The Vancouver Sun* launched an anti-gang advertising video contest for students in grades eight to twelve.<sup>8</sup> The contest, Teens Against Gangs, seeks to have students send messages to their peers about the dangers of “a criminal lifestyle.”<sup>9</sup> The Task Force emphasized the importance of having peers speak to peers, and also in creating discussion among teens about gang issues and problems.<sup>10</sup>

Another example of non-legal, cooperative self-regulation is that of some media corporations that depict crime in their programs. For example, in the United Kingdom, the British Broadcasting Corporation has created guidelines for producers in order to govern depictions of crime in television programs, such as *Crimewatch UK* which reconstructs crime in order to obtain the assistance of the public in identifying offenders. These guidelines prohibit reconstructions that seek to entertain rather than convey factual information, that frighten or disturb audiences, that provide details that did not occur or that might lead to copycat crimes, that cause more than minimal distress to victims of crime and their families, and that glamorize crime or criminals.<sup>11</sup> However, these guidelines may be loosely interpreted by producers of *Crimewatch UK*.<sup>12</sup>

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<sup>8</sup> Kim Bolan, “Sun Helps Launch Anti-Gang Video Contest for B.C. High School Students” *The Vancouver Sun* (30 November 2010), online: The Vancouver Sun <<http://www.vancouversun.com/news/helps+launch+anti+gang+video+contest+high+school+students/3903868/story.html>> [“Sun Helps Launch Anti-Gang Video Contest for B.C. High School Students”].

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

<sup>11</sup> Yvonne Jewkes, *Media and Crime* (London: Sage, 2004) at 154. Jewkes provides the BBC Producer Guidelines:

- Do not use reconstructions simply to attract or entertain audiences, but to convey factual information.
- Do not reconstruct detail which there is no reason to believe actually occurred.
- Filming techniques must not frighten or disturb audiences.
- Do not reveal details which could lead to copycat crimes.
- All reconstructions must be clearly signaled.
- Reconstructions must minimize the distress caused to victims of crime or their relatives.
- Do not glamorize crime or criminals.

<sup>12</sup> *Ibid.*

#### 4.3.3 The Use of Media in Anti-Organized Crime Initiatives Such as Education, Consciousness-Raising and Anti-Organized Crime Advertising

Social change occurs as a result of education in addition to law enforcement.<sup>13</sup> Social advertising is one method to reduce gang membership.<sup>14</sup> As the anti-gang advertising video contest launched by the British Columbia Gang Task Force and two media outlets demonstrates, the media can play a significant and effective role in anti-gang education and consciousness-raising in the community. Police in British Columbia assert that the success of anti-gang contests and community education in reducing gang violence and homicides is evidenced by the reduction of gang violence and homicides in Abbotsford – a city fraught with gang violence and homicides in recent years, and a city where the police launched a series of anti-gang posters and videos, and conducted workshops and community forums for students and other citizens.<sup>15</sup> Advertising campaigns and community awareness may not be the only events that reduced organized crime outlawry in Abbotsford, however. Prosecutions that have resulted in convictions and sentences for these outlaws may also contribute to the reductions. Two notorious outlaws from Abbotsford, Clay Roueche and James “Jamie” Bacon, have been and continue to be incarcerated for years – Roueche since May 2008<sup>16</sup> and Bacon since April 2009.<sup>17</sup> In addition, the turf wars among outlaw groups vying for territory ebb and flow, and thus, a social mal-order may have been established and may have “naturally” reduced gang violence – at least for a period of time.

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<sup>13</sup> Kristin M. Peterson, *Exploring Anti-Gang Advertising: Focus Group Discussions with Gang Members and At-Risk Youth* (M.A. Thesis, Greenspun School of Communication, University of Nevada, 1994) [unpublished] [*Exploring Anti-Gang Advertising: Focus Group Discussions with Gang Members and At-Risk Youth*] at 12. Peterson asserts that social change also occurs due to engineering.

<sup>14</sup> *Ibid.* at 16.

<sup>15</sup> “Sun Helps Launch Anti-Gang Video Contest for B.C. High School Students”, *supra* note 8.

<sup>16</sup> Kim Bolan, “B.C. Gangster Clay Roueche Plotted Deaths of Prosecutors: Documents” *Leader-Post* (8 July 2010), online: *Leader-Post* <<http://www.leaderpost.com/news/gangster+Clay+Roueche+plotted+deaths+prosecutors+Documents/3248552/story.html>>; Kim Bolan, “United Nations Gang Leader Clay Roueche Sentenced to 30 Years” *The Vancouver Sun* (16 December 2009), online: *The Vancouver Sun* <<http://www.vancouversun.com/news/United+Nations+gang+leader+Clay+Roueche+sentenced+years/2348698/story.html>>; and Kim Bolan, “Judge Must Reconsider Clay Roueche’s 30-year Sentence: UN Gang Founder Wins Partial Victory in U.S. Court” *The Vancouver Sun* (2 November 2010), online: *The Vancouver Sun* <[http://www.vancouversun.com/story\\_print.html?id=3760957&sponsor=>](http://www.vancouversun.com/story_print.html?id=3760957&sponsor=>).

<sup>17</sup> *R. v. Bacon*, 2010 BCPC 325, [2010] B.C.J. No. 2539 (Q.L.).

Some empirical evidence shows that peers educating peers and youth in gangs educating youth-at-risk may be effective. Kristin M. Peterson sought the opinions and responses of gangs and at-risk youth regarding aspects of anti-gang advertising,<sup>18</sup> and showed them several anti-gang television advertisements<sup>19</sup> in an effort to determine whether it discouraged gang membership.<sup>20</sup> Her research in the United States noted that anti-gang messages have more influence if gang members the age of the audience delivered the message, rather than older gang members.<sup>21</sup> Anti-gang messages were also most credible and effective when they came from individuals who had first-hand experience of being in gangs such as a black gang member, and not when they came from a white spokesperson,<sup>22</sup> such as a politician or government official.<sup>23</sup>

The research findings of Peterson's study outline many ways in which media advertising can contribute to anti-organized crime measures or campaigns. These findings confirm many of the principles and tenets asserted by the sociological and criminological theories discussed in this thesis, and may prove instructive in anti-gang advertising:

1. *Threats of death and imprisonment in anti-gang advertisements are not deterrents.*

Anti-gang messages from an inmate that used the threat of death to discourage gang activity did not have a deterrent effect<sup>24</sup> because gang members accepted death as reality and did not fear it, and they placed a value on dying for a gang<sup>25</sup> that made it honourable or respected if it happened. Participants debated the merits of depicting death and violence.<sup>26</sup> Anti-gang messages from an inmate that used the threat of prison had a poor deterrent effect because the possibility of jail or death did not scare the study participants who agreed that while they did not

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<sup>18</sup> Peterson employs the term "anti-gang" perhaps due to the youthfulness of her study group. This thesis will use that term interchangeably with "anti-organized crime."

<sup>19</sup> *Exploring Anti-Gang Advertising: Focus Group Discussions with Gang Members and At-Risk Youth*, *supra* note 13 at 2. Her three focus group members were age 12 to 17; they were in gangs or were highly predisposed to gang activity; they had committed felony offenses which meant they were at risk of being removed from their homes and placed in correctional institutions; and they were enrolled in non-punitive rehabilitative programs. *Ibid.* at 25.

<sup>20</sup> *Ibid.* at 1-2.

<sup>21</sup> *Ibid.* at 50.

<sup>22</sup> *Ibid.* at 36.

<sup>23</sup> *Ibid.* at 37.

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.* at 37-39. Peterson says that the study group did not suggest that gang membership increased the honor or value of dying. However, some of their comments imply just that, such as "It's like dying for something you believe in"; "It's a like a pride thing"; "It's like an ego... We have a gang ego."; and "It's like saving face." *Ibid.* at 38.

<sup>26</sup> *Ibid.* at 48-50.

want to be incarcerated, reminding them of the consequences of their gang membership does not prevent them from committing crimes<sup>27</sup> likely due to their fatalistic view of life.<sup>28</sup>

2. *Anti-gang advertisements that glamourize gang life are perceived as unrealistic and not effective.*

Advertisements that attempted to glamourize gang life by showing gang members wearing their colours and carousing to loud music in prison were perceived as unrealistic, and generated criticism, disgruntlement and concern that younger children may receive the wrong message.<sup>29</sup>

3. *Portrayals of gang cohesion in anti-gang advertisements were realistic, but may make gangs attractive.*

Anti-gang messages that asserted that gangs form because of the bonds or internal cohesion that occurs among gang members, received a positive response from study participants who related that this message reflected their personal lives.<sup>30</sup> However, one participant asserted that the message might encourage kids to belong to a gang.<sup>31</sup>

4. *Anti-gang advertising may have limited effectiveness on gang members, and will not rid society of gangs.*

Anti-gang messages were not going to change behaviour, and were not going to change the lives of gang members.<sup>32</sup> The study participants asserted individual responsibility for participating in gangs:

To the surprise of the moderators, the focus group members were adamant that regardless of why they became involved in deviant or gang activity, they were each responsible for their own behaviors. They also suggested that regardless of the amount of pressure from peers or the unavailability of jobs, a young person “has a choice” whether or not to join a gang. Consequently, if a young person wants to abandon deviant or gang behavior, “nothing is gonna make him change except for himself.” Counseling or anti-gang messages are ineffective because young people have “really got to help themselves.” Unfortunately, this does not happen often.<sup>33</sup>

Study participants predicted the proliferation of gangs in the future: “One youth in particular wagered, ‘I give you five more years and the whole world will be in gangs,’ and another responded, ‘Yep.’”<sup>34</sup>

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<sup>27</sup> *Ibid.* at 40.

<sup>28</sup> *Ibid.* at 41.

<sup>29</sup> *Ibid.* at 42-43.

<sup>30</sup> *Ibid.* at 43-44. Peterson describes the bonding portrayed in the message as “... ‘kids listen to kids’ when their families often do not.”

<sup>31</sup> *Ibid.* at 44.

<sup>32</sup> *Ibid.* at 52.

<sup>33</sup> *Ibid.* at 53-54.

<sup>34</sup> *Ibid.* at 48.

5. *Anti-gang advertisements may have more success with youth not involved in gangs.*

Anti-gang messages would have the most influence on young kids who knew about gangs but were not members and were not hanging around with gangs.<sup>35</sup>

6. *Anti-gang advertisements must adequately portray the subject-matter.*

Anti-gang advertisements are ineffective because they are too short, and the issue requires more time to present the realities of gang membership.<sup>36</sup>

7. *Anti-gang advertisements must not perpetuate labels based on otherness, but rather, accurately portray the subject-matter to promote understanding.*

Negative portrayal of gangs by the media evinced a “we” and “they” mentality, strengthened gang cohesion, and enhanced or encouraged gang violence.<sup>37</sup> It generated frustration with the lack of accuracy in depicting gang violence:

...One teen also made a passionate attempt to explain the frustration he had with the way new reporters and outsiders view gangs.

They’re making it entirely wrong on us and that’s putting more pressure on us, so society’s coming at us. We’re like, fuck you all, you all coming at us. Why are we gonna stop to think when we’re gonna shoot when you already put us on the basis that we do it – that we do it everyday, that every time a gang gets together, they going out doing a job like every time they’re together – when gang bangers only do a shooting every once in a while, whenever they have to or whenever we get blasted on.<sup>38</sup>

The study participants opined that outsiders who have not experienced gang life ought not to make judgments about it.<sup>39</sup> Anti-gang advertising campaigns must break down the barriers between gangs and conventional societal members.<sup>40</sup> The advertisements must accurately reflect the truth about gang life, otherwise they may augment the barriers.<sup>41</sup>

8. *Anti-gang advertising is tainted by the biases of the receiver, and thus, may not be received the same by everyone.*

Peterson noted some dangers inherent in social advertising. Translation may not occur as the creator or disseminator intended due to the individual perspective of the receiver:

...Like Peter Berger and Thomas Luckman who argued that “reality” and “knowledge” are socially constructed, Dervin proposed that messages are constructed by the individuals who interpret them. Consequently she questioned the common assumption that the information in a message can be transferred from source to receiver without change,

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<sup>35</sup> *Ibid.* at 54-55.

<sup>36</sup> *Ibid.* at 50.

<sup>37</sup> *Ibid.* at 51.

<sup>38</sup> *Ibid.* at 51-52.

<sup>39</sup> *Ibid.* at 36.

<sup>40</sup> *Ibid.* at 64.

<sup>41</sup> *Ibid.* at 65.

suggesting that a “view of audiences-as-receivers of messages constrains our vision” ... and perpetuates the fallacy that “information is a thing rather than a construction”.... Instead, information should be viewed as a product of individual human observation, and an audience member should not be depicted as the receiver but rather the creator of the message. Ultimately, information is a “creation inexorably tied to the time, place, and perspectives of its creator”....<sup>42</sup>

Anti-gang campaigns target not individuals who subscribe to conventional institutional norms and cultural goals, but individuals who may be gang members who have adopted illegitimate means to achieve their goals and who may not connect with conventional society or who may not view the same set of circumstances as law-abiding individuals would. Advertising campaign designers must know how their audience will interpret the communicated information, in order to ensure it is received as intended.<sup>43</sup>

Peterson’s reference to social constructionism in this last finding demonstrates a connection between her empirical data and the insights of some criminological theory as it may be applied to organized crime outlaws. For instance, gang members in Peterson’s study noted that they have bonds or internal cohesion. Social control and bond theories assert that the development of organized crime outlaw identities develop from members forming bonds, developing an identity, and having internal cohesion. Also connected to Peterson’s findings is deviance and labelling theory. In spite of the fact that gang members believed they have independence in their choice to be part of a gang, and thus to change to their lifestyle must come from within themselves, social relations affect them. Gang members noted that negative portrayals of gangs created a sense of otherness and that served to strengthen the gang identity and encourage or enhance gang violence. These observations exemplify the concepts of primary and secondary deviation in deviance and labelling theory, and the concept of degradation in social psychology. These connections between the empirical evidence and criminological and sociological theory suggest that Peterson’s findings are relevant to determining how the media can participate in anti-organized crime measures.

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<sup>42</sup> *Ibid.* at 18. See Brenda Dervin, “Mass Communicating: Changing Conceptions of the Audience” in B. Dervin, L. Foreman-Wernet & E. Lauterbach, eds., *Sense-Making Methodology Reader: Selected Writings of Brenda Dervin* (Cresskill: Hampton Press, 2003) at 205.

<sup>43</sup> *Ibid.* See Brenda Dervin, “Mass Communicating: Changing Conceptions of the Audience” in B. Dervin, L. Foreman-Wernet & E. Lauterbach, eds., *Sense-Making Methodology Reader: Selected Writings of Brenda Dervin* (Cresskill: Hampton Press, 2003).

#### 4.3.4 Evaluations and Recommendations

Legislative restraints on the media may effect many of the requisites posited by insights from social constructionism, such as preventing sensationalization of an organized crime lifestyle; increasing organized crime group cohesion; and reducing stigmatization of organized crime outlaws. However, muzzling the media, except through publication bans to protect the rights of accused persons in criminal trials, not only violates the freedom of expression, but also risks misinforming the public about the state of society and its laws.

The media can play an important part in anti-organized crime initiatives. However, the media alone, through anti-gang advertising and education or consciousness-raising, cannot reduce gang violence and homicides. The use of organized crime reduction strategies require coordinated and cooperative efforts including law enforcement; community participation; media cooperation; public communication campaigns which include social advertising; school-based education and personal contacts; corporate cooperation; youth programs; and social services.<sup>44</sup> Cooperative and coordinated efforts can indeed benefit from the power of media, provided that adequate studies are conducted to understand the effects of dissemination of anti-organized crime information.

In order to not use legal constraints on the media in implementing anti-organized crime measures, law enforcement and communities should seek the voluntary support of media in portraying organized crime outlaws, and in launching anti-organized crime initiatives. The media should impose self-regulations to guide its depictions of crime and organized crime.

In keeping with Peterson's research findings, the media ought be used in order to launch anti-organized crime advertising campaigns that target primarily youth who are not involved in gangs, but also all individuals – youth, adults, organized crime members, and potential organized crime members – in communities that have (or are developing) an organized crime problem. In order to understand the effects of the advertisements on the receivers of the information, and in order to accommodate the biases of the receiver of

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<sup>44</sup> *Ibid.* at 15.

anti-organized crime advertising campaigns, empirical research ought to be conducted prior to their implementation. For instance, the advertisements may be effective by not resorting to threats of death and imprisonment; by not glamourizing gang life; by not portraying gang cohesion; by not adequately portraying the subject-matter; and by not perpetuating labels, but rather, by promoting understanding.

Based on the analysis of *Requisite Two* and the foregoing conclusions, this thesis makes the following recommendations:<sup>45</sup>

***Recommendation Four:*** *Law enforcement agencies, communities and media groups should work cooperatively in launching anti-organized crime initiatives, such as anti-organized crime advertising campaigns that target all members of the community which has or is developing an organized crime problem. Namely, such campaigns should target all community members – youth who are not involved in gangs, youth who are involved in gangs, law-abiding adults, organized crime outlaw group members, as well as potential organized crime members.*

***Recommendation Five:*** *The media should impose self-regulations to guide its depictions of crime and organized crime, and to deliver effective anti-organized crime messages.*

***Recommendation Six:*** *Empirical research ought to be conducted in relation to and prior to any anti-gang advertising campaign that the law enforcement agencies, communities, and/or media groups implement.*

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<sup>45</sup> These recommendations are numbered sequentially to those recommendations in *Requisite One*, and the recommendations in the remaining sections of Chapter Four will follow suit.

## 4.4 REQUISITE THREE FOR ANTI-ORGANIZED CRIME MEASURES

### *Requisite Three*

*Rooted in Social Control and Bond Theory, and Social Psychology:*

Anti-organized crime measures must foster pro-social bonds among societal members.

- a. These measures must foster bonds through attachment to conventional others; commitment to obeying societal rules; involvement in conventional activities; and belief in a common and conventional value system.

### 4.4.1 Overview

Almost every community that suffers from problems associated with gangs or organized crime at some point becomes recruited by anti-organized crime groups or motivated on its own to act. Usually communities respond in order to reduce the effects of gang or organized crime violence in the community; and to prevent non-outlaw and non-deviant individuals from becoming associated with or becoming members of a gang or organized crime group. They do so in part because anti-organized crime laws cannot adequately respond to the entire organized crime problem. The largely reactive nature of the law, especially the criminal law, limits its ability to prevent organized crime groups from forming and committing violence, and limits its ability to foster pro-social bonds among societal members. This thesis will set forth the limitations of the law in effecting the principles in *Requisite Three*. It also will demonstrate the ways in which the law can and does effect the principles in *Requisite Three*. It will not critique and evaluate community-based approaches to anti-organized crime measures – countless and varied initiatives involving communities have occurred in Canada and the United States. Rather, it will refer to types of community involvement that exemplify ways to maintain healthy and pro-social relations among societal members.

### 4.4.2 Fostering Pro-Social Bonds Through Anti-Organized Crime Legal Measures

The law, and specifically the criminal law, has a general or broad ability to foster pro-social bonds among societal members. For instance, the codification of societal rules and values in the *Criminal Code* declare what societal members should do and who they should strive to be. Formal codification into the law also decries what societal members

should not do, and who they should not be. This criminalization of certain acts and states of being makes some law-abiding members of society more committed to norms and values declared by the law because they do not want to stray from or violate convention.<sup>1</sup>

Essentially, the attachment to norms and values has a reciprocal relationship with the law. Where members of society already have attachments to conventional others, and are involved in conventional activities, the declaration of societal norms and values in criminal law provisions can reinforce such attachments, commitment, involvement and belief. The greater the attachment, the more likely individuals will accept and obey their rules.<sup>2</sup> The declaration of laws bolsters attachment of an individual to others because it reinforces “moral restraints” and “normative boundaries”, and thus, facilitates the “internalization of norms and conscience.”<sup>3</sup> That newly passed legislative provisions aimed at remedying social problems, even prior to testing them in courts of law, can calm moral panic<sup>4</sup> demonstrates the power of the law to reinforce cohesion among conventional societal members – that is to say, it demonstrates the fostering of pro-social bonds. The legitimacy of the law as a social institution is perceived as something that can

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<sup>1</sup> This phenomenon underlies one of the purposes of denunciation in sentencing.

<sup>2</sup> Travis Hirschi, *Causes of Delinquency* (Berkeley: University of California Press, 1969) at 30.

<sup>3</sup> *Ibid.* at 18.

<sup>4</sup> For example, the creation of criminal harassment and crime comics laws have calmed moral panic. Rosemary Cairns Way in “The Criminalization of Stalking: An Exercise in Media Manipulation and Political Opportunism” (1994) 39 McGill L.J. 379, discusses the rise of criminal harassment laws in the United States and Canada. In California in 1989, the stalking of five women by their ex-partners, and the murder of a television actress by an obsessed fan, received much media attention, and catapulted the issue of stalking into public view. Once the threat of stalking emerged or came to be identified by some members of the public, the mass media quickly advertised the problem, and the risk that it presented to not just celebrities, but to all women. In Canada, the murders of women by their ex-partners motivated Canadian legislators to act. In January 1993, the media seized on the murders of three women by men who were, by virtue of restraining orders, not to have contact with them. On the heels of the United States, Canadian legislators had identified the existence of the grave nature of the threat posed by stalking, and in 1992 and 1993, introduced legislation to criminalize the behaviour. The legislation in California did not calm moral panic right away. With respect to stalking in the State of California, even after the enshrinement of “anti-stalking” sentiments into statutory law, the sensationalism of the problem continued for years. However, in Canada, months after the creation of the offence of criminal harassment, media attention on the issue “virtually ceased” indicating that moral panic subsided.

Janice Dickin McGinnis in “Bogeymen and the Law: Crime Comics and Pornography” (1988) 20 Ottawa L.R. 3 discusses the rise of crime comic. In the late 1940s in Canada, the anti-crime comic campaign gained momentum in waging war against “...material portraying acts which the campaigners themselves regarded as improper”, *ibid.* at 5. Such material included crime comics, horror comics, and “true love” stories. The crime comics legislation also exemplifies the utilization of the law to calm moral panic stemming from a social problem, or rather, a non-existent problem. Regardless of the reasons for the rise of the panic, the turbidity within the nation surrounding the crime comics mandated, and resulted in the state legislating the panic away.

rescue law-abiding societal members from “others”, such as from organized crime outlaws.

Legal approaches to organized crime, and in particular strictly legal approaches, have limitations and fallibility in fostering pro-social bonds among societal members, however. Sociologists and criminologists have recognized that the use of the law comprises but one component of anti-gang or anti-organized crime initiatives. Indeed, community involvement comprises more significant components in anti-organized crime initiatives that give effect to *Requisite Three*.

#### 4.4.3 Community Education and Action Programs That Foster Pro-Social Bonds

Anti-organized crime measures that foster pro-social bonds largely employ preventative measures involving the community. The health care model emphasizes preventative measures for anti-gang initiatives, and prevention involves the community. Primary prevention targets youth or individuals before they involve themselves in a gang, and specifically, targets youth or individuals at risk of gang membership due to attributes of their population or community and not individual attributes. Secondary prevention targets individuals who have a high risk of joining gangs or who have had exposure to gangs, and uses intensive efforts to increase the resilience of these individuals against gang membership. Tertiary prevention, discussed as part of *Requisite Four*,<sup>5</sup> seeks to rehabilitate and redirect delinquency after individuals have become members of gangs.<sup>6</sup> Primary and secondary prevention methods within the health care model do not engage criminal law or punitive sanctions to achieve their ends.

Further, gang policy in the United States, for the most part, has incorporated five main components set forth in the Spergel model of gang prevention and intervention now referred to as the Comprehensive, Community-Wide Approach to Gang Prevention,

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<sup>5</sup> See section five “Requisite Four for Anti-Organized Crime Measures” in this Chapter.

<sup>6</sup> Kimberly Tobin, *Gangs: An Individual and Group Perspective* (Upper Saddle River: Pearson Prentice Hall, 2008) [*An Individual and Group Perspective*] at 148.

Intervention and Suppression Program model.<sup>7</sup> First, community mobilization occurs to create programs to strengthen institutions in the community.<sup>8</sup> This approach advocates equilibrium and social cohesion in order to maintain social order,<sup>9</sup> and thus, fosters a cooperative environment in order to mobilize communities and maintain behaviour which accords with their values and norms. This approach also accords with social control theory which suggests the use or maintenance of social norms to perpetuate law-abiding behaviour.

Second, social intervention occurs in the form of programs that seek to increase the resilience of individuals against gang membership.<sup>10</sup> This approach asserts that individual risk factors or deficits, such as those present in the family and psychologically, result in gang membership. Thus, social intervention seeks to develop connections between these individuals and larger society in order to achieve conformity to conventional beliefs and values.

The last three components of the Spergel model do not directly relate to fostering pro-social bonds among law-abiding societal members. The third component, as elaborated on as part of *Requisite Four*,<sup>11</sup> is the provision of opportunities in the form of programs to increase educational and employment opportunities.<sup>12</sup> The fourth, as discussed in *Requisite One*,<sup>13</sup> is suppression which occurs by augmenting legal system responses to

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<sup>7</sup> Irving A. Spergel, "A Comprehensive, Community-Wide Approach to the Youth-Gang Problem" (Paper presented to the 2010 Canada-U.S. Gang Summit Conference, Toronto, Ontario, 25 March 2010) online: 2010 Canada-U.S. Gang Summit <<http://www.gangsummit.com/Assets/Spergel%20Speech.pdf>> ["A Comprehensive, Community-Wide Approach to the Youth-Gang Problem"] at 1. This Spergel model includes community mobilization to create programs to strengthen institutions in the community; social intervention in the form of programs that seek to increase the resilience of individuals against gang membership; provision of programs to increase educational and employment opportunities; suppression by augmenting legal system responses to gangs; and organizational changes and development alter the administration of agencies that deal with gangs.

<sup>8</sup> *Ibid.* at 9.

<sup>9</sup> *Gangs: An Individual and Group Perspective*, *supra* note 6 at 151. This approach draws from anomie theory emphasizes the need for social cohesion among members in order to maintain social order rather than produce anomic states.

<sup>10</sup> "A Comprehensive, Community-Wide Approach to the Youth-Gang Problem", *supra* note 7 at 9-10.

<sup>11</sup> See section five "Requisite Four for Anti-Organized Crime Measures" in Chapter Four.

<sup>12</sup> "A Comprehensive, Community-Wide Approach to the Youth-Gang Problem", *supra* note 7 at 10.

<sup>13</sup> See section two "Requisite One for Anti-Organized Crime Measures" in Chapter Four.

gangs.<sup>14</sup> The fifth component, also as discussed in *Requisite One*,<sup>15</sup> deals with organizational changes and development alter the administration of agencies that deal with gangs.<sup>16</sup> For instance, law enforcement agencies may create gang task forces or integrated units; prosecution offices may create specialized prosecutors; and governments may pass legislation that targets gangs and gang activities.<sup>17</sup>

Recent research findings of Spergel and a team of researchers indicate the significance of community-based or “social-development”-based measures for preventing crime and outlawry in youth. This research also suggests that anti-gang measures must consider the nature of their targets or subjects in order to achieve any success. The Spergel research analysed youth contact with outreach youth workers, caseworkers, case managers, teachers, and treatment and manpower personnel, or altogether, that emphasized social development exclusively (that is to say, social intervention, provision of social services, and provision of opportunities such as education, training and jobs), or that emphasized interaction with suppression that includes low-level contact with police as well as arrests.<sup>18</sup> With respect to youth, the degree of entrenchment in criminality plays a role in selecting the proper type or component of anti-gang response:

We found in our current analysis that a strategy of social development alone, at a low or moderate level, was more effective in reducing violence arrests, particularly for younger youth; but a combination (or interaction) of social intervention and suppression was more effective in reducing felony or misdemeanor violence arrests for youth (at different ages and who had prior violence arrests) who were provided with low, moderate, or even high frequencies of worker contacts. On the other hand, the strategy of social development alone was particularly more effective with youth at any age in reducing drug arrests, than was a combination or interaction of social-intervention and suppression strategies.

Also, the interaction of social-development and suppression, particularly at low or moderate (and sometimes high) levels, was effective in reducing property arrests—and total arrests—for older youth between 16 and 19 years of age. Most of these youth had been chronic offenders.

In other words, collaboration of social-development workers, especially with each other, appeared to be more effective in reducing arrests particularly for

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<sup>14</sup> “A Comprehensive, Community-Wide Approach to the Youth-Gang Problem”, *supra* note 7 at 11-12.

<sup>15</sup> See section two “Requisite One for Anti-Organized Crime Measures” in Chapter Four.

<sup>16</sup> “A Comprehensive, Community-Wide Approach to the Youth-Gang Problem”, *supra* note 7 at 12.

<sup>17</sup> *Gangs: An Individual and Group Perspective*, *supra* note 6 at 156-57.

<sup>18</sup> “A Comprehensive, Community-Wide Approach to the Youth-Gang Problem”, *supra* note 7 at 18-19.

younger youth engaged, or about to be engaged in violence behavior. Social-development contacts alone were especially effective in reducing drug-use and drug-selling arrests. However, the interaction of social-development and suppression strategies was more effective with chronic offenders and older youth than were social development contacts alone, particularly for those youth with pre-program arrests for property crime.

We have not yet explored the differential effects of these strategies for males and females, for youth in the programs for longer and shorter periods, and for gang youth who might engage in a combination of criminal acts. The effectiveness of certain services, the mediating effects of school, jobs and family problems, and gang and peer relationships are yet to be examined. Also to be examined are how different types of agencies relate to each other, and contribute to positive change for gang youth.<sup>19</sup>

The inconclusive nature of this research data indicates the complexity of empirically evaluating preventative and community-based programs for law-abiding youth, youth-at-risk, and youth in gangs. However, the research does demonstrate that community-based programs or “social-development”-based programs are important to maintain or foster pro-social bonds and prevent outlawry.

A wide range of community-based, pro-social, preventative programs exists in Canada that may foster pro-social bonds among societal members. These programs may not be those that focus on or have as their mandate, education about gangs and gang prevention, but rather, they may simply be school programs or extracurricular social and sports programs that allow youth to interact in pro-social environments. Notably, in its report on organized crime, the Standing Committee on Justice and Human Rights reviewed information and statistics about the impact of organized crime on youth, and advocated allocation of resources for youth at risk in order “...to divert them from gangs and to promote alternatives to gangs.”<sup>20</sup> Pro-social clubs and programs for adults, also without an anti-gang mandate, may serve the same purpose.

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<sup>19</sup> *Ibid.* at 19-20.

<sup>20</sup> Canada, House of Commons, Standing Committee on Justice and Human Rights, *The State of Organized Crime*, 41<sup>st</sup> Parl., 1<sup>st</sup> sess. (March 2012) at 34.

For example, with respect to youth, the SNAP® or Stop Now And Plan program in Ontario seeks to “keep kids in school and out of trouble.”<sup>21</sup> “It is a cognitive-behavioural strategy that helps children and parents regulate angry feelings by getting them to stop, think, and plan positive alternatives before they act impulsively.”<sup>22</sup> This program initiated in Toronto in the late 1970s by the EarlsCourt Child and Family Centre, now the Child Development Institute, and involves scientists and practitioners. In 1985, the program was developed into the SNAP® Under 12 Outreach Program in order assist young children in conflict with the law. In 1996, the SNAP® Girls Connection was developed in order to make the SNAP® program gender-sensitive. Both of these SNAP® programs, unlike many community-based pro-social programs it seems, have been empirically evaluated, and have achieved success in fostering pro-social interactions.<sup>23</sup>

A wide range of community-based, pro-social, preventative programs *that specifically have an anti-gang mandate*, also exists in Canada. For example the British Columbia Integrated Gang Task Force and the Vancouver Police Dedicated Gang Squad are involved in a joint federal-provincial-municipal-community partnership called the Interministry Committee on the Prevention of Youth Violence and Crime. This Committee has a four-year mandate which targets middle-school-age youth, and seeks to implement measures that prevent youth participation in gangs.<sup>24</sup> Further, the Teens Against Gangs video contest for high school-age youth<sup>25</sup> seeks to bolster attachments to conventional others, and commitment to and belief in societal rules, by involving teens in

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<sup>21</sup> “What is SNAP®: The Stop Now and Plan® Program Keeps Kids In School And Out Of Trouble” (2010) online: <<http://www.stopnowandplan.com/whatis.php>>.

<sup>22</sup> *Ibid.*

<sup>23</sup> “Outcome Evaluation: Does SNAP® Work?” (2010) online: <<http://www.stopnowandplan.com/research.php>>. Generally, children participating in the program made more improvements than non-participants in the areas of externalizing behaviours such as aggression and delinquency, internalizing behaviours such as anxiety and depression, and social competency such as peer relations and participation in activities. Children reported improved quality of interaction with parents. They reported less positive attitudes toward anti-social behaviour, association with fewer peers whom parents considered a “bad influence”, and more pro-social skills in relating with teachers, peers and family members.

<sup>24</sup> Information regarding this program was provided by Superintendent Dan Malo, (lecture presented to The International Society for the Reform of Criminal Law on Gangs: International Organized Crime to Street Corner Gangsters, Vancouver, British Columbia, 2009) [unpublished].

<sup>25</sup> Kim Bolan, “Sun Helps Launch Anti-Gang Video Contest for B.C. High School Students” *The Vancouver Sun* (30 November 2010), online: The Vancouver Sun <<http://www.vancouversun.com/news/helps+launch+anti+gang+video+contest+high+school+students/3903868/story.html>>.

an activity that promotes pro-social lifestyles and values. Simultaneously, and perhaps by necessity, it educates teens as to who is “deviant” and whom or what that teen should not be. This activity may create a mentality or power in the teens to label “others”, and thus, not foster pro-social interactions between teens who *are not* at risk and teens who *are* at risk of becoming criminals or organized crime outlaws. These relatively new initiatives do not have the longevity of the SNAP® programs, and thus, have not received rigorous empirical evaluation, it seems.

With respect to adults, bar watch and restaurant watch programs exemplify community-based, pro-social, preventative programs that specifically have an anti-gang mandate. For example, some Canadian communities have created voluntary community safety programs that prevent gang members from wearing their patches, gang insignia, or gang colours in licensed public establishments, or from entering certain establishments at all. In British Columbia and Alberta,<sup>26</sup> club and restaurant owners in various communities<sup>27</sup> have voluntarily joined Bar Watch and Restaurant Watch programs. Some Bar Watch members have signs stating, “Anyone known to associate with gang organizations or activity will not be permitted entry.” Members allow police to enter their premises uninvited; to use metal detectors to locate weapons and identification scanners to identify patrons; and to escort known gangsters from their premises.<sup>28</sup> Restaurant Watch members agree to call police if they identify a gang member, gang associate, drug trafficker, or person with a propensity for violence on their premises; and they allow

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<sup>26</sup> CBC News Online, “Calgary Bars, Clubs Band Together to Keep Watch on Customers” (28 April 2009), online: CBC News <<http://www.cbc.ca/canada/calgary/story/2009/04/28/cgy-bar-watch-safety-security-cameras.html>>. Calgary, Alberta implemented a bar watch program similar to that in Vancouver in April of 2009.

<sup>27</sup> Royal Canadian Mounted Police, “Upper Fraser Valley Bar Watch – Committed to Community Safety” (10 March 2009), online: RCMP in B.C. <<http://bc.rcmp.ca/ViewPage.action?siteNodeId=50&languageId=1&contentId=8526>>. The Bar Watch program exists in various communities, and not only in downtown Vancouver or the Metro Vancouver area.

<sup>28</sup> Darryl Dyck, “Bar Watch Restaurant Defaced, Others Threatened” (20 March 2009), online: CBC News <<http://www.cbc.ca/canada/british-columbia/story/2009/03/20/bc-bar-watch-earls.html>> [“Bar Watch Restaurant Defaced, Others Threatened”].

uniformed and plain clothes officers to conduct random checks on their premises for gangsters.<sup>29</sup>

Some gangs have retaliated against participation in such programs by shooting at and writing threatening graffiti on Bar Watch establishments.<sup>30</sup> The successful implementation of bar watch and restaurant watch programs lies in the existence of social cohesion among law-abiding, and perhaps fearful, members of society. It also may be driven by economics, since bar and restaurant owners likely realize that they may lose business if they cater to organized crime members, and that they cannot survive on the business of organized crime members alone. One effect of such programs may be social control through the positive reinforcement of the social norms and non-criminal or non-outlaw behaviour. A second effect may be the maintenance and perpetuation of the label of “deviant” or “other” in relation to organized crime members. A third effect may be the preservation of identity – both of the law-abiding and of the organized crime outlaw. Empirical research needs to evaluate these community watch programs in order to determine whether they indeed foster pro-social interactions and cohesion among societal members; whether their true value lies in reducing community fear; and whether they actually thwart organized crime outlawry.

Whether or not a specific anti-organized crime program is in place or whether or not such a program thwarts organized crime outlawry may not matter. The act of educating and mobilizing community members against a common “evil” or social problem, may contribute to fostering pro-social bonds among societal members. Police forces and communities in the Fraser Valley, British Columbia have organized public forums to educate the public about the gang problem.<sup>31</sup> Abbotsford is home to many young organized crime outlaws and their families, and is a “petri dish”<sup>32</sup> to grow gang members.

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<sup>29</sup> CBC News Online, “New Effort Aims to Keep Gangs Out of Vancouver Restaurants” (17 July 2008), online: CBC News <<http://www.cbc.ca/canada/british-columbia/story/2008/07/17/bc-vancouver-restaurant-watch.html>>. Twenty-nine restaurants had become members as of July 17, 2008.

<sup>30</sup> “Bar Watch Restaurant Defaced, Others Threatened”, *supra* note 28.

<sup>31</sup> Kim Bolan, “Parents Urged to Help Stamp Out Gangs” *The Vancouver Sun* (7 January 2011), online: The Vancouver Sun <<http://www.vancouversun.com/news/Parents+urged+help+stamp+gangs/4073755/story.html>>.

<sup>32</sup> *Ibid.* as quoting Chief Bob Rich of the Abbotsford police.

Abbotsford Mayor, George Peary, sought to “deputize” community members, and told them that they needed to form posses to aid the police in the fight against organized crime.<sup>33</sup> The effect of this initiative and other such initiatives, on community cohesion and the reinforcement of pro-social bonds needs to be empirically tested.

Community-based education and action programs seem to be positive grassroots efforts to prevent organized crime, since they seek to reinforce conventional social norms and behaviours. They may serve to calm any fears or panic that communities may have about organized crime, and thus, attempt to strengthen a law-abiding identity and social order. However, they are not necessarily effective for all community members, and they are not necessarily all individuals who are at risk of becoming youth gang members or adult organized crime outlaws. Indeed, further empirical evaluations of various community-based anti-organized crime measures are required.<sup>34</sup> Spergel concludes from his recent research on youth:

We still do not know—based on good evidence—what models or approaches to the youth-gang problem—on an outreach, community-wide basis—are effective. There have been few quasi-experimental program evaluations; they are complex, expensive, and very difficult to accomplish.<sup>35</sup>

Without further research that evaluates gang programs, policies and initiatives will continue to be “afflicted by myths, politics and wrong decisions...”<sup>36</sup> In order to substantively combat organized crime outlaws, each community-based program ought to be evaluated for youth as well as for adults.

#### 4.4.4 Evaluations and Recommendations

Although community-based programs or “social-development”-based programs generally are important to maintain or foster pro-social bonds and prevent outlawry, the lack of empirical evidence regarding such programs with respect to adults; the inconclusive nature of research regarding the ability of community-based or “social-development”-based programs to prevent youth from engaging in criminal behaviour; and the diverse

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<sup>33</sup> *Ibid.*

<sup>34</sup> “A Comprehensive, Community-Wide Approach to the Youth-Gang Problem”, *supra* note 7 at 15.

<sup>35</sup> *Ibid.* at 15.

<sup>36</sup> *Ibid.* at 20.

and various types of community action and education programs that have anti-gang or anti-organized crime mandates, demands that further empirical research be conducted.

The law, and specifically the criminal law, should not be used in isolation as a means of fostering pro-social bonds among societal members. Although the formal criminalization of organized crime outlawry may have some positive effect on attachments, commitment, involvement and belief of law-abiding conventional societal members, these achievements are by-products rather than substantive ends for creating criminal organization legislation.

Based on the analysis of *Requisite Three* and the foregoing conclusions, this thesis makes the following recommendations:

***Recommendation Seven:*** *Criminal laws that have anti-organized crime mandates should be used in conjunction with community-based education and action programs.*

***Recommendation Eight:*** *Community-based education and action programs that have anti-organized crime mandates should be empirically evaluated in the short-term, as well as in the long-term in order to determine whether they foster pro-social bonds among societal members, and specifically, to determine whether they achieve the goals of attachment to conventional others; commitment to obeying societal rules; involvement in conventional activities; and belief in a common and conventional value system.*

***Recommendation Nine:*** *Community-based education and action programs that do not have anti-organized crime mandates, such as school programs, extracurricular programs, social clubs, athletic associations, should also be empirically evaluated in order to determine whether they foster pro-social bonds among societal members, and specifically, to determine whether they achieve the goals of attachment to conventional others; commitment to obeying societal rules; involvement in conventional activities; and belief in a common and conventional value system.*

## 4.5 REQUISITE FOUR FOR ANTI-ORGANIZED CRIME MEASURES

### *Requisite Four*

*Rooted in Social Control and Bond Theory, Differential Association and Social Learning in Subcultures, and Social Psychology:*

Anti-organized crime measures must maintain or foster positive social and symbolic interactions or situated activities between perceived deviants or outlaws (that is say, individuals who are at risk of criminal deviance or outlawry), and members of conventional society.

- a. These measures must ensure the re-integration and rehabilitation of organized crime offenders.
- b. These measures must provide pro-social learning and pro-social learning environments for organized crime outlaws.
- c. The measures must provide re-educative processes for members who leave or who are incapacitated from their organized crime group, and the presence of a non-outlaw environment in which ex-members can interact with law-abiding members of society.

### 4.5.1 Overview

*Requisite Four* accords with principles within the theory of restorative justice, and specifically, with some of the principles within John Braithwaite's theory of reintegrative shaming.<sup>1</sup> This section of Chapter Four will use restorative justice principles to unify and implement some of the relevant concepts underlying labelling theory, differential association and subculture theory, and social control theory. In so doing, it will determine whether community action programs and criminal laws have an effective proactive as well as reactive means of contributing towards a remedy for the problem of organized crime.

The application or implementation of restorative justice principles has some practical legal challenges in relation to organized crime outlawry due to the seriousness of most criminal organization offences, and due to the emphasis on principles of incapacitation, deterrence and stigmatizing denunciation rather than principles of reparation, rehabilitation and pro-social denunciation in sentencing organized crime outlaws. This Chapter will set forth these difficulties, and evaluate the capacity of present laws relating to *Criminal Code* offences and laws relating to corrections, to extend restorative justice

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<sup>1</sup> John Braithwaite, *Crime, Shame and Reintegration* (New York: Cambridge University Press, 1989) [*Crime, Shame and Reintegration*].

methods to organized crime outlaws. That is to say, it will set forth ways in which criminal and corrections law can denounce offending behaviour without stigmatization, and involve the community in pre-offence and post-offence “justice” or reparative healing to members of criminal organizations.

## 4.5.2 Restorative Justice Principles

### 4.5.2.1 The Relevance of Restorative Justice to Organized Crime Outlaws

Insights from restorative justice theory present positive and idyllic goals for many aspects of and processes within criminal justice. These insights offer the means to implement some of the requisites for anti-organized crime measures as suggested by sociological and criminological theories, and in particular, *Requisite Four*. However, restorative justice theory has limitations in its legal application and in its principles for organized crime outlaws, and it does not represent, in all circumstances, the only or the most appropriate method of what some might describe as “righting wrongs” or others may call “administering justice.”

Restorative justice is *not* a theory which offers explanations or reasons for the creation and perpetuation of organized crime outlaw identities. It is a *reactive* theory to the extent that an offender must become involved in the criminal justice system (even if this involvement is prior to arrest) in order for restorative justice principles to apply. Like sentencing theories, restorative justice is *reactive* to an event that has occurred, and, like sentencing theories, it is *proactive* in its intent to “right the wrong” in order to ensure that it does not occur again. Restorative justice extends beyond sentencing, however. It suggests ways to restore harmed relationships among community members, victims and offenders included, prior to sentence, prior to trial, and prior to charge approval.

The relevance of restorative justice in this thesis is two-fold. First, many of the tenets of restorative justice accord with concepts posited by criminological theories of deviance and labelling, differential association or social learning and subcultures, social control, and social constructionism. Second, restorative justice provides ideas for the

implementation of the requisites for anti-organized crime measures in the administration of justice. However, the inherent conflicts and limitations within the principles of restorative justice generally, and specifically as they may apply to organized crime outlaws, reveal the legal difficulties in applying restorative justice methods to criminal organization offences as they presently exist in the *Criminal Code*.<sup>2</sup> This section will discuss these difficulties, and focus on the circumstances in which restorative justice may be applied to “righting the wrongs” that result from organized crime outlawry.

#### 4.5.2.2 The Historical Tenets and Insights of Restorative Justice

Unlike retributivist methods of seeking to instill or awaken a sense of guilt in offenders by punishment effected through imprisonment,<sup>3</sup> restorative justice seeks to restore harmed relationships<sup>4</sup> and social equilibrium.<sup>5</sup> Restorative justice asserts that crime destroys “right” relationships in the community and creates harmful ones. Crime destroys *shalom* or community wholeness, completeness, and fulfillment; it destroys peace<sup>6</sup> and disturbs the relationship between the wrongdoer and the sufferer.<sup>7</sup> In order to re-establish community peace and repair or restore the disturbed relationship, the sufferer, the wrongdoer and the community must collectively repair the harm that occurred, and must each satisfy their concepts of justice.<sup>8</sup> Restorative justice aims to transform the relationship – not to reinstate the previous status quo – but to ensure that the wrong does not occur again.<sup>9</sup> Restitution for the victim must occur, and vindication of the victim as well as the law must take place. The restoration of a community damaged or harmed by crime does not occur through vengeance, but rather, through healing.<sup>10</sup>

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<sup>2</sup> R.S.C. 1985, c. C-46 [*Criminal Code*].

<sup>3</sup> Jennifer Llewellyn & Robert Howse, “Institutions for Restorative Justice: The South African Truth and Reconciliation Commission” (1999) 49 *University of Toronto Law Journal* 355 [“Institutions for Restorative Justice: The South African Truth and Reconciliation Commission”] at 377.

<sup>4</sup> Jennifer J. Llewellyn & Robert Howse, “Restorative Justice: A Conceptual Framework” (Ottawa: Law Commission of Canada, 1998) [“Restorative Justice: A Conceptual Framework”] at 1-2.

<sup>5</sup> *Ibid.* at 3.

<sup>6</sup> D.W. Van Ness, “New Wine and Old Wineskins: 4 Challenges of Restorative Justice” (1993) 4 *Criminal Law Forum* 251 [“New Wine and Old Wineskins: 4 Challenges of Restorative Justice”] at 254.

<sup>7</sup> “Restorative Justice: A Conceptual Framework”, *supra* note 4 at 1.

<sup>8</sup> Law Commission of Canada, *Transforming Relationships Through Participatory Justice* (Ottawa: Law Commission of Canada, 2003) at 15.

<sup>9</sup> “Restorative Justice: A Conceptual Framework”, *supra* note 4 at 43.

<sup>10</sup> “New Wine and Old Wineskins: 4 Challenges of Restorative Justice”, *supra* note 6 at 254-55.

Restorative justice draws from methods of ancient systems of social control.

Early legal systems that form the foundation of Western law emphasized the need for offenders and their families to settle with victims and their families. Although crime breached the common welfare, so that community had an interest in, and a responsibility for, addressing the wrong and punishing the offender, the offense was not considered primarily a crime against the state, as it is today. Instead a crime was viewed principally as an offense against the victim and the victim's family. This understanding was reflected in ancient legal codes from the Middle East, the Roman empire [*sic*], and later European polities. Each of these diverse cultures responded to what we now call crime by requiring offenders and their families to make amends to victims and their families – not simply to insure that injured persons received restitution but also to restore community peace.<sup>11</sup>

The Norman invasion of Britain in the 11<sup>th</sup> century marked a turning point away from the idea of crime as a breach of community and toward the idea that crime breached the King's peace.<sup>12</sup> In England, a criminal offence became an offence against the state rather than society, and this concept was passed to many common law jurisdictions including Canada. The principles of restorative justice attempt to shift the emphasis of the breach of monarchical or state peace back to a breach against society.

Restorative justice is holistic in the sense that all parties – the victim, the offender, the community and the government – must respond to crime and participate in the healing process. It emphasizes negotiation, reconciliation, reparation, mediation, reintegration, victim empowerment, and community inclusion. To effect these objectives, restorative justice requires a community to embrace a wrongdoer, and thus, to provide that wrongdoer with pro-social associations. Some proponents of restorative justice assert that it also requires a punitive sanction to have proportionality with the amount of harm inflicted on the community by the offence, and that it requires the sanction to be relevant to the needs of the offender as well as to the offence committed.<sup>13</sup> Thus, healing and restoration would not come without some punitive obligation or duty. Regardless, the involvement of the community with the wrongdoer in restorative justice accords with assertions by differential association or social learning theory, as well as social control

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<sup>11</sup> *Ibid.* at 253-54.

<sup>12</sup> *Ibid.* at 255-56. In 1066, William the Conqueror of Normandy, claiming that he had been promised the English Throne, invaded and imposed his rule on England.

<sup>13</sup> G. Bazemore & D. Maloney, "Rehabilitating Community Service: Toward Restorative Service Sanctions in a Balanced Justice System" (1994) 58 *Federal Probation* 24 at 25.

and bond theory that a wrongdoer or outcast must have pro-social attachments from which to develop the beliefs, values and attachments necessary to abide by societal laws.

#### 4.5.2.3 “Righting the Wrongs” of Organized Crime Outlawry: Application of Restorative Justice Principles to Insights from Sociological and Criminological Theory

Insights from the principles of some restorative justice theories may play a role in applying and critiquing concepts within the theories of deviance and labelling; differential association or social learning and subcultures; social control and bonding; and social constructionism to organized crime outlaws. They may also assist in formulating appropriate legal responses. John Braithwaite distinguished his concept of restorative justice from criminological theory and critiques aspects of social control<sup>14</sup> and labelling theories, but his description of his theory regarding reintegrative shaming, demonstrates it to be a method of social control, and he acknowledges that shaming is a “participatory form of social control.”<sup>15</sup>

Criminological theory has tended to adopt a rather passive conception of the criminal. Criminal behavior is determined by biological, psychological and social structural variables over which the criminal has little control. The theory of reintegrative shaming, in contrast, adopts an active conception of the criminal. The criminal is seen as making choices – to commit crime, to join a subculture, to adopt a deviant self-concept, to reintegrate herself, to respond to others’ gestures of reintegration – against a background of societal pressures mediated by shaming.

The latter pressures might mean that the choices are somewhat constrained choices, but they are choices. This is especially so because *the theory of reintegrative shaming explains compliance with the law by the moralizing qualities of social control rather than by its repressive qualities. Shaming is conceived as a tool to allure and inveigle the citizen to attend to the moral claims of the criminal law, to coax and caress compliance, to reason and remonstrate with him over the harmfulness of his conduct.* The citizen is ultimately free to reject these attempts to persuade through social disapproval.

An irony of the theory is the contention that moralizing social control is more likely to secure compliance with the law than repressive social control. ...<sup>16</sup> [Emphasis added].

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<sup>14</sup> *Crime, Shame and Reintegration*, *supra* note 1 at 13. Braithwaite asserts that Travis Hirschi’s control theory fails to account for the adoption of different criminality or criminal paths by “uncontrolled individuals.”

<sup>15</sup> *Ibid.* at 81.

<sup>16</sup> *Ibid.* at 9.

Reintegrative shaming relies on a form of denunciation because it requires conventional societal members to inform non-conforming deviant members about the harmful effects the non-conformity deviance has.<sup>17</sup> It encourages rather than coerces compliance, unlike imprisonment which acts a repressive social control that restricts autonomy.<sup>18</sup> However, shaming can only take place after an individual has been well-socialized and has adopted a conscience based on conventional normative behaviour and values. Shaming builds such consciences when citizens express “abhorrence” toward the criminal acts of other citizens, and thus, makes crime “an abhorrent choice” for citizens and one for which they will repent.<sup>19</sup> “Pangs of conscience” replace shaming and repentance, and are more reliable and timely in any event.<sup>20</sup> The effectiveness of reintegrative shaming without a common value structure, and thus, without the foundation to build a conscience at the outset, remains unclear. Braithwaite asserts that shaming is more effective than deterrence measures,<sup>21</sup> but without a presence within mainstream culture and a well-socialized conscience, an individual may not benefit from shaming alone.

Reintegrative shaming also accords with some of the principles within deviance and labelling theory, as well as concepts within differential association and subcultures.

The first step to productive theorizing about crime is to think about the contention that *labeling offenders makes things worse. The contention is both right and wrong. The theory of reintegrative shaming is an attempt to specify when it is right and when wrong. The distinction is between shaming that leads to stigmatization – to outcasting, to confirmation of a deviant master status – versus shaming that is reintegrative, that shames while maintaining bonds of respect or love, that sharply terminates disapproval with forgiveness, instead of amplifying deviance by progressively casting the deviant out. Reintegrative shaming controls crime; stigmatization pushes offenders toward criminal subcultures.*

The second step to more productive theorizing about crime is to realize what scholars like Sutherland, Cressey and Glaser grasped long ago – that *criminality is a function of the ratio of associations favorable to crime to those unfavorable to crime.* If this is a banal point, it is one that criminological theorists systematically forget. ...<sup>22</sup> [Emphasis added].

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<sup>17</sup> *Ibid.* at 10. Braithwaite asserts, *ibid.* at 17, that “the more said about crime the better” so as to express dismay and disapproval but in a constructive manner.

<sup>18</sup> *Ibid.* at 10.

<sup>19</sup> *Ibid.* at 81-82.

<sup>20</sup> *Ibid.* at 82.

<sup>21</sup> *Ibid.* at 69.

<sup>22</sup> *Ibid.* at 12-13.

Further, Braithwaite's concept of reintegrative shaming accords with some explanations for the formation of outlaw identities through criminal subcultures:

The theory of reintegrative shaming posits that the consequence of stigmatization is attraction to criminal subcultures. Subcultures supply the outcast offender with the opportunity to reject her rejectors, thereby maintaining a form of self-respect. In contrast, the consequence of reintegrative shaming is that criminal subcultures appear less attractive to the offender. Shaming is the most potent weapon of social control unless it shades into stigmatization. Formal criminal punishment is an ineffective weapon of social control partly because it is a degradation ceremony with maximum prospects for stigmatization.<sup>23</sup>

Essentially non-stigmatizing reintegrative shaming incorporates forgiveness with an offer of social approval based on changed behaviour. However, the application of shaming to subcultures seemingly must occur *before* the shamed individual becomes a part of the subculture since subcultures facilitate and empower their members to "...reject the rejectors."<sup>24</sup>

Restorative justice also has a connection to the social constructionist perspective. Proponents of restorative justice assert that for the law to have the respect of the people, the people or the community must participate in or be part of the process that creates that law.<sup>25</sup> Social constructionism ascribes legitimacy to the state when its institutions, such as its institutions of law and justice, respond to public outcry. That is to say, law stemming from moral panic generated by a perceived social problem seeks and will obtain respect because the state has responded to the demands of the people. Even if the law does not work in the long-term, in the short-term, that law is seen as responsive, and therefore, receives respect and lends legitimacy to the state. Respect for the law in the long-term, would require not only the continued involvement of the people from a restorative justice perspective, but also proven effectiveness which would derive from also public or community participation.

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<sup>23</sup> *Ibid.* at 14.

<sup>24</sup> *Ibid.* at 102. Braithwaite states, *ibid.* at 68:

...Reintegrative shaming is superior to stigmatization because *it minimizes risks of pushing those shamed into criminal subcultures*, and because social disapproval is more effective when embedded in relationships overwhelmingly characterized by social approval. [Emphasis added].

<sup>25</sup> "Institutions for Restorative Justice: The South African Truth and Reconciliation Commission", *supra* note 3 at 380-81.

The connection of restorative justice to social constructionism has particular relevance to Aboriginal street gangs. The disenfranchisement of Aboriginal peoples in Canada has resulted in a lack of respect for the law, and this may explain not only criminalization of acts associated with Aboriginal subsistence and spiritual practices,<sup>26</sup> but also a rejection of legal institutions and the segment of society that creates and imposes them. This lack of respect and rejection of state institutions may contribute to the development of Aboriginal street gangs, similar to the detachment that occurs according to social control and bond theory.

Generally, when individual or group behaviour is “criminalized through the laws of a society, a significant percentage of the members of that society are comfortable in the belief that their lawmakers have engaged in a considered and careful analysis of the social context of this particular behaviour, prior to its formal and legal denunciation through the law. The confidence of mainstream Canadian society is based on the belief and broad understanding that the ethos of a democratic society guarantees all of its members the right to full participation in the processes of their own government, including law making.

Most Aboriginal people have been, and continue to be, excluded from these processes of law-making in Canada. The reasons for this lack of involvement are many and complex, often related to legal, political, linguistic, and accessibility issues. The democratic approach, then, cannot and does not work in this context. In fact, the ongoing creation of laws, policies, and formal agreements that threaten Aboriginal peoples’ survival continues without their full and informed participation as peoples. They remain objects of the legislation and are neither equal members of Canadian democracy nor cultural beings within their own acknowledged and respected distinct societies.<sup>27</sup>

Restorative justice requires involvement of all persons in the development of the law, and until such inclusion and participation occurs, rejection of societal laws and legal institutions by Aboriginal peoples, including Aboriginal street gang outlaws, will continue.

These principles with restorative justice theory integrate insights from the various sociological and criminological theories discussed in Chapter three. Further, restorative

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<sup>26</sup> Lisa Chartrand & Cora Weber-Pillwax, “*Pimatsowin Weyasowewina: Our Lives, Others’ Laws*” in Janet Mosher & Joan Brockman, eds., *Constructing Crime: Contemporary Processes of Criminalization* (Vancouver: UBC Press, 2010) at 88-89.

<sup>27</sup> *Ibid.* at 90.

justice principles, and particularly Braithwaite's theory of reintegrative shaming, suggest ways to implement remedies for the negative aspects of labelling, anti-social association, and subculture membership in relation to organized crime outlaws in order to promote respect for the law, and belief and attachment to conventional societal values and norms. However, the practical implementation of restorative justice measures to criminal organization laws remains more challenging.

#### 4.5.3 Implementation of Restorative Justice to Organized Crime Outlaws

##### 4.5.3.1 Limitations and Inherent Conflicts Within the Principles of Restorative Justice in Relation to Organized Crime Outlaws<sup>28</sup>

A number of limitations and conflicts exist within restorative justice as it applies to organized crime outlaws. First, definitions of restorative justice contain goals of restoring or re-establishing "balance"<sup>29</sup> or "peace."<sup>30</sup> These terms seem to imply a state of affairs that existed for a "victim" or wronged individual prior to the criminal act in question. However, in the context of organized crime, states of affairs may have been far from balanced or peaceful – especially if that "victim" or wronged party operated within the criminal milieu. Indeed, the existence of balance and peace within society remains akin to social order or public peace, and due to the constant presence of crime and organized crime, balance and peace remain ideals and unattainable notions. This reality mutes the resounding potential and promises offered by restorative justice and its proponents.

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<sup>28</sup> The last three paragraphs in this section incorporate some of my earlier ideas and work in the area of restorative justice. They comprised part of my LL.M. thesis, Carol Fleischhaker, *Sentencing Legislation in Canada and the Conditional Sentence...The Answer to Our Problems or Just the Beginning of a New One?* (L.L.M. Thesis, University of Saskatchewan, 1999) [unpublished].

<sup>29</sup> Bruce P. Archibald, "Let My People Go: Human Capital Investment and Community Capacity Building Via Meta/Regulation in a Deliberative Democracy—A Modest Contribution for Criminal Law and Restorative Justice" (2008) 16 *Cardozo Journal of International and Comparative Law* 1 ["Let My People Go: Human Capital Investment and Community Capacity Building Via Meta/Regulation in a Deliberative Democracy—A Modest Contribution for Criminal Law and Restorative Justice"] at 29. Archibald adopts the following definition:

"Restorative justice is an approach to accountability for crime based on the restoration of balanced social relations and reparation of criminal harms [which] is rooted in values of equality mutual respect and concern, and [which] uses deliberative processes involving crime victims, offenders, their respective supporters and representatives of the broader community under the guidance of authorized and skilled facilitators."

<sup>30</sup> "New Wine and Old Wineskins: 4 Challenges of Restorative Justice", *supra* note 6 at 254.

Second, proponents of restorative justice repeatedly use the term “community” in their definitions and in their application of the concept to criminal justice processes. However, there exists a general lack of explanation about the parameters of “community”, and whose community it is – that of the offender, the victim, or some other segment of conventional law-abiding society. Further, implicit in the use of the term “community” is consensus. However, Canadian society contains, and even embraces, pluralism and divergence, and thus, bias and conflict of values are inherent within any community regardless of its size, location or cultural make-up. In his recent study of “Aboriginal youth gangs”,<sup>31</sup> Michael Totten stated that community development approaches are founded on the premise that a singular cohesive “Aboriginal community” exists, but such community does not exist in reality due to competing interests on reserves and urban neighbourhoods, religious and spiritual divisions, as well as unequal access to income and wealth.<sup>32</sup> The needs of an offender may conflict with the “victim” or “community’s” concept of what degree and what type of punishment is necessary to right the wrong.<sup>33</sup>

A third problem lies in the fact that restorative justice requires the “community” and the “victim” to participate in reconciling and reintegrating the offender. However, the community may not exist or it may be fragmented, and it, as well as the victim, may be completely unwilling to participate. “It is undisputed that without a community willing to help to restore and reintegrate the offender into the community the restorative approach is doomed to fail.”<sup>34</sup> Restorative justice efforts for some offenders can create an artificial community comprised of persons employed by the government or private agencies that provide support to offenders and positive role modeling. However, such provisions hardly cease or reduce social control and surveillance of the individual by the state. In addition, community-based restorative justice may be a misnomer or contradictory in

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<sup>31</sup> Mark Totten, “Aboriginal Youth and Violent Gang Involvement in Canada” (2009) 3 Institute for the Prevention of Crime Review 135 at 136. While Totten’s research pertains to “Aboriginal youth”, he employs this term to include Aboriginal individuals between the ages of 12 and 30 years.

<sup>32</sup> *Ibid.* at 143-44.

<sup>33</sup> In a similar vein, restorative justice also does not abate the inherent conflict between individualization in sentencing and the sentencing principle of proportionality in s. 718.1 and parity in section 718.2(b) of the *Criminal Code* which requires a sentence to be proportionate to the offence as well as to other sentences for that offence.

<sup>34</sup> *R. v. Taylor* (18 December 1997) Regina 6896 (Sask. C.A.) at 27.

principle when the state regulates these programs.<sup>35</sup> Further, the methods and techniques of administering justice or righting wrongs in one community or for one offender, may have little value or application when used or imposed on another community or in relation to another offender.<sup>36</sup>

A fourth problem with restorative justice in relation to organized crime outlaws (or any offender) is that the responsibility of the “community” to reform, rehabilitate, and reintegrate offenders seems illogical when the community itself played a role in the creation of deviance. The community from which the offender came may be “unhealthy” and its inclusion in the reintegration process may serve to reinforce the values which conventional society finds unacceptable. While the offender may be able to participate in programs and projects provided by a “healthy” segment of the community from which he probably did not originate, he may have to sever previous ties with family or friends in order to maintain law-abiding behaviour.

#### 4.5.3.2 Legal Limitations in the Application of Restorative Justice to Criminal Organization Offences

Restorative justice is an ideal,<sup>37</sup> and thus, it has practical and legal limitations. Many of the criminal organization provisions in the *Criminal Code* contain mandatory minimum sentences. Thus, “community” involvement will be legally limited at the front end of these prosecutions and sentences. That is to say, diversion or alternative measures will likely not apply as criminal organization charges involve serious offences, and probation

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<sup>35</sup> “Let My People Go: Human Capital Investment and Community Capacity Building Via Meta/Regulation in a Deliberative Democracy—A Modest Contribution for Criminal Law and Restorative Justice”, *supra* note 29 at 39.

<sup>36</sup> For instance, the concept of “aboriginal justice” and “sentencing or healing circles” are often touted as demonstrative of methods of utilizing restorative justice techniques. However, “aboriginal communities” themselves are far from singular and without difference. E.J. Dickson-Gilmore & Chris Whitehead in “Aboriginal Organized Crime in Canada: Developing a Typology for Understanding and Strategizing Responses” (2002) 7 *Trends in Organized Crime* 3 at 18 assert that no homogenous “Canadian Indian” or “Indian offender” exists, and that Aboriginal people and offenders come from various backgrounds and cultures. In Canada, there are 50 Aboriginal languages, 52 cultural groups, and six major cultural regions – the Woodland, Iroquoian, Plains, Plateau, Pacific Coast, and Mackenzie and Yukon River basins. Further, not all “aboriginal communities” have the social health, cohesion, self-governance, or wealth to support an offender. Further, while section 718.2(e) mitigates sentences if an offender is an aboriginal offender, the emotional links and desired connections of aboriginal offenders to their bands, communities and nations are also individual and divergent.

<sup>37</sup> “Restorative Justice: A Conceptual Framework”, *supra* note 4 at 26.

and conditional sentence conditions that promote “community” involvement will not be imposed because sentences will involve two or more years of imprisonment. For instance, the offences of drive-by shootings, sexual assault with a firearm, and kidnapping with a firearm have proscribed aggravated sentences when they are done in connection with a criminal organization – they impose mandatory minimum sentences of five years for a first such offence and seven years for a second or subsequent offence.<sup>38</sup>

Other offences that involve criminal organization charges or criminal organization members do not contain mandatory minimum sentences, but they still mandate or result in significant periods of incarceration that limit the availability of restorative justice options. The possession of explosive substances in connection with a criminal organization is an indictable offence, and an offender is liable to imprisonment for a term not exceeding 14 years.<sup>39</sup> One offender who was not convicted of the connection offence, but was convicted of the offence of possession of explosive substances simpliciter and was found to be a member of the Hells Angels, received seven years imprisonment.<sup>40</sup> Another offender who was convicted of extortion in connection with a criminal organization received four years and four months in addition to credit for 20 months of pre-sentence custody.<sup>41</sup> In spite of the fact that sentences for extortion do not generally exceed five to six years,<sup>42</sup> another offender who was convicted of extortion *not* in connection with a criminal organization but who was found to be a Hells Angel member, received four years with credit for 44 days of pre-trial custody.<sup>43</sup> Similarly, although an offender’s act of extortion “was not an example of the most serious act of extortion”,<sup>44</sup> the offender was a member of the Hells Angels and received four years imprisonment.<sup>45</sup> These sentences amount to federal time, and exclude the possibility of probationary or conditional

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<sup>38</sup> *Criminal Code*, *supra* note 2 at ss. 244.2, 272(2) and 279(1.1).

<sup>39</sup> *Ibid.* at ss. 82(2).

<sup>40</sup> *R. v. Violette*, 2009 BCSC 1025, [2009] B.C.J. No. 1940 (Q.L.) at para. 89. Randall Richard Potts had stored grenades as well as firearms under the porch of his mother’s trailer home. The Honourable Mr. Justice Romilly held, *ibid.* at paras. 83 and 85, that the only purpose of the explosive substances was for “sinister” and “evil.”

<sup>41</sup> *R. v. Lindsay*, 2009 ONCA 532, [2009] O.J. No. 2700 (Q.L.) at paras. 38-47.

<sup>42</sup> *R. v. Violette*, 2009 BCSC 1557 at para. 135.

<sup>43</sup> *Ibid.* at para. 156.

<sup>44</sup> *R. v. Grant*, 2007 MBQB 135, [2007] M.J. No. 193 (Q.L.) at para. 12.

<sup>45</sup> *Ibid.* at para. 91.

sentence order terms that might involve reparation to, rehabilitation in, or reintegration into a community.

Further, the definition of “criminal organization” itself in section 467.1 includes the presence of “serious offences” which are defined as indictable offences with a maximum sentence of five years or more. This part of the definition suggests that organized crime offences are to be considered serious offences that will attract significant sentences of imprisonment. And, it mandates that sentences for offences that are in connection with a criminal organization be served consecutively to sentences for all other offences.<sup>46</sup> Thus, the majority of organized crime outlaws who are convicted of a criminal organization offence or offences will receive lengthier sentences than they might otherwise if they could benefit from concurrent sentences.

Given these statutory provisions, the nature of a criminal organization itself, and the types of offences that are likely to be prosecuted using section 467.1 will be indictable offences or offences which will attract prison sentences of two years or more rather than jail sentences of less than two years. There have been exceptions where courts have dealt with less serious offences involving organized crime outlaws, and imposed more severe sentences pursuant to section 718.2(a)(iv) of the *Criminal Code*.<sup>47</sup> These sentences did not amount to federal time, but this type of circumstance will not be the majority of criminal organization cases. Consequently, conditional sentences which cannot be imposed for sentences of two or more years, and probation orders which can only attach to sentences of less than two years, very likely have no application to criminal organization offences or offenders. Restorative justice techniques in relation to criminal organizations could not occur through conditional sentence orders or probation orders.

Another problem in practically applying restorative justice principles to criminal organization offences is that statutory laws both limit and empower courts to *not* employ

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<sup>46</sup> *Criminal Code*, *supra* note 2 at s. 467.14.

<sup>47</sup> *R. v. Timmins*, 2006 BCCA 354, [2006] B.C.J. No. 1767 (Q.L.); and *R. v. Kirton*, 2007 MBCA 38, [2007] M.J. No. 299 (Q.L.). The offender Timmins was sentenced for breach of probation, and received a probation order. The offender Kirton was sentenced for assault and breach of probation, and received a probation order.

restorative justice principles and techniques. For instance, courts have power to impose conditions as a part of sentencing, but not as a part of statutory or conditional release after a jail or prison term. They do not have the power to impose conditions attaching to the release and parole of organized crime outlaws. Further, the *Criminal Code* enshrines deterrence and incapacitation as sentencing principles to which a court can resort in determining the appropriate sentence for an individual offender,<sup>48</sup> and these principles often remain appropriate for organized crime outlaws. In reviewing the sentences of members of the Manitoba Warriors in *R. v. Pangman*,<sup>49</sup> the Manitoba Court of Appeal noted the significance of deterrence, incapacitation and denunciation in spite of the presence of the restorative justice objective in section 718.2(e) of the *Criminal Code* regarding aboriginal offenders,<sup>50</sup> and asserted:

**43** While no categories of offences are exempt from consideration, courts have recognized that, depending on the circumstances, sentences for serious offences may well not be ameliorated by the principles arising from *R. v. Gladue*. There are some serious offences and some offenders for which and for whom separation, denunciation and deterrence are fundamentally relevant (*R. v. Gladue* at para. 78). This point is also made in *R. v. Sackanay* (2000), 47 O.R. (3d) 612 (C.A.) at para. 11:

Admittedly, both *Gladue* and the later Supreme Court of Canada decision in *R. v. Wells*, [[2000] 1 S.C.R. 207, 2000 SCC 10] acknowledge that sentences should not be automatically reduced for aboriginal offenders, and that for more serious and violent offences sentences are likely to be similar whether the offender is aboriginal or not.

**44** Whether a crime is a serious one is a factual matter determined on a case by case basis. The gravity of the offence must be considered as well as the offender's degree of responsibility. It should also be acknowledged that for some aboriginal offenders, and depending upon the nature of the offence, the goals of denunciation

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<sup>48</sup> *Criminal Code*, *supra* note 2 at ss. 718(b) and (c).

<sup>49</sup> 2001 MBCA 64, [2001] M.J. No. 217 (Q.L.) [*R. v. Pangman*].

<sup>50</sup> *Ibid.* at para. 38. The appellate Court states:

**38** The section recognizes the overincarceration of aboriginal offenders and the fact that most traditional aboriginal conceptions of sentencing hold restorative justice to be the primary objective. The overincarceration of the aboriginal offenders is of special concern in Manitoba. According to information from the Manitoba Department of Corrections, in 1999, aboriginal offenders made up approximately 66% of prisoners on remand status and 70% of the population of provincial inmates.

**39** The section does not mandate better treatment for aboriginal offenders than non-aboriginal offenders. It is simply a recognition that the sentence must be individualized and that there are serious social problems with respect to aboriginals that require more creative and innovative solutions. This is not reverse discrimination. It is an acknowledgment that to achieve real equality, sometimes different people must be treated differently.

and deterrence are of prime importance to the offender's community (R. v. Gladue at para. 42).

...

**56** ... Leaders of gangs and gang members make a very deliberate choice to lead a criminal lifestyle. R. v. Gladue was never meant to shield organized and violent cocaine traffickers who prey upon and exploit the most vulnerable members of our society for profit.<sup>51</sup>

These comments demonstrate that repeat and serious offenders who are entrenched in an outlaw lifestyle may indeed require incapacitation. In addition, although courts must impose the least restrictive sentence available for an offender,<sup>52</sup> the necessity of individuality within the sentencing process means that restorative justice principles do not form a blanket policy or compulsory social theory to be used for all offenders at the sentencing stage. Indeed, restorative justice measures are only appropriate if the offender consents and participates voluntarily.<sup>53</sup>

Interviews with Aboriginal street gang members involved in the Ogijiita Pimatiswin Kinamatiwin in Winnipeg, Manitoba indicate that they accepted that as gang members, they are going to go to jail or prison as a consequence.<sup>54</sup> While incarceration is not a solution to inner city violence, gang members agreed with a “get tough on crime” approach, and agreed that if they commit crimes, they should suffer the consequences.<sup>55</sup> Restorative justice theory may interpret these assertions as efforts by these gang members to accept responsibility for their actions, to be accountable for them, and to acknowledge their wrongdoing. Non-restorative justice theorists may interpret these assertions by gang members as simply resignation that on this occasion they were caught, and as acceptance of incarceration as a legitimate sentencing goal without any desire for reparation with the community.

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<sup>51</sup> *Ibid.* at paras. 43-44 and 56.

<sup>52</sup> *Criminal Code*, *supra* note 2 at ss. 718.2(d).

<sup>53</sup> “Let My People Go: Human Capital Investment and Community Capacity Building Via Meta/Regulation in a Deliberative Democracy—A Modest Contribution for Criminal Law and Restorative Justice”, *supra* note 29 at 34.

<sup>54</sup> Elizabeth Comack, Lawrence Deane, Larry Morrissette, and Jim Silver, “If You Want to Change Violence in the ‘Hood, You have to Change the ‘Hood: Violence and Street Gangs in Winnipeg’s Inner City” online: Ogijiita Pimatiswin Kinamatiwin <<http://ogijitapk.ca/ChangeTheHood.htm>> [“If You Want to Change Violence in the ‘Hood, You have to Change the ‘Hood: Violence and Street Gangs in Winnipeg’s Inner City”].

<sup>55</sup> *Ibid.*

Research in relation to youth involved in some types of criminality indicates that suppression ought to accompany the provision of social development programs.<sup>56</sup> In addition, the degree of criminal entrenchment, as indicated by a criminal record, may play a role in determining the degree of social development programs and social opportunities.<sup>57</sup> Further empirical research ought to be conducted to determine the nature, timing and degree of reintegrative social development programs and social opportunities for organized crime outlaws, and how to individualize provision of these services. The comments of the Aboriginal street gang members and the youth research data regarding suppression combined with social development suggests that emphasis on or the implementation of restorative justice measures at the sentencing phase, may not be the appropriate time. And, sentences of imprisonment do not mean that slow reintegration and rehabilitation beginning with institutional programs cannot ever occur.

#### 4.5.3.3 Legal Application of Restorative Justice Principles in Post-Sentencing Criminal Justice Processes

“...[T]he door is never closed on the possibility of restorative justice.”<sup>58</sup>

Most restorative justice measures, such as police cautions, diversion or alternative measures, victim-offender conferences, restorative conferences, and sentencing or healing circles, function before or during a prosecution or at the sentencing phase where federal terms of imprisonment are not imposed. However, some reintegrative conferences or efforts may encourage dialogue among offenders, victims and community after the

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<sup>56</sup> Irving A. Spergel, “A Comprehensive, Community-Wide Approach to the Youth-Gang Problem” (Paper presented to the 2010 Canada-U.S. Gang Summit Conference, Toronto, Ontario, 25 March 2010) online: 2010 Canada-U.S. Gang Summit <<http://www.gangsummit.com/Assets/Spergel%20Speech.pdf>> [“A Comprehensive, Community-Wide Approach to the Youth-Gang Problem”] at 19-20. The interaction of social-development and suppression strategies was more effective with chronic offenders and older youth than were social development contacts alone, particularly for those youth with pre-program arrests for property crime.

<sup>57</sup> *Ibid.*

<sup>58</sup> “Restorative Justice: A Conceptual Framework”, *supra* note 4 at 91.

imposition of a sentence<sup>59</sup> or during incarceration, such as through training, education, counseling and communication with victims or sufferers of wrongdoing.<sup>60</sup>

These opportunities are also advocated within the Spergel model of gang prevention and intervention, now referred to as the Comprehensive, Community-Wide Approach to Gang Prevention, Intervention and Suppression Program model.<sup>61</sup> The third component of the Spergel model advocates the provision of opportunities in the form of programs to increase educational and employment opportunities.<sup>62</sup> Like the restorative justice approach, the Spergel model advocates reintegration through involvement in conventional activities. Opportunity provisions have been found to be the most effective strategy for cities with chronic gang problems, and community mobilization is the most effective strategy for cities with emerging gang problems.<sup>63</sup> However, opportunity provision policies and community mobilization policies often remained the least utilized.<sup>64</sup>

Certainly, the removal of offenders from society during prison sentences, such as those likely to be imposed on organized crime outlaws, poses significant hurdles to using restorative justice measures and providing opportunities for reintegration. At that point, restorative and reintegrative programs would most often fall within the purview of the correctional branches of provincial and federal governments. Policies, rather than the statutory or common law, would govern their implementation, management and

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<sup>59</sup> “Let My People Go: Human Capital Investment and Community Capacity Building Via Meta/Regulation in a Deliberative Democracy—A Modest Contribution for Criminal Law and Restorative Justice”, *supra* note 29 at 39.

<sup>60</sup> “Restorative Justice: A Conceptual Framework”, *supra* note 4 at 92.

<sup>61</sup> “A Comprehensive, Community-Wide Approach to the Youth-Gang Problem”, *supra* note 56 at 1. This Spergel model, as discussed in this Chapter in section four “Requisite Three for Anti-Organized Crime Measures,” includes community mobilization to create programs to strengthen institutions in the community; social intervention in the form of programs that seek to increase the resilience of individuals against gang membership; provision of programs to increase educational and employment opportunities; suppression by augmenting legal system responses to gangs; and organizational changes and development alter the administration of agencies that deal with gangs.

<sup>62</sup> *Ibid.* at 10.

<sup>63</sup> Kimberly Tobin, *Gangs: An Individual and Group Perspective* (Upper Saddle River: Pearson Prentice Hall, 2008) at 150. Tobin cites research within the Spergel model according to Irving Spergel and G. David Curry, “The National Youth Gang Survey: A Research and Development Process” in Arnold P. Goldstein and C. Ronald Huff, eds., *Gang Intervention Handbook* (Champaign: Research Press, 1993).

<sup>64</sup> *Ibid.* at 150. Tobin cites research within the Spergel model according to Irving Spergel and G. David Curry, “The National Youth Gang Survey: A Research and Development Process” in Arnold P. Goldstein and C. Ronald Huff, eds., *Gang Intervention Handbook* (Champaign: Research Press, 1993).

resources. The most significant role of the state in restorative justice and reintegrative measures may lie in funding and coordination of correctional and community efforts.<sup>65</sup>

During incarceration, reintegrative and re-educative programs exist for offenders, but seemingly less so for organized crime offenders. However, not every prison or correctional centre has programs tailored to address the specific needs of organized crime outlaws. One list of federal programs specific to Aboriginal offenders provides for many different kinds of programs<sup>66</sup> – some for all offenders and some for particular types of offenders.<sup>67</sup> Only one program in Manitoba, the Gang Intervention Program, specifically targeted gang members and violent offenders.<sup>68</sup> In spite of likely many common problems, there are issues that make organized crime offenders different from common criminals. Reintegrative and re-educative programs in prison settings may need to be specifically designed for organized crime outlaws, and may need to be offered in every incarceration facility. Indeed, the Standing Committee on Justice and Human Rights recommended in its report on organized crime that “...the Correctional Service of Canada develop stronger rehabilitation programs, including mental health assessments, for offenders involved in organized crime”, and that these programs continue on release in order facilitate reintegration into society.<sup>69</sup>

After incarceration and on release, the means to continue or to implement reintegrative and reparative measures already exist in law. Further, the philosophy or principles underlying correctional release from prison accord with some of the principles advocated by proponents of restorative justice, such as information for victims, easement of

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<sup>65</sup> “Let My People Go: Human Capital Investment and Community Capacity Building Via Meta/Regulation in a Deliberative Democracy—A Modest Contribution for Criminal Law and Restorative Justice”, *supra* note 29 at 67; and “Restorative Justice: A Conceptual Framework”, *supra* note 4 at 106.

<sup>66</sup> Nicola Epprecht, “Programs for Aboriginal Offenders: A National Survey” *FORUM on Corrections Research* (13 August 2009) online: Correctional Service Canada <<http://www.csc-scc.gc.ca/text/pblct/forum/e121/e121n-eng.shtml>>. The list includes substance abuse with a Native Spirituality component; unresolved childhood trauma; Aboriginal mothers; development of life skills; and anger management.

<sup>67</sup> *Ibid.* The types of offenders includes sex offenders generally; sex offenders who specifically perpetrate incest; offenders who perpetrate domestic violence; violent offenders; and mentally disordered offenders.

<sup>68</sup> *Ibid.*

<sup>69</sup> Canada, House of Commons, Standing Committee on Justice and Human Rights, *The State of Organized Crime*, 41<sup>st</sup> Parl., 1<sup>st</sup> sess. (March 2012) at 18.

offenders back into the community, and the facilitation of “human capital development” of offenders.<sup>70</sup> However, some Parole Boards are reluctant to release individuals whom courts have found to be members of criminal organizations,<sup>71</sup> and thus, they may delay or fail to utilize reintegrative and reparative measures for these offenders.

The concept of parole is based on the belief that a gradual, controlled, and supported release helps offenders *re-integrate into society as law-abiding citizens and helps contribute to a safer society*. This concept is supported by long-term studies and Canada, like many other countries, has made conditional release programs part of its criminal justice system.

Protection of society is the paramount consideration in any release decision. The [National Parole] Board members will grant parole only if in their opinion:

the offender will not present an undue risk to society before the end of the sentence; and

*the release of the offender will contribute to the protection of society by facilitating his/her return to the community as a law-abiding citizen.*<sup>72</sup>

[Emphasis added].

The *Corrections and Conditional Release Act*<sup>73</sup> allows victims to obtain information about the service of federal prison sentences by offenders from whom they have suffered harm.<sup>74</sup> Aside from temporary absences, the *Act* also allows federal inmates to obtain

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<sup>70</sup> “Let My People Go: Human Capital Investment and Community Capacity Building Via Meta/Regulation in a Deliberative Democracy—A Modest Contribution for Criminal Law and Restorative Justice”, *supra* note 29 at 8. Archibald refers to human capital development or human capacity enhancement as:

...the constellation of individual life choices, private sector encouragements and supporting government programmes and policies that enable members of the workforce to *upgrade and improve their knowledge, skills and abilities in ways that help them to participate more productively in the workforce*. [Emphasis added].

<sup>71</sup> *R. v. Pangman*, *supra* note 49 at para. 89; and Laurence L. Motiuk & Ben Vuong, “Prison Careers of Federal Offenders with Criminal Organization Offences: A Follow-Up” *Correctional Service Canada* (13 January 2010) online: Correctional Service Canada <<http://www.csc-scc.gc.ca/text/rsrch/briefs/b42/b42-eng.shtml>> at 8. In *R. v. Pangman*, the Court of Appeal did not consider, but noted, the indications by the Parole Board that it “...would not be inclined to grant early release to those individuals who were found to be members of a criminal organization.” Motiuk and Vuong found that federal offenders with criminal organization offences were significantly more likely than offenders without such offences to be released later in their sentence, but that they were more likely to receive unescorted and escorted temporary absences than offenders not convicted of organized crime offences.

<sup>72</sup> Federal Ombudsman for Victims of Crime, “National Parole Board” (26 September 2009) online: Government of Canada <<http://www.victimsfirst.gc.ca/serv/rol/npb-cnlc.html>>.

<sup>73</sup> S.C. 1992, c. 20 [*Corrections and Conditional Release Act*].

<sup>74</sup> *Ibid.* at s. 26. Section 26 states:

26. (1) At the request of a victim of an offence committed by an offender, the Commissioner

(a) shall disclose to the victim the following information about the offender:

(i) the offender's name,

(ii) the offence of which the offender was convicted and the court that convicted the offender,

release on day parole, full parole, or long-term supervision<sup>75</sup> the purposes of which are to reintegrate and rehabilitate offenders.<sup>76</sup> The National Parole Board may impose conditions of release which seek to reintegrate and rehabilitate offenders, such as conditions of residence in the community.<sup>77</sup> The *Act* also contains conditions for federal

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(iii) the date of commencement and length of the sentence that the offender is serving, and

(iv) eligibility dates and review dates applicable to the offender under this Act in respect of temporary absences or parole; and

(b) may disclose to the victim any of the following information about the offender, where in the Commissioner's opinion the interest of the victim in such disclosure clearly outweighs any invasion of the offender's privacy that could result from the disclosure:

(i) the offender's age,

(ii) the location of the penitentiary in which the sentence is being served,

(iii) the date, if any, on which the offender is to be released on temporary absence, work release, parole or statutory release,

(iv) the date of any hearing for the purposes of a review under section 130,

(v) any of the conditions attached to the offender's temporary absence, work release, parole or statutory release,

(vi) the destination of the offender on any temporary absence, work release, parole or statutory release, and whether the offender will be in the vicinity of the victim while travelling to that destination, and

(vii) whether the offender is in custody and, if not, the reason why the offender is not in custody.

(2) Where a person has been transferred from a penitentiary to a provincial correctional facility, the Commissioner may, at the request of a victim of an offence committed by that person, disclose to the victim the name of the province in which the provincial correctional facility is located, if in the Commissioner's opinion the interest of the victim in such disclosure clearly outweighs any invasion of the person's privacy that could result from the disclosure.

<sup>75</sup> *Ibid.* at Part II.

<sup>76</sup> *Ibid.* at s. 100. Section 100 states:

100. The purpose of conditional release is to contribute to the maintenance of a just, peaceful and safe society by means of decisions on the timing and conditions of release that will best facilitate the rehabilitation of offenders and their reintegration into the community as law-abiding citizens.

<sup>77</sup> *Ibid.* at s. 133. Section 133 states:

133. (1) In this section, "releasing authority" means

(a) the Board, in respect of

(i) parole,

(ii) statutory release, or

(iii) unescorted temporary absences authorized by the Board under subsection 116(1),

(b) the Commissioner, in respect of unescorted temporary absences authorized by the Commissioner under subsection 116(2), or

(c) the institutional head, in respect of unescorted temporary absences authorized by the institutional head under subsection 116(2).

(2) Subject to subsection (6), every offender released on parole, statutory release or unescorted temporary absence is subject to the conditions prescribed by the regulations.

(3) The releasing authority may impose any conditions on the parole, statutory release or unescorted temporary absence of an offender that it considers reasonable and necessary in order to protect society and to facilitate the successful reintegration into society of the offender.

(4) Where, in the opinion of the releasing authority, the circumstances of the case so justify, the releasing authority may require an offender, as a condition of parole or unescorted temporary absence, to reside in a community-based residential facility.

inmates to participate in “human capital development” activities while serving their sentences.<sup>78</sup> Further, a case management team implements the strategy for an offender who is released into the community.<sup>79</sup> This case management team is a multidisciplinary team comprised of a parole officer, a correctional officer, and a correctional manager, and it may also include correctional or vocational instructors, a psychologist or psychiatrist, a Chaplain, an Aboriginal liaison officer, an Elder or community member, police officer, police liaison officer, volunteers, and caseworkers from aftercare agencies or community residential centers. The legal provisions in the *Corrections and Conditional Release Act*, and their implementation in the community through a case management team, demonstrate that the legislative power and philosophy already exists to implement restorative justice measures for organized crime outlaws who are released prior to the completion of their sentences. These provisions are available to be utilized.

The Regina Anti-Gang Services or RAGS program exemplifies a collaborative restorative justice approach for organized crime members. It provides services for member who are

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(4.1) In order to facilitate the successful reintegration into society of an offender, the releasing authority may, as a condition of statutory release, require that the offender reside in a community-based residential facility or in a psychiatric facility, where the releasing authority is satisfied that, in the absence of such a condition, the offender will present an undue risk to society by committing an offence listed in Schedule I before the expiration of the offender's sentence according to law.

<sup>78</sup> *Ibid.* at s. 18. The *Corrections and Conditional Release Act* provides for work release during the service of a federal prison sentence:

18. (1) In this section, "work release" means a structured program of release of specified duration for work or community service outside the penitentiary, under the supervision of a staff member or other person or organization authorized by the institutional head.

(2) Where an inmate is eligible for unescorted temporary absences under Part II or pursuant to section 746.1 of the Criminal Code, subsection 140.3(2) of the National Defence Act or subsection 15(2) of the Crimes Against Humanity and War Crimes Act, and, in the opinion of the institutional head,

(a) the inmate will not, by reoffending, present an undue risk to society during a work release,

(b) it is desirable for the inmate to participate in a structured program of work or community service in the community,

(c) the inmate's behaviour while under sentence does not preclude authorizing the work release, and

(d) a structured plan for the work release has been prepared, the institutional head may authorize a work release, for such duration as is fixed by the institutional head, subject to the approval of the Commissioner if the duration is to exceed sixty days.

(3) The institutional head may impose, in relation to a work release, any conditions that the institutional head considers reasonable and necessary in order to protect society.

<sup>79</sup> Public Safety Canada, “People Who Work With Offenders” (12 April 2010) online: Public Safety Canada <<http://www.publicsafety.gc.ca/prg/cor/acc/ff7-eng.aspx>>.

primarily out of prison, but also provides services for members who are inmates. Regina, Saskatchewan is home to over 300 known gang members, 75 per cent of whom are between the age of 12 and 20.<sup>80</sup> The RAGS project began in 2007, and seeks to “reduce criminal activities committed by young Aboriginal gang members.”<sup>81</sup> The project targets gang-involved Aboriginal youth and young adults in a neighbourhood of Regina, Saskatchewan that has a high gang presence and disproportionate level of crime, and provides “intensive support services to reduce involvement in gang life and to facilitate leaving gangs.”<sup>82</sup> However, some RAGS programming is provided in correctional facilities.<sup>83</sup> Police services, corrections, addictions counselors or services, front-line support workers, educators, and federal partners use a “wraparound process” – that is to say, a “collaborative community process that actively engages youth and their families, service providers and community partners in inclusive case management and safety planning, service provision and support.”<sup>84</sup> The wraparound process emphasizes various reintegrative processes. It seeks to reduce anti-social behaviour; provide available services to families; increase pro-social peer associations; increase family cohesion; and reduce placements outside the home.<sup>85</sup> RAGS is a pilot project that is in the process of evaluation, but preliminary results indicate some positive effects.<sup>86</sup>

Similarly, the Ogijiita Pimatiswin Kinamatwin<sup>87</sup> program in the North End of Winnipeg, Manitoba, works with Aboriginal gang members who have sought to remain in their gangs, but not engage in criminal activity.<sup>88</sup> It began in 2001, and teaches participants

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<sup>80</sup> “Regina Anti-Gang Services: RAGS” (30 July 2010) online: Public Safety Canada <<http://www.publicsafety.gc.ca/prg/cp/ythgng/cpa01-rags-eng.aspx>>.

<sup>81</sup> *Ibid.*

<sup>82</sup> *Ibid.*

<sup>83</sup> *Ibid.*

<sup>84</sup> *Ibid.*

<sup>85</sup> *Ibid.*

<sup>86</sup> *Ibid.* As of July 18, 2011, the evaluation process had begun.

<sup>87</sup> Larry Morrissette, “Ogijiita Pimatiswin Kinamatwin” (Paper presented to the 2010 Canada-U.S. Gang Summit, Toronto, Ontario, 24-26 March 2010) online: 2010 Canada-U.S. Gang Summit <<http://www.gangsummit.com/Assets/OPK%20LESSONS%20LEARNED.pdf>> [“Ogijiita Pimatiswin Kinamatwin”]; and Lawrence Deane, Denis C. Bracken & Larry Morrissette, “Desistance Within an Urban Aboriginal Gang” (2007) 54 *Probation Journal* 125 [“Desistance Within an Urban Aboriginal Gang”] at 127. This name means “learning to become a protector and provider for the community.”

<sup>88</sup> “Desistance Within an Urban Aboriginal Gang”, *supra* note 87 at 126.

construction skills while they renovate North End houses.<sup>89</sup> It seeks to help participants “...reframe their negative life experiences in a way that enables them to move towards positive Aboriginal life.”<sup>90</sup> It gives participants a sense of purpose, pride, dignity, and reparation in their community.<sup>91</sup> As part of the derelict housing renewal project, two Aboriginal carpenters who were ex-federal inmates and who had led non-criminal lives for over 20 years, were hired as trainers for the participants.<sup>92</sup> Unfortunately, the program cannot reach all who wish to participate and who would benefit from its effects.<sup>93</sup>

While RAGS and the Ogijiita Pimatiswin Kinamatwin program are examples of restorative justice programs that involve organized crime outlaws, they are specific for Aboriginal organized crime members. These programs are tailored to address the needs of these particular outlaws, and may not work for any and all organized crime outlaws. As criminological and sociological theoretical insights have suggested and as the outlaws discussed in Chapter Two demonstrate, organized crime outlaw groups may form in different ways and circumstances and their members may join for different reasons. For instance, an Aboriginal street gang members may have had poor attachment, belief, involvement and commitment and failed to bond with a conventional law-abiding group. An outlaw motorcycle gang member may have been a criminal and biker who was stigmatized in his relations with conventional societal members, and came to identify with an organized crime group that held similar values and beliefs as he did and the association facilitated his criminal activities. A member of La Cosa Nostra may have differentially associated with Mafiosi family members his entire life, internalized their values and norms, and adopted their identity in a ritualized ceremony. Each of these organized crime outlaws may need specific and individualized restorative justice

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<sup>89</sup> “If You Want to Change Violence in the ‘Hood, You have to Change the ‘Hood: Violence and Street Gangs in Winnipeg’s Inner City”, *supra* note 54.

<sup>90</sup> “Ogijiita Pimatiswin Kinamatwin”, *supra* note 87.

<sup>91</sup> “If You Want to Change Violence in the ‘Hood, You have to Change the ‘Hood: Violence and Street Gangs in Winnipeg’s Inner City”, *supra* note 54.

<sup>92</sup> “Desistance Within an Urban Aboriginal Gang”, *supra* note 87 at 128.

<sup>93</sup> “If You Want to Change Violence in the ‘Hood, You have to Change the ‘Hood: Violence and Street Gangs in Winnipeg’s Inner City”, *supra* note 54. The program has 9.5 employees, and a budget of \$450 000 per year. At least 30 more Aboriginal men, most associated with street gangs, would like to work with Ogijiita Pimatiswin Kinamatiwin. About \$1 million dollars more per year would be required to increase employment to this level.

processes in order to experience pro-social relations, adopt conventional values and norms, abandon his outlaw identity, and internalize a law-abiding social identity. Each restorative justice program must suit the individual organized crime outlaw and recognize the processes that occurred that led to him adopting the identity of an organized crime group.

#### 4.5.4 Evaluations and Recommendations

Insights from restorative justice theory present idyllic goals toward which society should strive in order to maintain social order or public peace. However, just as society is not idyllic or often peaceful, restorative justice is not always flawless or applicable. While restorative justice should be an option to employ for organized crime outlaws, the timing of its use and the voluntariness of its participants are important considerations. And, restorative justice processes must be individualized to the organized crime outlaw.

At the sentencing stages of criminal justice, the criminal law imposes some constraints or limitations regarding the implementation of restorative justice principles for organized crime outlaws. Conflicts among sentencing principles, particularly the emphasis on denunciation, deterrence and incapacitation for organized crime outlaws, stymie principles of rehabilitation and reintegration – perhaps necessarily so given the need to protect society against serious crime. At the post-sentencing stages of criminal justice during imprisonment and on release from imprisonment, some limitations on programming that emphasize restorative justice measures for organized crime outlaws in prisons and correctional facilities, likely exists. However, these limitations are not legal limitations. Adequate funding and implementation of policies based on restorative justice can breathe life into the legal provisions surrounding correctional laws that govern organized crime outlaws. Laws and legal policies do not necessarily pose a hindrance in this regard.

Given the need to emphasize deterrence, denunciation and incapacitation in sentencing criminal organization offenders for serious offences; and given that “getting tough on crime” in relation to organized crime outlawry may be appropriate and required, as

opined by some organized crime outlaws, the emphasis on or the implementation of restorative justice measures at the sentencing phase may not be the appropriate time to employ these measures. Rather, restorative justice measures ought to be implemented during service of a sentence.

Programs that specifically target organized crime outlaws (including associates, ex-members, and members of organized crime groups), and that utilize restorative justice principles, should be implemented during the correctional phase of the administration of criminal justice. This correctional phase includes the service of a sentence, as well as release from custody prior to the termination of a sentence.

Programs during incarceration that employ restorative justice measures, such as reintegrative shaming in order to attempt to build a “conscience” that will instill a common and conventional value structure, and in order to offer pro-social interactions to encourage the creation and maintenance of bonds between conventional society members and organized crime outlaws. A gentle denunciation, that is to say, denunciation with forgiveness attached, may encourage reintegration and rehabilitation. Further, restorative justice measures ought to be offered and re-offered throughout incarceration in order to continually attempt to reach resistant organized crime outlaws and to “keep the door open.”<sup>94</sup>

Based on the analysis of *Requisite Four* and the foregoing conclusions, this thesis makes the following recommendations:

***Recommendation Ten:*** *Restorative justice services ought to be made available at any time during an organized crime outlaw’s involvement in the criminal justice system – they should be offered and reoffered continually. However, these services should be implemented, or attempted to be implemented, during the correctional phase of the administration of criminal justice.*

***Recommendation Eleven:*** *Restorative justice services should be tailored to meet the individual needs of the organized crime outlaw.*

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<sup>94</sup> “Restorative Justice: A Conceptual Framework”, *supra* note 4 at 91.

*Recommendation Twelve: Empirical research must be conducted on restorative justice programs that seek to rehabilitate and reintegrate organized crime outlaws into conventional society in order to determine and implement the most appropriate program for a particular organized crime outlaw.*

## 4.6 REQUISITE FIVE FOR ANTI-ORGANIZED CRIME MEASURES

### *Requisite Five*

*Rooted in Differential Association and Social Learning in Subcultures, and Deviance and Labelling Theory:*

Anti-organized crime measures must limit and prevent differential association and anti-social learning within the subcultures of outlaws.

- a. These measures must reduce the internal cohesion and power of gangs or organized crime outlaws, and the reinforcement of their identities through ongoing anti-social interactions with one another in order to prevent the perpetuation of their identity and the empowerment of their reputations, for instance. For instance, such measures must ban associations to some degree and in some circumstances.

### 4.6.1 Overview

*Requisite Five* stems in part from criminological and sociological insights that seem to prove the age-old adages of “the apple does not fall far from the tree” and “birds of a feather flock together.” It also stems from insights from deviance and labelling theory as set forth in *Requisite Seven*. Deviance and labelling theory does not advocate labelling, and asserts that internalization of a label reinforces a deviant or outlaw identity. To some extent, therefore, conflict exists between insights from differential association and social learning in subcultures, and deviance and labelling theory. Conflict exists because banning anti-social associations is a possible anti-organized crime measure using the criminal law, but it may include proscription, and proscription is arguably one of the most severe forms of formal labelling that could occur. However, the option of proscription, in spite of a conflict with labelling theory, must be canvassed as a plausible anti-organized crime measure.

Two methods to prevent “bad apples” and flock mentalities exist, and will be analysed in this section. *Proactive* and *reactive methods* can be used to limit and prevent differential association and anti-social learning within the subcultures of outlaws. *Proactive methods* target gang members, gang members who would like to leave the gang, or individuals who are on the periphery of gang membership, and offer pro-social learning environments and interactions in the law-abiding community. *Reactive methods* may include these community-based proactive methods, and they may utilize criminal law measures to react

or respond to criminal offences through suppression – that is to say, through the imposition of punitive sanctions.

#### 4.6.2 Proactive Anti-Organized Crime Methods to Limit and Prevent Differential Association and Anti-Social Learning Within Subcultures of Outlaws

One of the first steps to effecting proactive methods is to raise community awareness and involvement in preventing organized crime. In this vein, police forces and communities in the Fraser Valley, British Columbia have recently launched a poster-ad campaign depicting a young child in prison garb and posing like a gangster.<sup>1</sup> The caption reads: “When I grow up, I want to be just like Daddy.”<sup>2</sup> This campaign took place in 2011 in the Fraser Valley of British Columbia where some well-known organized crime outlaws, such as the Bacon brothers and United Nations member Clay Roueche, have been born and bred.<sup>3</sup> The community seeks to maintain and foster pro-social bonds with its members in order to prevent anti-social interactions. It also targets at-risk youth. However, community members must simultaneously recognize that anti-social bonds can be maintained and fostered just as easily within groups and families in their community.

A multitude of other programs have been implemented by various communities in North America in order to enlist communities to reduce anti-social interactions with organized crime members or youth at-risk and their gangs, and to thus, to reduce the internal cohesion and power of gangs or organized crime outlaws. These other programs have been discussed in this Chapter in section four “Requisite Three for Anti-Organized Crime Measures.”

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<sup>1</sup> Kim Bolan, “Parents Urged to Help Stamp Out Gangs” *The Vancouver Sun* (7 January 2011), online: The Vancouver Sun

<<http://www.vancouversun.com/news/Parents+urged+help+stamp+gangs/4073755/story.html>>.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*

### 4.6.3 Reactive Anti-Organized Crime Methods to Limit and Prevent Differential Association and Anti-Social Learning Within Subcultures of Outlaws

#### 4.6.3.1 Reactive Methods of Suppression and Specifically Reactive Methods of Suppression Via the Criminal Law

Suppression stems from deterrence theory<sup>4</sup> in its attempts to modify individual behaviour through punitive sanctions. It also has links to social constructionism and social control theory as the state uses its legal institutions and other social control methods in order to maintain behaviour which accords with social norms, and in order to address the social problem of gang membership and activity. Suppression methods for youth include increased surveillance, metal detectors in schools, curfew and truancy checks, increased arrest and imprisonment of gang members.<sup>5</sup> Suppression also exists in the form of law enforcement, such as by police agencies creating gang task forces or integrated units; prosecution offices creating specialized prosecutors; and governments passing legislation that targets gangs and gang activities.<sup>6</sup> However, law enforcement efforts alone, or law enforcement efforts that are over-emphasized will likely not succeed.<sup>7</sup>

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<sup>4</sup> Kimberly Tobin, *Gangs: An Individual and Group Perspective* (Upper Saddle River: Pearson Prentice Hall, 2008) at 154.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.* at 156-57.

<sup>7</sup> *Ibid.* at 150. Tobin asserts:

...Law enforcement is often the primary agency in a suppression strategy. However, pure law enforcement suppression has a weak record of success. Extreme policing that increases surveillance and targets high-risk areas without community support reinforces the "us versus them" attitude (Klein, 1995; Maxson, Hennigan, and Sloane, 2005). There are some situations where extreme policing has led to officers essentially creating a gang of their own. In Los Angeles, Community Resources against Street Hoodlums (CRASH), an elite antigang unit, was formed to control gang crime. It came under fire in 1998 and was disbanded in 2000 because of criminal charges against CRASH officers and systematic enforcement of the law through unlawful means. The charges against CRASH officers included murder, drug charges, bank robbery, shooting unarmed suspects, stealing, assault, planting evidence, and perjury. The Rampart Scandal, as it came to be known, involved a secret fraternity of more than 30 antigang unit members and supervisors. Their behavior resulted in more than 100 convictions being overturned on the basis of tainted evidence and credibility issues (see Kirk and Boyer, 2001; see also [Streetgangs.com](http://Streetgangs.com), n.d.).

Tobin cites research of Malcolm W. Klein, *The American Street Gang: Its Nature, Prevalence, and control* (New York: Oxford University Press, 1995); Cheryl L. Maxson, Karen M. Hennigan & David C. Sloane, "It's Getting Crazy Out There': Can a Civil Gang Injunction Change a Community?" (2005) 4 *Criminology and Public Policy* 577; and Michael Kirk & Peter J. Boyer, "L.A.P.D. Blues" (2001) *PBS Frontline* online: <[www.pbs.org/wgbh/pages/frontline/shows/lapd/bare.html](http://www.pbs.org/wgbh/pages/frontline/shows/lapd/bare.html)>.

Suppression also occurs through civil injunctions which seek to prevent gang activity by controlling legal, rather than illegal, behaviour.<sup>8</sup> This form of prevention and intervention seems akin to social control methods in that it reinforces positive social norms by banning behaviour that potentially threatens or violates those norms. For instance, injunctions may regulate gangs who carry pagers, wear insignia, use hand signs, or meet and occupy certain areas.<sup>9</sup> While civil injunctions reduce gang presence in the short term,<sup>10</sup> they often simply displace gangs, and fail to address the root of the problems that give rise and perpetuate gang activity.<sup>11</sup> In addition, empirical evidence exists to demonstrate that injunctions used in areas with less gang activity may serve to increase gang cohesion and fuel gang activity,<sup>12</sup> and thus, ought to be employed in areas where gangs already have an cohesive identity.<sup>13</sup>

#### 4.6.3.2 Proscription as a Reactive Method of Suppression

The primary reactive method of limiting and preventing differential association and anti-social learning within the subcultures of outlaws via the criminal law, lies in preventing association by criminalizing certain groups; by banning association of individuals with members of certain organized crime groups; or by banning association among members of certain organized crime groups. The law allows the government to implement proscription, as discussed in this Chapter in section two “Requisite One for Anti-Organized Crime Measures” at subsection eight “Proscription as a Solution to Definitional, Investigative, Evidentiary, and Prosecutorial Problems within Criminal Organization Legislation.” Arguments for proscription will not be reiterated in this section. Instead, this section will set forth the ways in which the criminal law allows for orders of non-association, and the merits and demerits of such non-association orders.

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<sup>8</sup> *Ibid.* at 156.

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.* Tobin cites Cheryl L. Maxson, Karen M. Hennigan & David C. Sloane, “‘It’s Getting Crazy Out There’: Can a Civil Gang Injunction Change a Community?” (2005) 4 *Criminology and Public Policy* 577.

<sup>11</sup> *Ibid.* Tobin cites Beth Bjerregaard & Carolyn A. Smith, “Gender Differences in Gang Participation, Delinquency, and Substance Use” (1993) 9 *Journal of Quantitative Criminology* 329.

<sup>12</sup> *Ibid.* Tobin cites Cheryl L. Maxson, Karen M. Hennigan & David C. Sloane, “‘It’s Getting Crazy Out There’: Can a Civil Gang Injunction Change a Community?” (2005) 4 *Criminology and Public Policy* 577.

<sup>13</sup> *Ibid.* Tobin cites Jean Marie McGloin, “Policy and Intervention Considerations of a Network Analysis of Street Gangs” 4 *Criminology and Public Policy* 607.

#### 4.6.3.3 Non-Association Orders in Bail Conditions as a Reactive Method of Suppression

Non-association orders exemplify one method of what has been termed “suppression” in relation to anti-organized crime measures. As referred to in this Chapter in section five “Differential Association and Social Learning Within Groups and Subcultures” at subsection three “Requisites for Anti-Organized Crime Measures According to Differential Association and Social Learning Within Groups and Subcultures”, suppression is one of the five main components of the Spergel model of gang prevention and intervention, now referred to as the Comprehensive, Community-Wide Approach to Gang Prevention, Intervention and Suppression Program model.<sup>14</sup> Non-association orders are common in bail orders, probation orders, and conditional release after incarceration. In relation to bail orders, they are employed largely because association may be a problem if the accused or offender poses a threat to the administration of justice, for instance, because of a history of intimidation of victims and witnesses.<sup>15</sup> Indeed, criminal conduct in connection with criminal organization outlawry instills fear in witnesses, and consequently, threatens police investigations and the administration of justice.<sup>16</sup> Non-association orders are also employed in an attempt to secure the good behaviour of the accused or offender while on bail, probation or conditional release, and to facilitate rehabilitation and reintegration into society. Non-association orders accord with the insights from differential association and social learning theory perspective, in that such orders prevent or reduce anti-social relations of an individual with a group or subculture that encourages the anti-social values, norms and identity of that individual, and in so doing, they may encourage pro-social relations instead.

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<sup>14</sup> Irving A. Spergel, “A Comprehensive, Community-Wide Approach to the Youth-Gang Problem” (Paper presented to the 2010 Canada-U.S. Gang Summit Conference, Toronto, Ontario, 25 March 2010) online: 2010 Canada-U.S. Gang Summit <<http://www.gangsummit.com/Assets/Spergel%20Speech.pdf>> at 1. This Spergel model includes community mobilization to create programs to strengthen institutions in the community; social intervention in the form of programs that seek to increase the resilience of individuals against gang membership; provision of programs to increase educational and employment opportunities; suppression by augmenting legal system responses to gangs; and organizational changes and development alter the administration of agencies that deal with gangs.

<sup>15</sup> *R. v. Fisk*, [1997] B.C.J. No. 542 (B.C.S.C.); and *R. v. Payne*, 2007 BCCA 541, [2007] B.C.J. No. 2391 (Q.L.) at paras. 45 and 48.

<sup>16</sup> *R. v. Payne*, 2007 BCCA 541, [2007] B.C.J. No. 2391 (Q.L.) at paras. 45 and 48.

Non-association orders as part of a bail order may be imposed where a court orders the release of an accused person, and imposes various conditions to ensure the good conduct of the accused including “other reasonable conditions.”<sup>17</sup> Further, if accused are alleged to be criminal organization members and charged with criminal organization offences such as committing offences in connection with that organization, a non-association order may be imperative to maintain ongoing public confidence in the administration of justice.<sup>18</sup> If the accused are not members, then a non-association clause should not pose

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<sup>17</sup> *Criminal Code*, R.S.C. 1985, c. C-46 [*Criminal Code*] at s. 515(4)(f). Sections 515(1), (2) and (4) state:  
**515.** (1) Subject to this section, where an accused who is charged with an offence other than an offence listed in section 469 is taken before a justice, the justice shall, unless a plea of guilty by the accused is accepted, order, in respect of that offence, that the accused be released on his giving an undertaking without conditions, unless the prosecutor, having been given a reasonable opportunity to do so, shows cause, in respect of that offence, why the detention of the accused in custody is justified or why an order under any other provision of this section should be made and where the justice makes an order under any other provision of this section, the order shall refer only to the particular offence for which the accused was taken before the justice.  
(2) Where the justice does not make an order under subsection (1), he shall, unless the prosecutor shows cause why the detention of the accused is justified, order that the accused be released  
...  
(4) The justice may direct as conditions under subsection (2) that the accused shall do any one or more of the following things as specified in the order:  
(a) report at times to be stated in the order to a peace officer or other person designated in the order;  
(b) remain within a territorial jurisdiction specified in the order;  
(c) notify the peace officer or other person designated under paragraph (a) of any change in his address or his employment or occupation;  
(d) abstain from communicating, directly or indirectly, with any victim, witness or other person identified in the order, or refrain from going to any place specified in the order, except in accordance with the conditions specified in the order that the justice considers necessary;  
(e) where the accused is the holder of a passport, deposit his passport as specified in the order;  
(e.1) comply with any other condition specified in the order that the justice considers necessary to ensure the safety and security of any victim of or witness to the offence; and  
(f) comply with such *other reasonable conditions* specified in the order as the justice considers desirable. [Emphasis added].

<sup>18</sup> *R. v. Hall*, 2002 SCC 64, [2002] S.C.J. No. 65 (Q.L.) at paras. 40 and 41. The Court stated:  
41 This, then, is Parliament's purpose: to maintain public confidence in the bail system and the justice system as a whole. The question is whether the means it has chosen go further than necessary to achieve that purpose. In my view, they do not. Parliament has hedged this provision for bail with important safeguards. The judge must be satisfied that detention is not only advisable but *necessary*. The judge must, moreover, be satisfied that detention is necessary not just to any goal, but to *maintain confidence in the administration of justice*. Most importantly, the judge makes this appraisal objectively through the lens of the four factors Parliament has specified. The judge cannot conjure up his own reasons for denying bail; while the judge must look at all the circumstances, he must focus particularly on the factors Parliament has specified. At the end of the day, the judge can only deny bail if satisfied that in view of these factors and related circumstances, a reasonable member of the community would be satisfied that denial is necessary to maintain confidence in the administration of justice. In addition, as McEachern C.J.B.C. (in

any difficulty. However, such orders may be stigmatizing and may violate the freedom of association.

In *R. v. Farago*,<sup>19</sup> the Alberta Court of Queen's Bench determined that a bail condition that prevented the accused from associating with Hells Angels members in Saskatchewan violated his right to freedom of association in section 2(d) of the *Canadian Charter of Rights and Freedoms*.<sup>20</sup> The Court stated that the Crown had not established that unless a non-association order was imposed that there is a substantial likelihood that he will commit further criminal offences while awaiting trial; that the safety of the public was at risk; or that such restriction was necessary to maintain public confidence in the criminal justice system.<sup>21</sup>

4 Everyone in Canada has a Constitutional right of freedom of association. Even taking into account the amendments to the Criminal Code that came into effect on January 7, 2002, which were not in effect in May 1998 when the crime alleged against Mr. Farago was alleged to have occurred, it is not a crime in Canada to be a member of the Hell's Angels Motorcycle Club.

5 Any person who is charged with an offence in Canada has the Constitutional right not to be denied reasonable bail without just cause. "Reasonable" bail conditions are conditions which reasonably support the statutory objectives of bail and which relate to one of the three grounds for detaining an accused person pending trial: the need to ensure that an accused will attend the judicial proceedings; the need to protect the safety of the public including protecting the public from any substantial likelihood that the accused will commit a criminal offence while awaiting trial; and any other just cause including the need to maintain confidence in the justice system especially in circumstances where the prosecution case against the accused is strong and it is likely that conviction will attract a lengthy term of imprisonment. In relatively recent amendments to the Criminal Code, Parliament has given each of these potential grounds equal weight: attendance at court is no longer considered the primary ground. A condition that an accused not associate with the Hell's Angels is presumably directed to the second ground.

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Chambers) noted in *R. v. Nguyen* (1997), 119 C.C.C. (3d) 269, the reasonable person making this assessment must be one properly informed about "the philosophy of the legislative provisions, *Charter* values and the actual circumstances of the case" (p. 274). For these reasons, the provision does not authorize a "standardless sweep" nor confer open-ended judicial discretion. Rather, it strikes an appropriate balance between the rights of the accused and the need to maintain justice in the community. In sum, it is not overbroad. [Emphasis original].

<sup>19</sup> 2002 ABQB 35, [2002] A.J. No. 42 (Q.L.) [*R. v. Farago*].

<sup>20</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 [*Charter*].

<sup>21</sup> *R. v. Farago*, *supra* note 19 at para. 6.

6 *The prosecution has not established that unless a restriction is imposed on Mr. Farago's right of association with members of the Hell's Angels Motorcycle Club, there is a substantial likelihood that he will commit further criminal offences while awaiting trial, or that public safety will otherwise be imperilled. Nor has it established that such restriction is necessary to maintain public confidence in the criminal justice system. The non-association condition is removed.*<sup>22</sup> [Emphasis added].

The above passage suggests that while non-association orders in bail conditions may be useful in suppressing organized crime activity, courts may be unwilling to impose such conditions due to their infringement of the *Charter*. However, case law indicates otherwise – that is to say, that many other courts have imposed such orders.<sup>23</sup> The case law also indicates that court imposing non-association orders as bail conditions do not adhere to a standard requirement of proof of a criminal organization or membership in that organization. While some courts may impose non-association orders where criminal organization charges are alleged,<sup>24</sup> other courts impose such orders without such charges being laid<sup>25</sup> and even where only a “high possibility” exists that the accused had involvement in gang activities.<sup>26</sup>

Deviance and labelling theory or social psychology concepts would likely agree that the end result in *R. v. Farago* is correct, but not because non-association orders violate the *Charter*. From the perspectives of deviance and labelling theory and social psychology concepts, the imposition of non-association conditions means that an accused person is formally being given a stigmatizing or degrading label. It means that a court is accepting that there is a basis for the Crown’s allegation that the accused is a member of a criminal

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<sup>22</sup> *Ibid.* at paras. 4 to 6.

<sup>23</sup> *R. v. Coates*, 2009 CarswellQue 8892 (Que. S.C.) at para. 54; *R. v. Campbell*, 2007 CarswellOnt 1780 (Ont. S.C.J.) at para. 45; *R. v. T.(R.)*, 2006 CarswellOnt 5396 (Ont. C.J.) [*R. v. T.(R.)*] at para 8; *R. v. Dunlop*, 2006 CarswellOnt 9695 (Ont. C.J.) [*R. v. Dunlop*] at para. 32; and *R. v. Tran*, 2005 ABQB 133, 2005 CarswellAlta 1754 [*R. v. Tran*] at Appendix A.

<sup>24</sup> *R. v. Dunlop*, *supra* note 23 at para. 32. The Court ordered a broad condition on the accused: “...Do not associate with or communicate with directly or indirectly with ...any person who is known by you to associate with any member of the Hells’ Angels Motorcycle Club or organization...”

<sup>25</sup> *R. v. Tran*, *supra* note 23 at Appendix A. The Court ordered the following condition after the Crown alleged to be a member of the Crazy Dragon Killers: “...have no contact, direct or indirect, with any known member of the Crazy Dragon Killers or White Boys Posse organizations nor with anyone else he knows to possess a criminal record...”

<sup>26</sup> *R. v. T.(R.)*, *supra* note 23 at para 8. This Youth Court imposed the following condition on the accused: “You will not associate with anyone known to you to have a youth court or criminal record and you will not associate with anyone known to you to have gang affiliations.”

organization, and that accused will be subject to bail conditions that contribute to formally entrenching that label. In so doing, courts may be attempting to preserve the respect and confidence in the administration of justice, and perhaps, to assist the accused in behaving in a law-abiding fashion and increase pro-social relations with conventional societal members. However, these good intentions do not prevent the application of the negative label.

While non-association orders may benefit the community and the accused by suppressing differential association and social learning in organized crime groups, they should only be imposed if an evidentiary foundation exists to show that an accused person is a member of a criminal organization. According to the Ontario Court of Justice, at bail hearings, the Crown must establish a strong *prima facie* case of gang or criminal organization affiliation.<sup>27</sup> The *Criminal Code* does not define or criminalize offences committed in relation to “gangs.” Thus, for a non-association order to be ordered, the Crown should establish a strong *prima facie* case of criminal organization membership as “criminal organization” is defined in the *Criminal Code*. Proper proof requirements in order to impose non-association orders would ensure that non-organized crime outlaws are not incorrectly or unfairly labelled as members of a criminal organization, and thus, the recipients of potentially negative social interactions that will further entrench an outlaw identity.

Adherence by bail courts to a standard proof requirement would contribute to satisfying some of the insights from differential association and social learning theory, and avoid some of the problems set forth by the insights from deviance and labelling theory and social psychology. Deviance and labelling theory would assert that any label – whether correctly imposed on an actual member of a criminal organization or incorrectly imposed on a non-organized crime member – is formally stigmatizing. However, at least proper and uniform proof requirements for non-association orders would ensure that if such orders were necessary, that they are imposed only on accused persons who truly organized crime outlaws.

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<sup>27</sup> *R. v. C.(M.)*, 2001 Carswell Ont 5118 (Ont. C.J.) at para. 17.

#### 4.6.3.4 Non-Association Orders in Probation Conditions as a Reactive Method of Suppression

Prior to the implementation of the criminal organization legislation in the *Criminal Code*, where sentences included probation orders, courts treated “gang assaults” as aggravating factors,<sup>28</sup> and imposed conditions of non-association on offenders who committed offences in relation to a gang,<sup>29</sup> but who were not necessarily members of a gang.<sup>30</sup>

Notably, without statutory definitions of “gang” and what constitutes a connection of an offence to a gang, courts determined in what circumstances the association of a gang in an offence amounted to an aggravating factor at sentencing. The term “gang” in the past was apparently common knowledge – it was socially constructed and need not be enshrined in statute. Perhaps, proof requirements in relation to the term “gang” and membership in that gang were less structured than with statutorily defined terms in the *Criminal Code* as exist today.

However, even with definitions of “criminal organization” in the *Criminal Code*, and specifications regarding aggravating factors and proof for connection of predicate offences to the “criminal organization”, the criminal organization provisions have not clarified when and in what circumstances non-association conditions should be imposed. They have not clarified when and for whom a label of “criminal organization” member should attach. The formal social (or legal) construction of “criminal organization” may have succeeded in encouraging courts to employ non-association conditions and aggravated sentences simply due to its presence in the *Criminal Code* and advertisements

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<sup>28</sup> *R. v. Lam*, 1984 CarswellBC 1519, [1984] B.C.W.L.D. 3083 (B.C. C.A.) at para. 13. The British Columbia Court of Appeal stated:

13 ... This kind of gang assault on others is a very serious problem in the city of Vancouver and elsewhere. To the extent that it is possible for the judiciary to bring a halt to it we must do so. I think one way to do that is to impose appropriate sentences for those who see fit to participate in this kind of conduct. ...

<sup>29</sup> *Ibid.* at para. 13; *R. v. Wilson*, 1988 CarswellBC 1593, [1989] B.C.W.L.D. 274 (B.C. County Ct.) [*R. v. Wilson*] at paras. 2 and 21; and *R. v. Clairoux*, 1991 CarswellOnt 3249 (Ont. C.J. (Prov. Div.)) at para. 8

<sup>30</sup> *R. v. Wilson*, *supra* note 29 at paras. 2 and 21. The British Columbia County Court held that although the offender was not a member of the gang, he “let himself become involved in a ritualistic gang beating”, and the Court imposed a condition of probation that he “...not associate or communicate in any manner with any of the co-accused in these proceedings nor the accused, John Yee, nor any person known to him to be a member of or in any way associated with the Lotus Gang.”

of gangs as social problems. However, disparities in the imposition of non-association conditions and aggravated sentences in relation to “criminal organizations” and their members raise significant concerns in effectively remedying the problem of organized crime. The below discussion of cases in which courts have imposed non-association orders will reveal that no one can predict when, for whom, and on what basis, a court may impose such an order.

The *Criminal Code* allows for non-association orders as conditions of probation. In *R. v. Shoker*,<sup>31</sup> the Supreme Court of Canada discussed the nature of appropriate conditions for probation orders given the broad residual power in section 732.1(3)(h) of the *Criminal Code* to impose “other reasonable conditions.”<sup>32</sup> The Court held, as the statutory language provides, that before a probation condition can properly be imposed it must be reasonable in the circumstances, and it must be imposed to protect society as well as to facilitate the rehabilitation the specific offender and his reintegration into the community. Notably, the Court stated that while reasonable conditions in a probation order will generally be linked or connected to the particular offence, they need not be.

**13** Before discussing the issue that arises in this case, I wish to make a few general comments about the power to impose optional conditions under s. 732.1(3). The residual power under s. 732.1(3)(h) speaks of “other reasonable conditions” imposed “for protecting society and for facilitating the offender’s successful reintegration into the community”. Such language is instructive, not only in respect of conditions crafted under this residual power, but in respect of the optional conditions listed under s. 732.1(3): before a condition can be imposed, it must be “reasonable” in the circumstances and must be ordered for the purpose of protecting society and facilitating the particular offender’s successful reintegration into the community. Reasonable conditions will generally be linked to the particular offence but need not be. What is required is a nexus between the offender, the protection of the community and his reintegration into the community. See, for example, *R. v. Kootenay* (2000), 150 C.C.C. (3d) 311 (Alta. C.A.), and *R. v. Traverse* (2006), 205 C.C.C. (3d) 33 (Man. C.A.), where appellate courts have upheld conditions requiring abstinence from alcohol or drugs even

<sup>31</sup> 2006 SCC 44, [2006] S.C.J. No. 44 (Q.L.) [*R. v. Shoker*].

<sup>32</sup> *Criminal Code*, *supra* note 17 at s. 732.1(3)(h). This section states:

(3) The court may prescribe, as additional conditions of a probation order, that the offender do one or more of the following:

...

(h) comply with such other reasonable conditions as the court considers desirable, subject to any regulations made under subsection 738(2), for protecting society and for facilitating the offender’s successful reintegration into the community.

though these played no part in the commission of the offence for which the offender was sentenced. On the other hand, conditions of probation imposed to punish rather than rehabilitate the offender have been struck out: *R. v. Ziatas* (1973), 13 C.C.C. (2d) 287 (Ont. C.A.); *R. v. Caja* (1977), 36 C.C.C. (2d) 401 (Ont. C.A.); *R. v. Lavender* (1981), 59 C.C.C. (2d) 551 (B.C.C.A.); *R. v. L.* (1986), 50 C.R. (3d) 398 (Alta. C.A.). In contrast, punitive conditions may be imposed pursuant to s. 742.3(2)(f) as part of a conditional sentence: *Proulx*, [2000 SCC 5, [2000] 1 S.C.R. 61] at para. 34.

**14** The residual power to craft individualized conditions of probation is very broad. It constitutes an important sentencing tool. The purpose and principles of sentencing set out in ss. 718 to 718.2 of the *Criminal Code* make it clear that sentencing is an individualized process that must take into account both the circumstances of the offence and of the offender. It would be impossible for Parliament to spell out every possible condition of probation that can meet these sentence objectives. The sentencing judge is well placed to craft conditions that are tailored to the particular offender to assist in his rehabilitation and protect society. However, the residual power to impose individualized conditions is not unlimited. The sentencing judge cannot impose conditions that would contravene federal or provincial legislation or the *Charter*. Further, inasmuch as the wording of the residual provision can inform the sentencing judge's exercise of discretion in imposing one of the listed optional conditions as I have described, the listed conditions in turn can assist in interpreting the scope of "other reasonable conditions" that can be crafted under s. 732.1(3)(h). As we shall see, none of the listed conditions is aimed at facilitating the investigation of suspected breaches of probation. I will come back to this point later.<sup>33</sup>

These assertions leave the door open for the imposition of a non-association order for an organized crime offender in a probation order if that order protects society and facilitates the rehabilitation and reintegration of the offender in society. However, there must exist an evidentiary foundation on which the sentencing judge can exercise his discretion to impose a condition that will protect society and facilitate rehabilitation and reintegration, and that is not linked or not connected to the offence for which the offender is being sentenced.<sup>34</sup> Such conditions accord with insights from sociological and criminological theory – namely, that limitations on anti-social relations of an outlaw offender with other outlaws would indeed facilitate rehabilitation and reintegration because they afford the outlaw offender an opportunity to have pro-social interactions with law-abiding community members.

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<sup>33</sup> *R. v. Shoker*, *supra* note 31 at paras. 13 and 14.

<sup>34</sup> *R. v. Etifier*, 2009 BCCA 292, [2009] B.C.J. No. 1520 (Q.L.) at paras. 18 and 19.

In *R. v. Smith*,<sup>35</sup> the Ontario Superior Court of Justice followed the decisions in *R. v. Shoker* and *R. v. Timmins*, and extended the principles and parameters of “other reasonable conditions” to recognizances for sexual offenders or alleged sexual offenders in section 810.1 of the *Criminal Code*.<sup>36</sup> Thus, “any reasonable conditions ... that the judge considers desirable to secure the good conduct of the defendant” need not have a nexus to the offence respecting which the offender is being sentenced.<sup>37</sup> These “reasonable conditions” *may* be linked or connected to “...the prevention of further offences similar to those for which the respondent has such a long and appalling record”,<sup>38</sup> but they may not be.<sup>39</sup> Thus, non-association orders that protect society by securing the good conduct of a sexual offender or alleged sexual offender, can be ordered. This interpretation of “reasonable conditions” is likely equally applicable to the section 810.01 recognizances for organized crime outlaws, since the wording of sections 810.01 and 810.1 remain almost identical regarding the imposition of conditions.<sup>40</sup>

In *R. v. Timmins*,<sup>41</sup> the British Columbia Court of Appeal upheld a condition of non-association for an accused who pleaded guilty to transferring firearms without

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<sup>35</sup> [2007] O.J. No. 4839 (Q.L.), (2007), W.C.B. (2d) at 718 (Ont. S.C.J.) [*R. v. Smith*].

<sup>36</sup> *Criminal Code*, *supra* note 17 at s. 810.1(3). Section 810.1(1) and (3.02) state:

810.1 (1) Any person who fears on reasonable grounds that another person will commit an offence under section 151, 152, 155 or 159, subsection 160(2) or (3), section 163.1, 170, 171 or 172.1, subsection 173(2) or section 271, 272 or 273, in respect of one or more persons who are under the age of 16 years, may lay an information before a provincial court judge, whether or not the person or persons in respect of whom it is feared that the offence will be committed are named.

...

(3.02) The provincial court judge may add any reasonable conditions to the recognizance that the judge considers desirable to secure the good conduct of the defendant, ...

<sup>37</sup> *R. v. Smith*, *supra* note 35 at 15.

<sup>38</sup> *Ibid.* at para. 14.

<sup>39</sup> *Ibid.* at para. 13.

<sup>40</sup> *Criminal Code*, *supra* note 17 at ss. 810.01(1), (3) and (4). Sections 810.01(1), (3) and (4) state:

810.01 (1) A person who fears on reasonable grounds that another person will commit an offence under section 423.1, a criminal organization offence or a terrorism offence may, with the consent of the Attorney General, lay an information before a provincial court judge.

...

(3) If the provincial court judge before whom the parties appear is satisfied by the evidence adduced that the informant has reasonable grounds for the fear, the judge may order that the defendant enter into a recognizance to keep the peace and be of good behaviour for a period of not more than 12 months.

...

(4.1) The provincial court judge may add any reasonable conditions to the recognizance that the judge considers desirable to secure the good conduct of the defendant, ...

<sup>41</sup> 2006 BCCA 354, [2006] B.C.J. No. 1767 (Q.L.) [*R. v. Timmins*].

authorization under the *Firearms Act* contrary to section 99(1)(a) of the *Criminal Code*. The sentencing judge imposed a probation order that required that the offender not attend “the Renegades Clubhouse at 1590 Fir Street in Prince George, B.C., or any other clubhouse of a like variety.”<sup>42</sup> The police conducted an investigation into the Prince George Renegades Club and the Vancouver chapter of the Hells Angels Motorcycle Club, and evidence of the firearms offence was obtained with the assistance of a police agent.<sup>43</sup> Ten individuals were charged on five indictments, and four accused were members of the Renegades.<sup>44</sup> The accused admitted to police that he was a “striker” which is a prospective member of the Renegades.<sup>45</sup> The Honourable Mr. Justice Low stated for the Court:

7 In my opinion, the condition is not punitive. One of the purposes of a probation order is to require the offender to remove himself from associations that tend to influence him into being involved in criminal enterprises. This is part of the process of rehabilitating the offender. The appellant had associations through the Renegades, some of whose members were involved in criminal enterprises, and the police agent he dealt with was a former member and president of the club. The condition was a reasonable restriction on the freedom and activities of the appellant as an attempt to have him dissociate himself from those who might tempt him to become involved in further criminality. It is no more restrictive than requiring an offender to not associate with named individuals. Indeed, it is less restrictive because it does not prevent the appellant from associating with members of the club at places other than the clubhouse.

8 The appellant says that the condition is not reasonable in the absence of some connection between the subject offence and the Renegades clubhouse. He says that the crime was not committed at the clubhouse, the agent had no ongoing connection with the Renegades, and neither Massey nor McBeth was associated with the club. Therefore, the appellant says there is no concern that he might commit other offences if he attends the clubhouse.

9 In my opinion, there was a connection between the offence and the club simply because the appellant knew the agent through the club. In any event, there is no requirement of such a connection to make the condition imposed both lawful and reasonable. Section 732.1(2) of the *Criminal Code* lists the conditions that must be included in a probation order. Section 732.1(3) lists additional conditions that may be prescribed. There is no requirement in either section that there be some connection with the circumstances of the offence for which the offender is being sentenced. The final item listed in s. 732.1(3)(h) provides that the sentencing judge may order that the offender “comply with such other reasonable

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<sup>42</sup> *Ibid.* at paras. 1 and 2.

<sup>43</sup> *Ibid.* at para. 3.

<sup>44</sup> *Ibid.* at para. 5.

<sup>45</sup> *Ibid.*

conditions as the court considers desirable . . . for protecting society and for facilitating the offender's successful reintegration into the community." This is very broadly stated and it is significant that Parliament did not restrict this area of discretion to those matters directly related to the offence itself. It is enough that the condition is reasonable and serves one or both of the purposes stated.<sup>46</sup>

This decision in *R. v. Timmins* facilitates suppression through non-association orders. It allows for the imposition of non-association orders in probation conditions without proof beyond a reasonable doubt that a group is a "criminal organization." It allows for the admission of hearsay to show that an accused was a member or associate of that organization. And, it does not require an evidentiary foundation to demonstrate that the association or membership in that organization will not protect society and will not facilitate the rehabilitation of the offender and his reintegration into the community.

The requisite proof for imposing conditions of non-association remains far from clear, and generally, courts seem to impose such conditions without stringent proof requirements. Some courts have imposed non-association orders where an accused is a gang or "criminal organization" member, although there is no proof that the organization is a "criminal organization." For instance, the Ontario Superior Court of Justice in *R. v. Sears*<sup>47</sup> imposed a very broad condition of non-association that the offender "...not associate or communicate with any member or associate of the outlaws motorcycle club, Bandidos, Hell's Angels, Black Pistons, as known to the accused."<sup>48</sup> The accused plead guilty to firearms offences, but no criminal organization offences. The Crown stated that he was a member of the Toronto chapter of the Outlaw Motorcycle Gang and had been observed wearing Outlaw colours and paraphernalia. Similarly, the Ontario Court of Justice in *R. v. Ahmed*<sup>49</sup> imposed a non-association order where it was satisfied that a group was a gang but did not state that the group was a "criminal organization."<sup>50</sup>

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<sup>46</sup> *Ibid.* at paras. 7-9.

<sup>47</sup> *R. v. Sears*, 2005 CarswellOnt 6923 (Ont. S.C.J.).

<sup>48</sup> *Ibid.* at para. 14.

<sup>49</sup> *R. v. Ahmed*, 2003 CarswellOnt 7644 (Ont. C.J.).

<sup>50</sup> *Ibid.* at para. 35. The Court imposed a condition that the offender "...not to associate, be seen with, or associate with any member of the Ledbury Crips...."

Further, the Court prohibited the offender from being in a “gang area” which was also a “high crime area.”<sup>51</sup>

Other courts have also imposed non-association orders without proof beyond a reasonable doubt that a group is a “criminal organization” or that an individual is a member of that group. The Ontario Court of Justice did so in *R. v. Bailey*<sup>52</sup> for an offender who had a “willingness to associate with known gang members.”<sup>53</sup> The offender was “not to associate with anyone known to have a criminal or youth court record except incidental contact at employment.”<sup>54</sup> The Ontario Superior Court of Justice in *R. v. Boudreault*<sup>55</sup> considered a non-association order in relation to a long-term supervision order for an offender who “purported to be” a member of the Hells Angels which “has been held to be a criminal organization.”<sup>56</sup> It recommended as part of the terms of community supervision that the offender “not associate with known members of the Hell’s Angels Motorcycle Club HAMC.”<sup>57</sup>

In contrast to these decisions, in *R. v. Kirton*,<sup>58</sup> the Manitoba Court of Appeal disallowed a probation condition that required the accused to “not ... associate or communicate either directly or indirectly with any person known to him to be a member or associate of a gang including the Hells Angels motorcycle club.”<sup>59</sup> The sentencing judge had used the separate judicial finding of the Ontario Superior Court of Justice in *R. v. Lindsay*<sup>60</sup> to determine that the Hells Angels was a “criminal organization”,<sup>61</sup> and incorrectly found that the accused had worn “gang colours” at the time of the offence.<sup>62</sup> The judge imposed the non-association condition to protect the public and rehabilitate the offender.<sup>63</sup> The

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<sup>51</sup> *Ibid.* at para. 39

<sup>52</sup> *R. v. Bailey*, 2005 CarswellOnt 7706 (Ont. C.J.).

<sup>53</sup> *Ibid.* at paras. 9 and 10.

<sup>54</sup> *Ibid.*

<sup>55</sup> *R. v. Boudreault*, 2005 CarswellOnt 4358 (Ont. S.C.J.).

<sup>56</sup> *Ibid.* at paras. 52 and 54.

<sup>57</sup> *Ibid.*

<sup>58</sup> 2007 MBCA 38, [2007] M.J. No. 299 (Q.L.) [*R. v. Kirton*].

<sup>59</sup> *Ibid.* at para. 1.

<sup>60</sup> [2005] O.J. No. 2870 (Q.L.), 66 W.C.B. (2d) 454 (Ont. S.C.J.).

<sup>61</sup> *R. v. Kirton*, *supra* note 58 at para. 4.

<sup>62</sup> *Ibid.* at para. 6.

<sup>63</sup> *Ibid.* at para. 5.

Manitoba Court of Appeal rightly stated that one court cannot rely on and is not bound by the finding by another court that a group is a “criminal organization.”<sup>64</sup> In addition, the condition was vague and uncertain in its wording, and thus, unenforceable and not “reasonable” pursuant to section 732.1(3)(h) of the *Criminal Code*.<sup>65</sup> Further, no evidentiary foundation existed to support a conclusion that the offence was committed for the benefit of, at the direction of or in association with a criminal organization as required by section 718.2(a)(iv).<sup>66</sup>

These disparities in the requisite evidentiary foundations for imposing non-association conditions in sentences, are a concern. Offenders, whether organized crime outlaws or not, do not know whether this sanction applies to them, and do not know on what basis courts might impose it. Further, dangers exist when courts make non-association orders without proper evidence. First, they may be imposing stigmatizing labels on offenders who are not organized crime outlaws. Without finding beyond a reasonable doubt that a certain group is a “criminal organization”, and without a connection of the offence to that “criminal organization”, the court is imposing a negative label and a punitive condition without an evidentiary basis to do so, and thus, may doing so on a non-organized crime outlaw or an individual who has not been proven to be a member of a “criminal organization” and who has not committed an offence in relation to that organization. While *R. v. Shoker* does not require linkage between an offence and a probation condition, some evidentiary basis must exist that the nature of the alleged group as well as association with the alleged group will not allow facilitate the reintegration and rehabilitation of the offender into the community and will not protect society. Without proof that a group is a “criminal organization” and that an individual is a member of that group, courts are assuming that a non-association order will assist in reintegrating and rehabilitating an offender. Such order may not be necessary. Without proper proof requirements, courts cannot possibly know. Speculation about the nature of certain groups and previous court decisions that have found certain groups to be “criminal organizations” should not do when imposing liberty restrictions and stigmatizing labels.

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<sup>64</sup> *Ibid.* at paras. 17 and 18.

<sup>65</sup> *Ibid.* at para. 32.

<sup>66</sup> *Ibid.*

#### 4.6.3.5 Non-Association Orders in Conditional Release Conditions as a Reactive Method of Suppression

The *Corrections and Conditional Release Act*<sup>67</sup> allows for the releasing authority to impose conditions on offenders who are released on parole, statutory release, or unescorted temporary absence.<sup>68</sup> The statute does not specifically provide for non-association orders, and does not contain a broad power to impose “other reasonable conditions” as the *Criminal Code* allows in relation to bail and probation orders.<sup>69</sup> However, the *Regulations Respecting Corrections and the Conditional Release and Detention of Offenders* set forth a number of conditions designed to reintegrate and rehabilitate the offender while securing his good conduct.<sup>70</sup> One of these conditions

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<sup>67</sup> S.C. 1992, c. 20 [*Corrections and Conditional Release Act*].

<sup>68</sup> *Ibid.* at s. 133(2), (3), (5) and (6). These subsections state:

(2) Subject to subsection (6), every offender released on parole, statutory release or unescorted temporary absence is subject to the conditions prescribed by the regulations.

(3) The releasing authority may impose any conditions on the parole, statutory release or unescorted temporary absence of an offender that it considers reasonable and necessary in order to protect society and to facilitate the successful reintegration into society of the offender.

(5) A condition imposed pursuant to subsection (3), (4) or (4.1) is valid for such period as the releasing authority specifies.

(6) The releasing authority may, in accordance with the regulations, before or after the release of an offender,

(a) in respect of conditions referred to in subsection (2), relieve the offender from compliance with any such condition or vary the application to the offender of any such condition; or

(b) in respect of conditions imposed under subsection (3), (4) or (4.1), remove or vary any such condition. ...

<sup>69</sup> *Criminal Code*, *supra* note 17 at ss. 515(4)(f) and 732.1(3)(h), respectively.

<sup>70</sup> *Regulations Respecting Corrections and the Conditional Release and Detention of Offenders*, S.O.R./92-620 [*Regulations Respecting Corrections and the Conditional Release and Detention of Offenders*] at ss. 161(1)(c) and (2)(c). Section 161 states:

161. (1) For the purposes of subsection 133(2) of the Act, every offender who is released on parole or statutory release is subject to the following conditions, namely, that the offender

(a) on release, travel directly to the offender's place of residence, as set out in the release certificate respecting the offender, and report to the offender's parole supervisor immediately and thereafter as instructed by the parole supervisor;

(b) remain at all times in Canada within the territorial boundaries fixed by the parole supervisor;

(c) *obey the law and keep the peace*;

(d) inform the parole supervisor immediately on arrest or on being questioned by the police;

(e) at all times carry the release certificate and the identity card provided by the releasing authority and produce them on request for identification to any peace officer or parole supervisor;

(f) report to the police if and as instructed by the parole supervisor;

(g) advise the parole supervisor of the offender's address of residence on release and

requires the offenders to “obey the law and keep the peace.” Such a broad condition does not specifically allow for non-association. Indeed, association with criminal organization groups would not violate the law as the present criminal organization provisions exist in the *Criminal Code*. However, if proscription were employed to criminalize certain criminal organizations and membership in those organizations, then released offenders could not associate with organized crime groups without disobeying the law, and thus, breaching their release. In this way, the punitive measures in the criminal law could facilitate non-association as a suppression method for organized crime offenders released back into the community.

#### 4.6.4 Problems with Reactive Methods of Suppression

A number of difficulties arise in relation to suppression methods, and in particular, with respect to the imposition of non-association orders in relation to organized crime outlaws.

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thereafter report immediately

- (i) any change in the offender's address of residence,
- (ii) any change in the offender's normal occupation, including employment, vocational or educational training and volunteer work,
- (iii) any change in the domestic or financial situation of the offender and, on request of the parole supervisor, any change that the offender has knowledge of in the family situation of the offender, and
- (iv) any change that may reasonably be expected to affect the offender's ability to comply with the conditions of parole or statutory release;

(h) not own, possess or have the control of any weapon, as defined in section 2 of the *Criminal Code*, except as authorized by the parole supervisor; and

(i) in respect of an offender released on day parole, on completion of the day parole, return to the penitentiary from which the offender was released on the date and at the time provided for in the release certificate.

(2) For the purposes of subsection 133(2) of the Act, every offender who is released on unescorted temporary absence is subject to the following conditions, namely, that the offender

(a) on release, travel directly to the destination set out in the absence permit respecting the offender, report to a parole supervisor as directed by the releasing authority and follow the release plan approved by the releasing authority;

(b) remain in Canada within the territorial boundaries fixed by the parole supervisor for the duration of the absence;

(c) *obey the law and keep the peace*;

(d) inform the parole supervisor immediately on arrest or on being questioned by the police;

(e) at all times carry the absence permit and the identity card provided by the releasing authority and produce them on request for identification to any peace officer or parole supervisor;

(f) report to the police if and as instructed by the releasing authority;

(g) return to the penitentiary from which the offender was released on the date and at the time provided for in the absence permit;

(h) not own, possess or have the control of any weapon, as defined in section 2 of the *Criminal Code*, except as authorized by the parole supervisor. [Emphasis added].

The first problem lies in the fact that the imposition of non-association orders via the criminal law, particularly proscription, amount to coercive measures to limit anti-social behaviour and create pro-social behaviour in organized crime outlaws. If sociological and criminological theories regarding differential association and social learning in the context of subcultures were to discuss anti-organized crime laws and proscription, they might not advocate coercion so much as coaxing and convincing in order to effect behavioural changes – or, perhaps coercion in conjunction with coaxing and convincing. Generally, empirical evidence from the United States shows that communities most frequently employed suppression as a means to combat gangs although it is the least effective strategy.<sup>71</sup> Thus, the law alone may not coerce organized crime outlaws into behaving in pro-social ways and abandoning criminal subcultures, and coercion itself may not be the whole answer. Consequently, suppression or coercion via court orders of non-association in one form or another, must be accompanied by or blended with community education and support, as well as pro-active socialization programs.

Second, methods of suppression imposed by the criminal justice system, such as court ordered non-association conditions or conditions that limit association, are usually and largely reactive in nature. That is to say, the accused outlaw must face criminal charges prior to any orders being imposed. Thus, individuals who are at risk or beginning to associate with organized crime groups cannot be subject to non-association orders using criminal law provisions, unless reasonable grounds exist that the individual will commit a criminal organization offence. In that case, a provincial court judge hearing the application for preventative judicial restraint may order that individual to enter into a recognizance, and impose “reasonable conditions” to prevent the commission of such offence. The criminal law allows some conditions of non-association proactively – that is to say, in preventative judicial restraint orders, such as when alleged sex offenders must have no contact with persons under a certain age. Such conditions may also occur in relation to individuals who pose a risk of committing a criminal organization offence.

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<sup>71</sup> Kimberly Tobin, *Gangs: An Individual and Group Perspective* (Upper Saddle River: Pearson Prentice Hall, 2008) at 150. Tobin cites research within the Spergel model according to Irving Spergel and G. David Curry, “The National Youth Gang Survey: A Research and Development Process” in Arnold P. Goldstein and C. Ronald Huff, eds., *Gang Intervention Handbook* (Champaign: Research Press, 1993).

Third, non-association orders that accompany judicial interim release orders are not commonly made when a court detains an accused. However, the *Criminal Code* allows for no contact orders with “other persons” deemed necessary by the superior court judge upon detention of the accused for certain offences, such as murder.<sup>72</sup> Such provisions could be used to prevent association during pre-trial and pre-sentence custody for co-accused who are allegedly members of a criminal organization provided that they had

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<sup>72</sup> *Criminal Code, supra* note 17 at ss. 516(1) and (2), 522(1)-(2.1) and 469. Section 522(1), (2) and (2.1) allow the superior court justice to order the detained accused to not communicate with “other persons”:

522. (1) Where an accused is charged with an offence listed in section 469, no court, judge or justice, other than a judge of or a judge presiding in a superior court of criminal jurisdiction for the province in which the accused is so charged, may release the accused before or after the accused has been ordered to stand trial.

(2) Where an accused is charged with an offence listed in section 469, a judge of or a judge presiding in a superior court of criminal jurisdiction for the province in which the accused is charged shall order that the accused be detained in custody unless the accused, having been given a reasonable opportunity to do so, shows cause why his detention in custody is not justified within the meaning of subsection 515(10).

(2.1) A judge referred to in subsection (2) who orders that an accused be detained in custody under this section may include in the order a direction that the accused abstain from communicating, directly or indirectly, with any victim, witness or other person identified in the order except in accordance with such conditions specified in the order as the judge considers necessary.

Section 516(1) and (2) enable the court to make such orders when remanding the accused prior to a bail hearing:

516 (1). A justice may, before or at any time during the course of any proceedings under section 515, on application by the prosecutor or the accused, adjourn the proceedings and remand the accused to custody in prison by warrant in Form 19, but no adjournment shall be for more than three clear days except with the consent of the accused.

(2) A justice who remands an accused to custody under subsection (1) or subsection 515(11) may order that the accused abstain from communicating, directly or indirectly, with any victim, witness or other person identified in the order, except in accordance with any conditions specified in the order that the justice considers necessary.

Section 469 sets forth the offences for which orders under sections 516 and 522 can be made:

469. Every court of criminal jurisdiction has jurisdiction to try an indictable offence other than

(a) an offence under any of the following sections:

- (i) section 47 (treason),
- (ii) section 49 (alarming Her Majesty),
- (iii) section 51 (intimidating Parliament or a legislature),
- (iv) section 53 (inciting to mutiny),
- (v) section 61 (seditious offences),
- (vi) section 74 (piracy),
- (vii) section 75 (piratical acts), or
- (viii) section 235 (murder);

(b) the offence of being an accessory after the fact to high treason or treason or murder;

(c) an offence under section 119 (bribery) by the holder of a judicial office;

(c.1) an offence under any of sections 4 to 7 of the *Crimes Against Humanity and War Crimes Act*;

(d) the offence of attempting to commit any offence mentioned in subparagraphs (a)(i) to (vii);  
or

(e) the offence of conspiring to commit any offence mentioned in paragraph (a).

commit these enunciated offences. Further, creative uses of pre-existing criminal law provisions may succeed in effecting non-association orders for organized crime outlaws without expressly intending to do so. Some courts have imposed conditions of bail that prohibit accused individuals from communicating or associating directly or indirectly with any persons known to the accused to have a criminal record except for members of his immediate family or in relation to his employment.<sup>73</sup> The fact that criminal justice principles require no contact or no association in circumstances to protect victims, witnesses, and the administration of justice, suggests that non-association provisions ought to exist in relation to individuals prosecuted for offences that are based on or related to the power of a group itself. But for the power of the group, the offence would not have occurred, and would not continue to occur. However, again, these criminal law options remain reactive.

Fourth, while non-association orders in relation to organized crime prosecutions may occur in relation to judicial interim release, such orders would likely not occur in relation to post-sentence orders, since most sentences will involve terms of imprisonment of more than two years. Thus, a sentencing court could not order accompanying conditions to attach to a federal sentence, such as could attach to a provincial sentence in a probation order. Further, the only applicable power in the *Regulations Respecting Corrections and the Conditional Release and Detention of Offenders* is to order conditions for offenders to “obey the law and keep the peace”, and this provision is likely too broad to specifically contemplate non-association conditions.<sup>74</sup>

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<sup>73</sup> *R. v. Croitoru*, [2005] O.J. No. 6404 (Ont. S.C.J.) at paras. 327-28. For instance, the Court made the following order in relation to one accused, and such order mirrored those for a second co-accused:

327 First of all, I will deal with Mr. Gravelle. The conditions of his release are as follows:

(1) A recognizance be entered into in the amount of \$2,000,000 without deposit with five sureties ...

(6) He shall not communicate or associate directly or indirectly with any persons known to him to have a criminal record except for members of his immediate family or in relation to his employment.

(7) He shall not communicate or associate directly or indirectly with the following persons:

... Ion Croitoru....

In *R. v. Croitoru*, *ibid.* at para. 39, the accused were not charged with criminal organization offences, but the Crown alleged that they comprised part of a family criminal organization.

<sup>74</sup> *Regulations Respecting Corrections and the Conditional Release and Detention of Offenders*, *supra* note 70 at ss. 161(1)(c) and 2(c).

Fifth, and likely most significantly, non-association orders may violate section 2(d) of the *Charter* if they order no association or contact with a non-proscribed group, or with members of a proscribed group if those members are not co-accused themselves in which case non-association would often and even ordinarily occur. Such non-association orders are precisely what Parliament meant to avoid in passing the criminal organization legislation. It did not mean to ban association in or with a certain group. However, if detention can occur where necessary to effect public safety, such as by a detention order in order to protect the administration of justice<sup>75</sup> made in part because of association with an alleged criminal organization,<sup>76</sup> then proscription and non-association ought to be implemented.

Sixth, non-association orders via the criminal law alone have questionable preventative value without a replacement of positive social associations and pro-social learning in a cultural rather than subcultural environment. Coercive suppression without reintegrative efforts will not likely reduce the ties that bind organized crime outlaws to their identity and to their group.

#### 4.6.5 Evaluations and Recommendations

Bans on association with organized crime outlaws, such as via court ordered conditions of non-association, are reactive. This method of suppression reacts to problems that have already occurred – problems that have given rise to the formation of an organized crime outlaw. Further, non-association still leaves the organized crime member or association susceptible to anti-social interactions and outlaw norms and behaviours. As discussed earlier in Chapter Three at section six “Deviance and Labelling Theory”, in *R. v. Myles*,<sup>77</sup> the Ontario Court of Justice noted at a bail hearing of an accused who had allegedly resigned from the Hells Angels, that even resignation from a criminal organization may not prevent or limit association.<sup>78</sup> Thus, bans on association alone cannot remedy the

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<sup>75</sup> *R. v. Skeard*, 2002 NSSC, [2002] N.S.J. No. 480 (Q.L.).

<sup>76</sup> *Ibid.* at paras. 15-22.

<sup>77</sup> [2007] O.J. No. 4985 (Q.L.) (Ont. S.C.J.) [*R. v. Myles*].

<sup>78</sup> *Ibid.* at para. 19. This case is discussed in Chapter Three, section six “Deviance and Labelling Theory” in subsection three “Application of Concepts within Deviance and Labelling Theory to the Identity of Outlaws” at subsection two “Evidence of Deviance and Labelling in Relation to Gangs”

circumstances of the organized crime outlaw and cannot secure his rehabilitation in and reintegration into society. As a result, bans on association in non-association orders, without more, cannot protect the public in the long-term.

Suppression of organized crime through non-association orders as allowed by provision in the *Criminal Code* may limit and prevent differential association and anti-social learning within the subcultures of outlaws. However, these orders should not be imposed without the implementation of other policies that educate the community, that enlist community support for pro-social interactions with organized crime outlaws, and that provide programs of rehabilitation and reintegration for organized crime outlaws.

Court that impose any condition of non-association should have found beyond a reasonable doubt, based on evidence tendered at trial or at a sentencing hearing, that a group with whom an offender should not associate is a “criminal organization” as defined in the *Criminal Code*; and that court should have determined, based on an evidentiary foundation but not necessarily beyond a reasonable doubt, that the association of the offender with the “criminal organization” will not facilitate the reintegration into or rehabilitation of the offender in society, and will not protect the public. Similarly, courts that impose non-association conditions in bail orders should be satisfied on a balance of probabilities that the accused is a member in a “criminal organization” and has committed offences in connection with that “criminal organization.” Without a proper evidentiary foundation, non-association orders will not reduce the internal cohesion and power of a group that has been “properly labelled” or “properly adjudicated” as a criminal organization. That is to say, these orders will not have targeted the correct individuals or groups, and will risk casting the social control net too broadly at significant sacrifice to individual rights and freedoms as guaranteed by the *Charter*.

Based on the analysis of *Requisite Five* and the foregoing conclusions, this thesis makes the following recommendations:

***Recommendation Thirteen:*** Courts should impose non-association orders in bail orders where the prosecution has proven and the court has found on a balance of probabilities that the accused persons are members of a “criminal organization” charges as defined in

*the Criminal Code, and that they committed their offences in connection with this "criminal organization."*

***Recommendation Fourteen:*** *Courts should impose non-association orders in sentences where the prosecution has proven and the court has found beyond a reasonable doubt that the accused persons are or were members of a "criminal organization" charges as defined in the Criminal Code, and that they committed their offences in connection with this "criminal organization."*

***Recommendation Fifteen:*** *Where courts order non-association orders, community support and resources ought to be provided to organized crime outlaws in order to facilitate pro-social interactions conventional societal members and institutions.*

## 4.7 REQUISITE SIX FOR ANTI-ORGANIZED CRIME MEASURES

### *Requisite Six*

*Rooted in Differential Association and Social Learning in Subcultures, and Social Psychology:*

Anti-organized crime measures must prevent and limit the bolstering of organized crime identities through the use of gang names and insignia in public and in private in order to decrease their internal cohesion and the power of their reputation. For instance, such measures must diminish or ban the display of names and symbols associated with negative or violent identities of organized crime outlaws.

#### 4.7.1 Overview

There are a number of legal and non-legal ways to implement anti-organized crime measures that will give effect to *Requisite Six*. This section will review proceeds of crime and forfeiture legislation, also known as anti-money laundering and asset recovery regimes, and the employment of civil forfeiture legislation in relation to criminal organizations. Both measures seek to reduce the power and proliferation of organized criminals through the seizure of the symbols which empower their violent reputation and which embolden their identity as fearsome outlaws in society. This section will also evaluate statutorily mandated community safety programs implemented by some Canadian provinces in an effort to prevent organized crime outlaw members from wearing their patches, outlaw insignia, or outlaw colours in certain public places. In addition, this section will evaluate trade-mark and copyright laws as they presently exist, and as they could be amended, that could prevent and limit the bolstering of organized crime identities; decrease internal cohesion within organized crime groups; and reduce the power of their reputations. At the outset, this section will discuss the significance and power of the names and insignia of organized crime outlaw groups.

#### 4.7.2 The Power of “the Patch” or of Organized Crime Outlaw Names and Insignia

The “power of the patch” refers to the power of the reputation of an organized crime outlaw group. This power enables such a group to effect its purposes through intimidation and violence. The “patch” refers to the names and emblems that adorn clothing and accessories worn by organized crime outlaw group members, and to a more limited degree, worn by their

associates. Most outlaw motorcycle gangs wear patches. However, not all organized crime outlaw groups wear patches or clothing with group insignia. Some groups, such as the Japanese Yamaguchi-gumi, use lapel pins and have business cards.<sup>1</sup> Others, such as the Asian crime group the Born to Kill, had the initials of their group (“BTK”) tattooed on the webbed skin between their thumb and forefinger.<sup>2</sup> Other gangs wore insignia on jewelry, such as the Rock Machine outlaw motorcycle gang that wore a gold ring with an engraved head of an eagle,<sup>3</sup> and the Dark Circle hit squad that wore necklaces with a pendant of a palm tree and island.<sup>4</sup> The Rock Machine used sweaters and rings to signify membership, and only used patches after the group had patched over to the Bandidos.<sup>5</sup> Some newer organized crime groups do not use a particular name or insignia.<sup>6</sup> However, for those groups that do use names and insignia, the group’s name and insignia or “patch” becomes synonymous with the organized crime outlaw group and its reputation.

Organized crime outlaw group names and insignia are so important that some groups have registered their insignia and names in order to protect their reputation.<sup>7</sup> As described in subsection four “The Power of the Patch: Symbolization of the Reputation for Violence and Intimidation” in section four “Outlaw Motorcycle Gangs” in Chapter Two, organized crime outlaw groups usually limit the use and display of their insignia and names to members only. Members share the values and norms of the organized crime group, and enhance the reputation of the group by committing acts of violence and intimidation. Non-members who use group insignia and names will dilute the reputation of the group because they do not behave in accordance with the values and norms of the group – that is to say, they will not

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<sup>1</sup> Howard Abadinsky, *Organized Crime*, 8<sup>th</sup> ed. (Belmont: Thomson Wadsworth, 2007) [*Organized Crime*] at 195.

<sup>2</sup> Stephen Schneider, *Iced: The Story of Organized Crime in Canada* (Mississauga: John Wiley & Sons Canada, 2009) [*Iced: The Story of Organized Crime in Canada*] at 477.

<sup>3</sup> *Ibid.* at 409.

<sup>4</sup> *Ibid.* at 413. According to Schneider, *ibid.* at 410, the Alliance was comprised of the Rock Machine, independent drug gangs, and bar owners who collectively sought to battle against the Hells Angels in order to protect and claim drug trafficking territory.

<sup>5</sup> *R. v. Leclerc*, [2001] R.J.Q. 747, [2001] Q.J. No. 426 (Q.L.) (Que. Ct. (Crim. and Pen. Div.)) at para. 49.

<sup>6</sup> Canada, House of Commons, Standing Committee on Justice and Human Rights, *The State of Organized Crime*, 41<sup>st</sup> Parl., 1<sup>st</sup> sess. (March 2012) [*The State of Organized Crime*] at 10.

<sup>7</sup> The Hells Angels Motorcycle Club has registered its trade-marks: *R. v. Lindsay*, 2005 CanLII 24240, [2005] O.J. No. 2870 (Ont. S.C.J.) [*R. v. Lindsay* trial decision] at paras. 235-37 and 263-72. The Mongol Nation Motorcycle Club has registered its trade-marks, as per *Rivera v. Carter*, (31 July 2009) Central District of California Case No. 2:09-cv-02435-FMC-VBK (C.D. Cal.) [*Rivera v. Carter*] at 2.

uphold the fearsome reputation. Some groups have launched lawsuits to prevent trade-mark violation,<sup>8</sup> or threatened legal action to do so.<sup>9</sup>

For these reasons, organized crime outlaw groups often have very strict rules regarding who can use and wear their names and insignia. For instance, the Hells Angels Motorcycle Club Corporation in Oakland, California owns the “colours” of the Club, and has rules and policies regarding their use.<sup>10</sup> Each Hells Angels chapter in Canada must sign a licensing agreement with the Corporation, permitting its members to use the trademarks by wearing them and displaying them, and members must sign documentation acknowledging ownership of the “colours” by the Club.<sup>11</sup> The presence of rules that circumscribe the use and return of group names and insignia, demonstrates that organized crime groups are fully cognizant of the power of these names and insignia. These groups seek to protect their reputation from interference not only from civilians, but also from law enforcement officials. Staff-Sergeant Lemieux, as he was then, opined that the registration of trade-marks by the Hells Angels began in order to prevent police agencies from retaining seized colours.<sup>12</sup>

The seemingly paranoid, extreme, or at the very least, over-cautious, efforts of the Hells Angels to protect their insignia from law enforcement are anything but, and foreshadow recent attempts by law enforcement and governmental agencies to reduce the power of organized crime outlaw groups through the seizure and forfeiture of their insignia. In *Rivera*

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<sup>8</sup> Peter Edwards, “Hells Angels seek to protect skull logo” (21 February 2009) *Goldiron Wordpress* online: Goldiron.wordpress.com <<http://goldiron.wordpress.com/2009/02/21/hells-angels-seek-to-protect-skull-logo/>> [“Hells Angels seek to protect skull logo”]; and Rachel Mendleson, “Hells Angels get revved up over their trademarks” *Macleans’s* (26 February 2009) online: Macleans.ca <<http://www2.macleans.ca/2009/02/26/hells-angels-get-revved-up-over-their-trademarks/>> [“Hells Angels get revved up over their trademarks”].

<sup>9</sup> John Freeman, “ICFD Cover of the Week – 17<sup>th</sup> Feb 08” (18 February 2008), online: It Came From Darkmoor...A Blog Dedicated to the British Corner of the Marvel Comics Universe <<https://www.blogger.com/comment.g?blogID=5510941869814453320&postID=89345152381066736>> [“ICFD Cover of the Week – 17<sup>th</sup> Feb 08”].

<sup>10</sup> *R. v. Lindsay* trial decision, *supra* note 7 at para. 269.

<sup>11</sup> *Ibid.* at para. 237. These rules are described further in subsection four “The Power of the Patch: Symbolization of the Reputation for Violence and Intimidation” in section four “Outlaw Motorcycle Gangs” in Chapter Two.

<sup>12</sup> *Ibid.* Law enforcement would not be able to use these trade-marks without violating the *Trade-marks Act*, R.S.C. 1985, c. T-13, and cannot retain seized property indefinitely that belongs to a registered owner according to section 490.4 of the *Criminal Code*, R.S.C. 1985, c. C-46 [*Criminal Code*] unless it a court has found it to be proceeds of crime and ordered its forfeiture to the Crown pursuant to section 462.37 of the *Criminal Code*.

*v. Carter*,<sup>13</sup> the Government in California applied to the United States District Court in order to obtain a post-indictment Order Restraining Sale or Transfer of Trademark, and amendment thereto, in relation to two registered marks of the Mongol Nation Motorcycle Club, Inc.<sup>14</sup> Some members of the Mongols Club had been charged with having violated the *Racket-Influenced and Corrupt Organizations*<sup>15</sup> Act as well as other criminal statutes.<sup>16</sup> However, an unindicted member of the Mongols Club successfully applied for a preliminary injunction preventing law enforcement from seizing items bearing or displaying the trademark from individuals who were *not* charged in the indictment.<sup>17</sup> The District Court held that the *RICO* statute did not empower the State to obtain the forfeiture of a collective membership mark used by a group – the Mongol Nation Motorcycle Club, Inc.,<sup>18</sup> and alternatively, no statutory authority existed for the State to seize property bearing the mark from third parties.<sup>19</sup> A federal judge upheld this decision.<sup>20</sup>

This decision of United States District Court Judge Cooper in *Rivera v. Carter* outlines some of the protections afforded to gang insignia within American trade-mark law:

A collective membership mark is used by members of a cooperative, an association, or other collective organization to indicate membership in that organization. 15 U.S.C. § 1127. A collective mark is a subspecies of trademark, and when registered, is entitled to the same protections afforded a trademark. 15 U.S.C. § 1054. It is well recognized that an entity earns an exclusive right to a trademark only if the entity uses the mark in connection with its organization or product. ... *Any purported ownership of a mark without a corresponding use of the mark in its intended manner is therefore invalid as a matter of law.*

Even if the Court were to accept the Government's evidence that Ruben Cavazos controlled the use of the mark during his tenure as National President, there is no support for the notion that a defendant's control of property belonging to a

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<sup>13</sup> *Rivera v Carter*, *supra* note 7.

<sup>14</sup> *Ibid.* at 2-3. This decision was upheld according to Kate Mather, "Federal Judge Rejects Bid to Seize Mongols' Name and Logo", *Los Angeles Times* (01 July 2011) online: Los Angeles Times <<http://articles.latimes.com/2011/jul/01/local/la-me-mongols-logo-20110701>> ["Federal Judge Rejects Bid to Seize Mongols' Name and Logo"]. Mather set forth the reasons for this attempt by the prosecution:

Prosecutors asked the judge to bar Mongol members from using, distributing or wearing the name and logo, arguing that they were very closely associated with the gang and that removing them would prevent the Mongols from operating.

<sup>15</sup> *Racketeer-Influenced and Corrupt Organizations Act*, 18 U.S.C. §1962 (1970), and amendments thereto [*RICO*].

<sup>16</sup> *Rivera v. Carter*, *supra* note 7 at 3 and 10-11.

<sup>17</sup> *Ibid.* at 3 and 23-25.

<sup>18</sup> *Ibid.* at 11-14.

<sup>19</sup> *Ibid.* at 15.

<sup>20</sup> "Federal Judge Rejects Bid to Seize Mongols' Name and Logo", *supra* note 14.

RICO enterprise is sufficient to establish a forfeitable ownership interest in the property. ... Moreover, the Government's evidence demonstrates that the Mongol Nation began using the collective mark in approximately 1969, and either Mongol Nation or Mongols Nation, Inc. continues to use the mark to identify their members. (Guevara Decl. ¶ 6.) *The Mongol Nation and Mongols Nation, Inc, by virtue of having used the collective membership since 1969, having registered the mark in 2005, and having continued use of the mark to identify members of the club, have acquired and maintained exclusive ownership in the collective membership mark at issue.*<sup>21</sup> [Emphasis added].

The assertions in *Rivera v. Carter* exemplify some of the legal impediments that confront law enforcement and government in their attempts to combat organized crime outlaw groups that use their reputation, that is to say, the power of their patch, to effect criminal enterprises. Law enforcement and government cannot seize collective membership marks, which are a "subspecies of trademarks", when a cooperative, association or collective organization uses that mark, even though one of the members of that group engages in criminal activity in connection with, or allegedly in connection with, that mark. Essentially, there is power in numbers. Collective use and collective interest in a mark afford it protection under the law. A further legal impediment exists in relation to proof of usage. Based on the remarks of the District Court in *Rivera v. Carter*, proof must exist that use of the mark did not correspond to its intended usage, so that a court can find that the trade-mark protection is legally invalid, and thus, can order that the items bearing or displaying the trade-mark be forfeited to the government. If trade-mark laws required that owners of a mark demonstrate that their actual usage did indeed correspond to the intended or declared usage of a mark, and not usage of the mark in criminal-related activities, then collective membership marks such as those of the Mongols and similar groups would not receive legal protection, and courts such as the United State District Court in *Rivera v. Carter* would not be prevented from ordering forfeiture.

As this section will reveal, the use of proceeds of crime legislation, and amendments to trade-mark law as well as copyright law, could allow the government to control, and law enforcement to use, organized crime outlaw group names and insignia that were used in connection with criminal activities. Such control and use by non-members of organized crime outlaw groups would diminish the power of the patch, and the reputation of the groups

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<sup>21</sup> *Rivera v. Carter*, *supra* note 7 at 11-14.

would significantly change, and potentially be ruined. With little or no reputation for intimidation and violence, these groups would have much less power to engage in criminal activities. In this way, the power of the patch is at the heart of some of the problems associated with organized crime outlaws in Canada.

#### 4.7.3 Using Proceeds of Crime Legislation to Pierce the Power of the Patch

Proceeds of crime and forfeiture legislation, also known as anti-money laundering and asset recovery regimes, seek to ensure that criminals generally do not benefit financially from their criminal activities by empowering courts to order that property that is proceeds of crime be forfeited to the Crown. Thus, these provisions can negatively affect the economic means of organized crime outlaws and the groups to which they belong. These laws not only can pierce the power of the pocketbooks of organized crime groups, but they can also pierce the power of the patch – through the seizure of property that symbolizes the violent reputation of an organized crime group and that emboldens their identity as fearsome outlaws in society. However, these proceeds of crime and forfeiture provisions will have no impact on organized crime outlaws if they are not enforced or if they are not enforceable.

Proceeds of crime and forfeiture legislation exemplify pre-existing criminal law measures and “Business as Usual” approaches because, for the most part, they preceded the implementation of organized crime legislation. However, some governments that implement anti-organized crime measures, also augment proceeds of crime legislation in order to bolster the forfeiture and disposal of property specifically associated with organized crime. For instance, the United Kingdom amended the *Proceeds of Crime Act 2002*<sup>22</sup> in the *Serious Organised Crime and Police Act 2005* and extensively circumscribed the use of proceeds of crime by empowering courts to make confiscation orders;<sup>23</sup> civil freezing orders;<sup>24</sup> and extended orders for detention of seized cash.<sup>25</sup> This legislation also increased regulations

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<sup>22</sup> (U.K.), 2002, c. 29.

<sup>23</sup> *Serious Organised Crime and Police Act 2005* (U.K.), 2005, c. 15, and amendments thereto, at s. 97.

<sup>24</sup> *Ibid.* at s. 98.

<sup>25</sup> *Ibid.* at s. 100.

regarding money laundering.<sup>26</sup> These financial measures had an effect on individual criminals and organized crime groups.<sup>27</sup> Proceeds of crime provisions that specifically target organized crime groups may make membership in such groups less appealing – why would an individual belong to a targeted organized crime outlaw group if the proceeds of his crimes were more at risk of being forfeited? The answer depends on the enforcement and enforceability of the provisions themselves.

Like the United Kingdom, the United States also uses proceeds of crime legislation to reduce the power of organized criminals. *RICO* criminalizes the use of funds acquired from racketeering activity or unlawful debt collection in any “enterprise” which, like other terms in the *Act*, remains very broad.<sup>28</sup> In addition, efforts at forfeiture pursuant to violations of *RICO* have taken place.<sup>29</sup> As noted in the above section, the Government in California applied – unsuccessfully – to the United States District Court in *Rivera v. Carter*<sup>30</sup> to obtain a post-indictment Order Restraining Sale or Transfer of Trademark, and amendment thereto, in relation to two registered marks of the Mongol Nation Motorcycle Club, Inc.<sup>31</sup> This decision was upheld by a federal court judge.<sup>32</sup>

In Italy, legal efforts to curb money laundering activities began in 1978 when section 648 of the *Italian Penal Code*<sup>33</sup> criminalized profits obtained from aggravated robbery, aggravated extortion, and kidnapping for extortion.<sup>34</sup> In 1990, these laws were extended to include money obtained from the production and sale of drugs, and in 1991, further measures were introduced in an effort to regulate transfers of money through approved mediators or finance

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<sup>26</sup> *Ibid.* at ss. 102-07.

<sup>27</sup> Peter A. Sproat, “To What Extent is the UK’s Anti-Money Laundering and Asset Recover Regime Used Against Organised Crime?” (2009) 12 *Journal of Money Laundering Control* 134 [“To What Extent is the UK’s Anti-Money Laundering and Asset Recover Regime Used Against Organised Crime?”] at 146.

<sup>28</sup> *RICO*, *supra* note 15 at §1962(a)-(d). Subsection §1961(4) states:

“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....

<sup>29</sup> *Ibid.* at §1963.

<sup>30</sup> *Rivera v. Carter*, *supra* note 7.

<sup>31</sup> *Ibid.* at 2-3.

<sup>32</sup> “Federal Judge Rejects Bid to Seize Mongols’ Name and Logo”, *supra* note 14.

<sup>33</sup> *The Italian Penal Code*, trans. by Edward M. Wise & Allen Maitlin (Littleton: Fred B. Rothman & Co., 1978).

<sup>34</sup> Umberto Santino, “Law Enforcement in Italy and Europe Against Mafia and Organized Crime” *Centro Siciliano di Documentazione Giuseppe Impastato* (2003) online: Centroimpastato <<http://www.centroimpastato.it/otherlang/mcdonald.php3>> at Section 1.1.

companies.<sup>35</sup> In addition, in 1993, the definition of money laundering was expanded to include profits from not only aggravated robbery, aggravated extortion, kidnapping for extortion, and drug dealing, but any reinvestment of profit from any type of crime.<sup>36</sup>

Canada has followed the lead of these countries. As early as 1992, an integrated proceeds of crime unit was established and evolved into the Integrated Proceeds of Crime Initiative or IPOC which is comprised of various federal agencies, and which "...contributes to the disruption, dismantling and incapacitation of organized criminals and crime groups by targeting their illicit proceeds and assets."<sup>37</sup> In 2005, the Canadian government amended the proceeds of crime<sup>38</sup> and forfeiture order<sup>39</sup> legislation in the *Criminal Code* to specifically

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<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*

<sup>37</sup> Public Safety Canada, "2010-2011 Evaluation of the Integrated Proceeds of Crime Initiative: Final Report" (2011) online: Public Safety Canada <<http://www.publicsafety.gc.ca/abt/dpr/eval/ipoc-2011-eng.aspx>> ["2010-2011 Evaluation of the Integrated Proceeds of Crime Initiative: Final Report"] at 1. In 1992 the Integrated Anti-Drug Profiteering initiative was created, and in 1996 to 1997 13 IPOC units were created across Canada. IPOC brings together the Canada Border Services Agency, the Canada Revenue Agency, the Public Prosecution Service of Canada, Public Safety Canada, Public Works and Government Services Canada Forensic Accounting Management Group, and the Royal Canadian Mounted Police. While this recent evaluation finds, *ibid.* at 59, that IPOC "...has had an impact on organized crime and crime groups." Unfortunately, it does not distinguish between efforts and successes in seizing proceeds of crime using pre-existing *Criminal Code* legislation and using criminal organization provisions that specifically target organized crime.

<sup>38</sup> *Criminal Code*, *supra* note 12 at s. 462.37. Section 462.37(1) to (2.05) state:

462.37 (1) Subject to this section and sections 462.39 to 462.41, where an offender is convicted, or discharged under section 730, of a designated offence and the court imposing sentence on the offender, on application of the Attorney General, is satisfied, on a balance of probabilities, that any property is proceeds of crime and that the designated offence was committed in relation to that property, the court shall order that the property be forfeited to Her Majesty to be disposed of as the Attorney General directs or otherwise dealt with in accordance with the law.

(2) Where the evidence does not establish to the satisfaction of the court that the designated offence of which the offender is convicted, or discharged under section 730, was committed in relation to property in respect of which an order of forfeiture would otherwise be made under subsection (1) but the court is satisfied, beyond a reasonable doubt, that that property is proceeds of crime, the court may make an order of forfeiture under subsection (1) in relation to that property.

(2.01) A court imposing sentence on an offender convicted of an offence described in subsection (2.02) shall, on application of the Attorney General and subject to this section and sections 462.4 and 462.41, order that any property of the offender that is identified by the Attorney General in the application be forfeited to Her Majesty to be disposed of as the Attorney General directs or otherwise dealt with in accordance with the law if the court is satisfied, on a balance of probabilities, that

(a) within 10 years before the proceedings were commenced in respect of the offence for which the offender is being sentenced, the offender engaged in a pattern of criminal activity for the purpose of directly or indirectly receiving a material benefit, including a financial benefit; or

(b) the income of the offender from sources unrelated to designated offences cannot reasonably account for the value of all the property of the offender.

(2.02) The offences are the following:

(a) a criminal organization offence punishable by five or more years of imprisonment; and

target organized crime groups. The proceeds of crime provisions enable sentencing courts, on application by the Attorney General, to order forfeiture of property declared to be proceeds of crime in certain circumstances and in relation to certain offences. For instance, a sentencing court that finds on a balance of probabilities that property is proceeds of crime and that a designated offence was committed in relation to that property, may order it be forfeited to Her Majesty The Queen.<sup>40</sup> A court may also order forfeiture even if it does not find a connection between the designated offence and the property, but the court must be satisfied beyond a reasonable doubt that the property is proceeds of crime.<sup>41</sup> Where a court is sentencing an offender for a criminal organization offence punishable by imprisonment for five years or more,<sup>42</sup> the court may order forfeiture if within the previous ten years the offender engaged in "...a pattern of criminal activity for the purpose of directly or indirectly

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(b) an offence under section 5, 6 or 7 of the Controlled Drugs and Substances Act - or a conspiracy or an attempt to commit, being an accessory after the fact in relation to, or any counselling in relation to an offence under those sections - prosecuted by indictment.

(2.03) A court shall not make an order of forfeiture under subsection (2.01) in respect of any property that the offender establishes, on a balance of probabilities, is not proceeds of crime.

(2.04) In determining whether the offender has engaged in a pattern of criminal activity described in paragraph (2.01)(a), the court shall consider

(a) the circumstances of the offence for which the offender is being sentenced;

(b) any act or omission - other than an act or omission that constitutes the offence for which the offender is being sentenced - that the court is satisfied, on a balance of probabilities, was committed by the offender and constitutes an offence punishable by indictment under any Act of Parliament;

(c) any act or omission that the court is satisfied, on a balance of probabilities, was committed by the offender and is an offence in the place where it was committed and, if committed in Canada, would constitute an offence punishable by indictment under any Act of Parliament; and

(d) any other factor that the court considers relevant.

(2.05) A court shall not determine that an offender has engaged in a pattern of criminal activity unless the court is satisfied, on a balance of probabilities, that the offender committed, within the period referred to in paragraph (2.01)(a),

(a) acts or omissions - other than an act or omission that constitutes the offence for which the offender is being sentenced - that constitute at least two serious offences or one criminal organization offence;

(b) acts or omissions that are offences in the place where they were committed and, if committed in Canada, would constitute at least two serious offences or one criminal organization offence; or

(c) an act or omission described in paragraph (a) that constitutes a serious offence and an act or omission described in paragraph (b) that, if committed in Canada, would constitute a serious offence.

<sup>39</sup> *Ibid.* at s. 490.

<sup>40</sup> *Ibid.* at s. 462.37(1).

<sup>41</sup> *Ibid.* at s. 462.37(2). Note that the Standing Committee on Justice and Human Rights recommended in their report on organized crime that the *Criminal Code* be amended in order to allow the ownership of proceeds of crime to be proven on a balance of probabilities for organized crime offences: *The State of Organized Crime*, *supra* note 6 at 37.

<sup>42</sup> *Criminal Code*, *supra* note 12 at s. 462.37(2.02)(a).

receiving a material benefit, including a financial benefit...” or the income of the offender cannot account for the value of the property of the offender.<sup>43</sup>

Like some of the other criminal organization provisions in the *Criminal Code*, the proceeds of crime provisions contain specific penalties for specific types of offenders – that is to say, for organized crime offenders who have committed criminal organization offences punishable by imprisonment for five years or more. The provisions specify further penalties for organized crime offenders who have engaged in a “pattern of activity.” Thus, these proceeds of crime provisions specifically target organized crime offenders and treat them as status offenders to some degree.

Another problem with proceeds of crime legislation that specifically targets criminal organization offenders, is that the sections depend on the criminal organization provisions in the *Criminal Code* for their success. If the prosecution does not proceed with criminal organization charges, then these sections do not apply. A sentencing court would have to find based on evidence at trial, that criminal organization offences had been proved. However, the “ordinary” or pre-existing proceeds of crime provisions – that is to say, those that do not specifically target criminal organizations – allow for the seizure and forfeiture of offence-related property and have been and can be used for organized crime offenders who commit “ordinary” or pre-existing *Criminal Code* offences.<sup>44</sup>

In spite of these difficulties, proceeds of crime and forfeiture measures can reduce the power and proliferation of organized crime groups by seizing their property, such as clubhouses and their contents, that are the products of organized crime outlawry and that display the insignia of the group. Indeed, proceeds of crime legislation facilitated the 1997 raids of Rock Machine clubhouses and properties in Montreal and Quebec and seizure of various property items as proceeds of crime.<sup>45</sup> Specific proceeds of crime and forfeiture provisions that target organized crime outlaws are not required, and likely over-complicate evidentiary requirements to obtain such orders. Pre-existing proceeds of crime legislation can be used to

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<sup>43</sup> *Ibid.* at s. 462.37(2.01).

<sup>44</sup> *Ibid.* at s. 462.37(1) and (2).

<sup>45</sup> *Iced: The Story of Organized Crime in Canada*, *supra* note 2 at 415.

make membership in organized crime groups less appealing simply if such legislation is used, and if it results in forfeiture. Legislation that specifically target organized crime groups will not pierce the power of the patch nor the economic power of the group if its provisions are too complicated and unfair. It will not be used and will not result in forfeiture.

#### 4.7.4 Using Civil Forfeiture and Civil Proceedings To Pierce the Power of the Patch

Like proceeds of crime proceedings, the use of trade-mark laws and community safety programs, the employment of civil forfeiture legislation in relation to criminal organizations exemplifies the use of an “ordinary” or pre-existing measure that could reduce the power of organized crime groups through the seizure of their property which signifies their violent reputations and which emboldens their identities as fearsome outlaws in society. Civil forfeiture is also a non-criminal law measure. It is a measure that law enforcement and prosecutorial services in the United States and Canada have used to target criminal organizations.

The American approach to seizure and control of organized crime property and assets seems to provide greater facilitation in civil proceedings than does Canadian legislation. *RICO* makes specific provision for commencing civil actions in any district court of the United States in relation to racketeering activities,<sup>46</sup> and empowers the Attorney General with civil investigative demand powers in order to obtain information and documentation relating to racketeering investigations.<sup>47</sup>

In Canada, legislation also exists within some provinces to seize property of criminal organizations, but remains less potent than the powers of the Attorney General in the United States. The province of Ontario has passed specific legislation to combat organized crime property, as set forth in the *Civil Remedies Act, 2001*<sup>48</sup> and the Regulations of the *Remedies for Organized Crime and Other Unlawful Activities Act, 2001*.<sup>49</sup> The Ontario legislation

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<sup>46</sup> *RICO*, *supra* note 6 at §1965.

<sup>47</sup> *Ibid.* at §1968.

<sup>48</sup> S.O. 2001, c. 28 [*Civil Remedies Act, 2001*].

<sup>49</sup> O. Reg. 91/02 and O. Reg. 498/06.

seeks to provide civil remedies for individuals who suffer pecuniary and non-pecuniary losses due to the unlawful activities of others; to prevent those committing unlawful activities from keeping unlawfully obtained property; to prevent the use of certain property from being used in unlawful activities; and to prevent injury to the public as a result of conspiracies to engage in unlawful activities.<sup>50</sup> The Act defines “unlawful activity” very broadly.<sup>51</sup> On application by the Attorney General, a court must order forfeiture of property that is “proceeds of unlawful activity” unless it would “clearly not be in the interests of justice” to do so.<sup>52</sup> Similarly, if a court finds, on application by the Attorney General, that property is an “instrument of unlawful activity”,<sup>53</sup> then the court must order forfeiture to the Ontario Crown unless it would “clearly not be in the interests of justice” to do so.<sup>54</sup> These instruments include property that was used to engage in unlawful activity that resulted in serious bodily harm to another person or that resulted in the acquisition of other property.<sup>55</sup> This definition could arguably include gang insignia that is used in extortions.

Similarly, the province of British Columbia enacted the *Civil Forfeiture Act*<sup>56</sup> which empowers the director of civil forfeiture to apply to a court for an order of forfeiture of property, in whole or in part, that is “proceeds of unlawful activity.”<sup>57</sup> The term “unlawful

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<sup>50</sup> *Civil Remedies Act, 2001*, *supra* note 48 at s. 1(a)-(d).

<sup>51</sup> *Ibid.* at s. 2. “Unlawful activity” is defined as:

“unlawful activity” means an act or omission that,

(a) is an offence under an Act of Canada, Ontario or another province or territory of Canada, or

(b) is an offence under an Act of a jurisdiction outside Canada, if a similar act or omission would be an offence under an Act of Canada or Ontario if it were committed in Ontario,

whether the act or omission occurred before or after this Part came into force.

<sup>52</sup> *Ibid.* at s. 3(1).

<sup>53</sup> *Ibid.* at s. 7(1). “Instrument of unlawful activity” is defined as:

“instrument of unlawful activity” means property that is likely to be used to engage in unlawful activity that, in turn, would be likely to or is intended to result in the acquisition of other property or in serious bodily harm to any person, and includes any property that is realized from the sale or other disposition of such property; ....

<sup>54</sup> *Ibid.* at s. 8(1).

<sup>55</sup> *Ibid.* at s. 7(2). Section 7(2) states:

(2) For the purpose of the definition of “instrument of unlawful activity” in subsection (1), proof that property was used to engage in unlawful activity that, in turn, resulted in the acquisition of other property or in serious bodily harm to any person is proof, in the absence of evidence to the contrary, that the property is likely to be used to engage in unlawful activity that, in turn, would be likely to result in the acquisition of other property or in serious bodily harm to any person.

<sup>56</sup> S.B.C. 2005, c. 29 [*Civil Forfeitures Act* of BC].

<sup>57</sup> *Ibid.* at s. 3.

activity” is defined very broadly, and extends beyond criminal activities.<sup>58</sup> The court must order forfeiture to the government if the property is proceeds of unlawful activity or an instrument of unlawful activity.<sup>59</sup> Notably, the individual subject to the order need not have been found guilty of or even charged with a criminal offence.<sup>60</sup> Further, the individual subject to the forfeiture order bears the onus to prove that he rightfully and fairly acquired the property.<sup>61</sup> Only if the order is “clearly not in the interests of justice” may the court refuse, limit, or place conditions on a forfeiture order.<sup>62</sup>

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<sup>58</sup> *Ibid.* at s. 1(1). “Unlawful activity” is defined as:

“unlawful activity” means an act or omission described in one of the following paragraphs:

- (a) if an act or omission occurs in British Columbia, the act or omission, at the time of occurrence, is an offence under an Act of Canada or British Columbia;
- (b) if an act or omission occurs in another province of Canada, the act or omission, at the time of occurrence,
  - (i) is an offence under an Act of Canada or the other province, as applicable, and
  - (ii) would be an offence in British Columbia, if the act or omission had occurred in British Columbia;
- (c) if an act or omission occurs in a jurisdiction outside of Canada, the act or omission, at the time of occurrence,
  - (i) is an offence under an Act of the jurisdiction, and
  - (ii) would be an offence in British Columbia, if the act or omission had occurred in British Columbia,but does not include an act or omission that is an offence
- (d) under a regulation of a corporation, or
- (e) under an enactment of any jurisdiction if the enactment or the jurisdiction is prescribed under this Act.

<sup>59</sup> *Ibid.* at s. 5(1) and (2).

<sup>60</sup> *Ibid.* at s. 18. Section 18 states:

18 In proceedings under this Act, an unlawful activity may be found to have occurred even if

- (a) no person has been charged with an offence that constitutes the unlawful activity, or
- (b) a person charged with an offence that constitutes the unlawful activity was acquitted of all charges in proceedings before a criminal court or the charges are withdrawn or stayed or otherwise do not proceed.

<sup>61</sup> *Ibid.* at s. 6(2). Section 6(2) states:

6 (2) In the case of property that is proceeds of unlawful activity, the court may grant relief from forfeiture under subsection (1) if a party to the proceedings commenced under section 3 (1) proves both of the following:

- (a) she or he did not, directly or indirectly, acquire the property as a result of unlawful activity committed by the party;
- (b) she or he
  - (i) was the rightful owner of the property before the unlawful activity occurred and was deprived of possession or control of the property by means of the unlawful activity,
  - (ii) acquired the property for fair value after the unlawful activity occurred and did not know and could not reasonably have known at the time of the acquisition that the property was proceeds of unlawful activity, or
  - (iii) acquired the property from
    - (A) a person who was the rightful owner of the property before the unlawful activity occurred and who was deprived of possession or control of the property by means of the unlawful activity, or

Rather than seek forfeiture of property, the province of Manitoba has also enacted civil remedy legislation in *The Civil Remedies Against Organized Crime Act*.<sup>63</sup> The legislation specifically refers to “criminal organizations” and “criminal organization offences” as defined in the *Criminal Code*, and enables a police chief to seek damages from an individual for “any injury to the public that results from the unlawful activity” of the individual.<sup>64</sup> Again, the term “unlawful activity” is defined very broadly, and extends beyond criminal offences.<sup>65</sup> Like the Ontario legislation, the Manitoba legislation places an onus on the individual subject to the civil order for damages to rebut the presumption that he is a member of a criminal organization where the individual has been found guilty of a criminal organization offence.<sup>66</sup> However, that the individual was acquitted of the criminal organization charges, or that they were withdrawn or stayed, is irrelevant to rebutting such presumption.<sup>67</sup>

Civil forfeiture and civil remedy proceedings in Canada have occurred, and continue to occur, in relation to property and assets held by alleged criminal organizations. Some significant examples include the forfeiture of the Hells Angels clubhouse in Nova Scotia in 2003;<sup>68</sup> and the forfeiture proceedings of the Nanaimo Chapter of the Hells Angels in British Columbia pursuant to the *Civil Forfeiture Act*<sup>69</sup> as set forth in *British Columbia (Director of Civil Forfeiture) v. Angel Acres Recreation and Festival Property Ltd.*<sup>70</sup> According to an evaluation of the Integrated Proceeds of Crime Initiative of Canada or IPOC, the efforts of

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(B) a person who acquired the property for fair value after the unlawful activity occurred and did not know and could not reasonably have known at the time of the acquisition that the property was proceeds of unlawful activity.

<sup>62</sup> *Ibid.* at s. 6(1).

<sup>63</sup> S.M. 2002, c. 56, C.C.S.M. c. C107.

<sup>64</sup> *Ibid.* at ss. 1 and 7.

<sup>65</sup> *Ibid.* at s. 1(1). “Unlawful activity” is defined as:

“unlawful activity” means an act or omission that is an offence under

(a) an Act of Canada, Manitoba or another Canadian province or territory, or

(b) an Act of a jurisdiction outside Canada, if a similar act or omission would be an offence under an Act of Canada or Manitoba if it were committed in Manitoba.

<sup>66</sup> *Ibid.* at s. 11(a).

<sup>67</sup> *Ibid.* at s. 11(b).

<sup>68</sup> *Iced: The Story of Organized Crime in Canada*, *supra* note 2 at 425.

<sup>69</sup> *Civil Forfeitures Act* of BC, *supra* note 56 at s. 8.

<sup>70</sup> 2009 BCSC 322, [2009] B.C.J. No. 455 (Q.L.).

the municipalities and provinces in conjunction with IPOC have had some impact on disrupting organized crime through civil proceedings, and while some changes are recommended to increase the efficiency of the initiative by modifying its theory, design, strategy and personnel, the evaluators advocate continuing with IPOC.<sup>71</sup>

While civil forfeiture and civil remedies may prevent and limit the bolstering of organized crime identities through the use of gang names and insignia to some degree, this non-criminal law measure alone will not impact organized crime significantly, or significantly enough. It relies on the commission of unlawful activity or criminal offences, and the power and activities of law enforcement to come into play. Some provincial legislation extends very broadly – perhaps too broadly – due to the employment of the term “unlawful” rather than “criminal” activity. Although Ontario allow for rebuttable presumptions of membership in a criminal organization where the individual has been found guilty of a criminal organization offence, the British Columbia legislation applies whether or not an individual has been found guilty of or even charged with a criminal offence, and the Manitoba legislation makes acquittals, stays and withdrawn charges irrelevant to rebutting presumptions of membership in a criminal organization. These aspects of the civil remedy provisions negatively affect perceptions of such laws as fair and just. However, some of these civil proceedings, such as the British Columbia and Ontario forfeiture provisions which allow disposal of “instruments” of “unlawful activity” or crime, do provide another useful tool to combat organized crime by striking at the source of their power.

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<sup>71</sup> “2010-2011 Evaluation of the Integrated Proceeds of Crime Initiative: Final Report”, *supra* note 37 at 20, 21 and 61. In its evaluation, Public Safety Canada asserts, *ibid.* at 37:

...[T]he provinces have been moving in the direction of civil forfeiture since 2001. The first province to enact this kind of legislation was the province of Ontario (2001). ...[T]he Ontario civil seizures for 2008-2009 totaled \$31.73 million. This success is due in part to the referrals made by the IPOC Initiative to the province. Over that same period, British Columbia, which started civil seizures in 2006, succeeded in forfeiting \$1.27 million, mainly due to IPOC referrals, and ... the IPOC national seizures totaled \$16 million. Combined, the IPOC Initiative and the Ontario government figures alone provide impressive results: more than \$100 million of total seizures in 2007-2008 and 2008- 2009.

#### 4.7.5 Using Statutorily Mandated Community Safety Programs to Pierce the Power of the Patch

Statutorily mandated community safety programs amount to non-criminal law efforts to prevent organized crime outlaw group members from wearing their patches, group insignia, or group colours in licenced establishments such as bars. These programs seek to diminish the proliferation of the reputations of organized crime outlaw groups – that is to say, they seek to diminish the “power of the patch” – by controlling activities of organized crime at the community level. The attempt to prevent organized crime outlaws from displaying their identity in public may reduce the social cohesion of the outlaw group, and may deteriorate their identity as required by *Requisite Six*. It may also reduce the proliferation of their reputation for violence and intimidation as many individuals will not recognize or know them as members of organized crime outlaw groups, and thus, as individuals to be feared. It may prevent some individuals who are on the periphery of conventional society from identifying and associating with a criminal subculture, and learning the life of organized crime. In these ways, community safety programs may maintain social order or equilibrium – or at least, a false sense of it.

Some Canadian provinces have passed legislation aimed at thwarting criminal organization or gang activities within communities, or that may affect communities. The governments of Saskatchewan with *The Safer Communities and Neighbourhoods Act*,<sup>72</sup> and Manitoba with *The Liquor Control Amendment Act*<sup>73</sup> have prohibited individuals from wearing gang colours in any permitted or licenced premises. *The Education Administration Act*<sup>74</sup> in Manitoba combined with *The Public Schools Act*<sup>75</sup> allows the Minister of Education to ban the wearing

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<sup>72</sup> S.S. 2004, C.S-0.1 as amended by S.S., 2005, c. 41; and 2006, c.R-22.0001 [*The Safer Communities and Neighbourhoods Act*] at s. 60.1.

<sup>73</sup> R.S.M. 2002, C.C.S.M. c. L160 [*The Liquor Control Amendment Act*] at ss. 120(9) and (10); and Manitoba Justice, *Project Gang-Proof: A Handbook For Families and Community Members*, 2<sup>nd</sup> ed. (2004), online: Manitoba Government <<http://www.gov.mb.ca/justice/safe/gangproof/ganghandbook2004.pdf>> [*Project Gang-Proof: A Handbook For Families and Community Members*] at 39. Sub-section 120(10) of *The Liquor Control Amendment Act* defines gang colours:

In subsection (9), “gang colours” means a sign, symbol, logo or other representation identifying, associated with or promoting a group of persons who conspire to engage in unlawful activities.

<sup>74</sup> R.S.M. 1987, c. E10, C.C.S.M. C. E10 [*The Education Administration Act*].

<sup>75</sup> R.S.M. 1987, c. P250, C.C.S.M. c. P250 [*The Public Schools Act*].

of gang colours, signs, symbols or identifying representations of gangs in Manitoba schools.<sup>76</sup> Notably, such legislation may not withstand *Charter* scrutiny.

In *R. v. Bitz*,<sup>77</sup> the Saskatchewan Provincial Court determined that *The Safer Communities and Neighbourhoods Act* was *intra vires* the Saskatchewan Legislature,<sup>78</sup> and that wearing Hells Angels colours or insignia amounts to expression.<sup>79</sup> However, the Court concluded that the legislation violated the right to freedom of expression in sub-section 2(b)<sup>80</sup> of the *Charter*, and it was not saved by section 1.<sup>81</sup> The Ministry of Justice did not appeal the Provincial Court decision, and re-wrote the legislation.<sup>82</sup> Given the decision in *R. v. Bitz*, these efforts of communities to seize control of neighbourhood, schools and businesses and to preserve conventional values may provide short-term relief for societal members who fear organized crime outlaws. However, unless the legislation is used and withstands *Charter* scrutiny, it will prove to be just another hollow anti-organized crime measure.

#### 4.7.6 Using Trade-mark and Copyright Laws to Pierce the Power of the Patch<sup>83</sup>

The power of trade-mark symbolism to induce consumer action stretches beyond marks in commerce. Within the criminal milieu, organized crime outlaw groups often employ their name or insignia not only to identify themselves as a group and to declare themselves to others, but also to advertise their reputation by wearing it on their sleeve – or on their back. Organized crime outlaw groups use their names and insignia to commit crime. They intimidate and instill fear in non-members in both the criminal subculture and conventional

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<sup>76</sup> *The Education Administration Act*, *supra* note 74 at s. 2 and *The Public Schools Act*, *supra* note 75 at 41(y); and *Project Gang-Proof: A Handbook For Families and Community Members*, *supra* note 73 at 39.

<sup>77</sup> 2009 SKPC 138, 2009 CarswellSask 878 [*R. v. Bitz*].

<sup>78</sup> *Ibid.* at para. 42.

<sup>79</sup> *Ibid.* at para. 45.

<sup>80</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c.11 [*Charter*] at s. 2(b).

<sup>81</sup> *R. v. Bitz*, *supra* note 77 at para. 81.

<sup>82</sup> *The Safer Communities and Neighbourhoods Amendment Act*, S.S. 2010, c. 30; and James Wood, “Rethinking Gang Colour Law” *Leader Post* (15 January 2010), online: *Leader Post*

<<http://www.leaderpost.com/health/Rethinking+gang+colour/2444033/story.html?id=2444033>>.

<sup>83</sup> Many of the ideas and contents of this subsection are taken directly, with modifications, from Carol Fleischhaker, “Piercing the Power of the Patch: How Trademark Law Could Diminish the Power of Gang Insignia” (2010) 14 *The Journal of World Intellectual Property* 21. They are reproduced in the thesis under the terms of the Creative Commons Attribution Non Commercial License according to the terms and conditions for Wiley Open Access online articles.

society in order to effect their criminal endeavours. Over time, the violent and intimidating reputation of the group builds, and simply the mention of their name or the display of their insignia causes fear and produces acquiescent behaviour in others. This fearsome reputation facilitates the group in its criminal activities – both commercial and non-commercial. Trade-mark and copyright laws enhance these organized crime outlaw groups' reputations by providing various rights to trade-mark and copyright holders, and thus, contribute to the social problem that is organized crime violence and crime. Unlike the proceeds of crime legislation and forfeiture provisions in the *Criminal Code*, the Canadian government has not amended trade-mark and copyright laws as part of its anti-organized crime measures.

Some gangs have legally registered their names and insignia in order to protect their reputation by preventing others from using it. For instance, the Hells Angels Motorcycle Club, and the Mongol Nation Motorcycle Club, Inc. have registered their trade-marks.<sup>84</sup> Recently, the Hells Angels sued a Los Angeles fashion boutique that sold a t-shirt bearing the message: "My boyfriend's a Hells Angel." The lawyer for the Hells Angels stated that the lawsuit meant to "get them off the market, sequester them and have them destroyed."<sup>85</sup> Further, the Hells Angels forced Disney Pictures to change a movie script because it referred to the Hells Angels name, and successfully sued an author who used the Hells Angels winged death head on the cover of his book.<sup>86</sup> The Hells Angels only had to legally threaten Marvel Comics in order to prevent them from using the name "Hell's Angel" for one of their comic characters. John Freeman, a former editor of Marvel Comics, explained in a blog:

Ah, Hell's Angel - the most tortured superheroine in the Marvel UK pantheon, ever. Legal threats from the Hells Angels (I kid you not) forced the name change [*sic*] and prompted legal searches to ensure all other MUK character names weren't infringing other rights holders (it was okay to name a comic Warheads but we weren't to try copyrighting the name on a missile...) ....<sup>87</sup>

The legal power of organized crime outlaw groups to prevent the use of their names and insignia outside the criminal milieu, demonstrates that trade-mark and copyright laws afford

<sup>84</sup> *R. v. Lindsay* trial decision, *supra* note 7 at paras. 235-37 and 263-72; and *Rivera v. Carter*, *supra* note 7 at 2.

<sup>85</sup> Phil Villarreal, "Hells Angels Sue L.A. T-Shirt Maker For Copyright Infringement" (26 August 2011) *The Consumerist* online: [consumerist.com <http://consumerist.com/2011/08/hells-angels-sue-la-t-shirt-maker-for-copyright-infringement.html>](http://consumerist.com/2011/08/hells-angels-sue-la-t-shirt-maker-for-copyright-infringement.html).

<sup>86</sup> "Hells Angels seek to protect skull logo", *supra* note 7; and "Hells Angels get revved up over their trademarks", *supra* note 8.

<sup>87</sup> "ICFD Cover of the Week – 17<sup>th</sup> Feb 08", *supra* note 9.

some protection afforded to these groups. Legal protection of their reputations remains a force to be reckoned with.

This subsection analyses the extent to which trade-mark and copyright laws protect organized crime outlaw groups' insignia within non-commercial and commercial illegal enterprises. It also examines the extent to which trade-mark and copyright laws prevent law enforcement from using this insignia. In addition, it demonstrates the power of organized crime outlaw groups insignia generally, and the ways in which trade-mark and copyright laws enhance this power. Further, it recommends amendments to the *Trade-marks Act*<sup>88</sup> and the *Copyright Act*<sup>89</sup> in order to negatively affect the ability of these groups to engage in criminal enterprises by diminishing the power of their patches.

#### 4.7.7 Legal Protections Afforded to Gang or Organized Crime Outlaw Group Insignia by Trade-mark and Copyright Laws

An analysis of the substantive hurdles posed by trade-mark and copyright laws for law enforcement agencies that wage war against criminal organizations in Canada remains essential in order to understand the interaction between intellectual property and criminal law in the context of organized crime outlaw groups marks. An application of trade-mark and copyright laws to these groups, their reputation, and their marks, illuminates the ways in which trade-mark and copyright laws unintentionally enable these groups to expand the power of their reputation, and thus, the ways in which these laws facilitate them in their criminal enterprises. Within any commercial arena, including the criminal milieu, reputation is everything.

A number of trade-mark laws apply to organized crime outlaw group insignia, and protect their reputations by protecting their marks and names. For groups that have registered their marks, laws regarding passing off, use, confusion, as well as depreciation of goodwill, safeguard the rights of the groups to use their insignia within commercial trade areas. For groups that have not registered their trade-marks, the laws regarding passing off provide

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<sup>88</sup> *Trade-marks Act*, R.S.C. 1985, c. T-13 [*Trade-marks Act*].

<sup>89</sup> *Copyright Act*, R.S.C. 1985, c. C-42 [*Copyright Act*].

protection. Copyright laws uphold the rights of these groups to reproduce their works, and afford them protection against infringements of their rights, such as by the distribution of copies of their works. As these legal measures protect the rights of organized crime outlaw groups, they simultaneously augment the reputations of these groups, and prevent the infringement of those rights and the sully of that reputation by law enforcement agencies. This subsection will examine the concepts within trade-mark and copyright laws that relate to, and that may protect, insignia of organized crime outlaw groups.

#### 4.7.7.1 Protections Against Passing Off

Both registered trade-marks and unregistered marks of organized crime outlaw groups benefit from the laws regarding passing off. Passing off occurs when an individual sells his own goods as if they are another person's goods.<sup>90</sup> The remedy of passing off exists separately from statutory remedies, and may be employed regardless of invalid registration and infringement claims.<sup>91</sup> Section 7 of the *Trade-marks Act* codifies passing off into statute:

7. No person shall

- (a) make a false or misleading statement tending to discredit the business, wares or services of a competitor;
- (b) direct public attention to his wares, services or business in such a way as to cause or be likely to cause confusion in Canada, at the time he commenced so to direct attention to them, between his wares, services or business and the wares, services or business of another;
- (c) pass off other wares or services as and for those ordered or requested;
- (d) make use, in association with wares or services, of any description that is false in a material respect and likely to mislead the public as to
  - (i) the character, quality, quantity or composition,
  - (ii) the geographical origin, or
  - (iii) the mode of the manufacture, production or performanceof the wares or services; or
- (e) do any other act or adopt any other business practice contrary to honest industrial or commercial usage in Canada.<sup>92</sup>

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<sup>90</sup> Ruth M. Corbin, "Intention to Deceive: The Role It Plays in 'Passing Off'" (2004) 18 I.P.J. 97 ["Intention to Deceive: The Role It Plays in 'Passing Off'"] at 98. Corbin cites *Perry v. Truefitt*, [1842] 6 Beav. 66, 49 E.R. 749 (Eng. Rolls Ct.): "A man is not to sell his own goods under the *pretence* that they are the goods of another man."

<sup>91</sup> Bradley J. Freedman & Robert J.C. Deane, "Trade-marks and the Internet: A Canadian Perspective" (2001) 34 U.B.C. L. Rev. 345 ["Trade-marks and the Internet: A Canadian Perspective"] at para. 23.

<sup>92</sup> *Trade-marks Act*, *supra* note 88 at s. 7(b).

The common law tort of passing-off protects trade-marks and trade-names, and seeks to ensure honesty and fairness of competition.<sup>93</sup> Historically, passing off required the individual who allegedly misused a mark or falsely represented the mark, to have ill intent – that is to say the intention to deceive.<sup>94</sup> However, case law in the 20<sup>th</sup> century asserts that the tort of passing off does not require ill-intent,<sup>95</sup> and only requires a misrepresentation that causes public deception or confusion. Essentially, it requires a demonstration of goodwill, misrepresentation leading to confusion, and damage.<sup>96</sup>

If an organized crime outlaw group obtained registration of its name and symbol, or if it used it to a degree to which passing-off would protect them by having developed goodwill in the mark, then the purpose or enterprise of the group would seemingly not matter – that is to say, the tort of passing off would prevent others from using or misrepresenting the group name and symbol in a way that leads to confusion and results in damage to goodwill. The common law protection within passing off seems to require that the use of the trade-mark or name occur in commercial activities or transactions, since section 7 of the *Trade-marks Act* relates passing off to the provision of “wares and services.” The test to determine passing off refers to the consumer perspective in the context of trade,<sup>97</sup> and the definitional elements of passing off refer to the actual use by a “competitor” within the course of trade.<sup>98</sup> Thus, if an individual such as a non-member or police officer wore insignia or a trade-mark of an

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<sup>93</sup> *Kirkbi AG v. Ritvik Holdings Inc.*, 2005 SCC 65, [2005] 3 S.C.R. 302 [*Kirkbi AG v. Ritvik Holdings Inc.*] at para. 63.

<sup>94</sup> “Intention to Deceive: The Role It Plays in ‘Passing Off’”, *supra* note 90 at 98. Corbin states that proof of an intention to deceive may have been a necessary element of passing off originally, but that requirement does out in the late 19<sup>th</sup> century when the concept of “injury to goodwill” evolved.

<sup>95</sup> *Ibid.* at 99.

<sup>96</sup> *Kirkbi AG v. Ritvik Holdings Inc.*, *supra* note 93 at para. 66.

<sup>97</sup> *British Columbia Automobile Association v Office and Professional Employees’ International Union, Local 378*, 2001 BCSC 156, [2001] 4 W.W.R. 95 (B.C.S.C.) [*British Columbia Automobile Association v Office and Professional Employees’ International Union, Local 378*] at para. 117. The Court states:

117 What is the appropriate standard to measure whether there is a passing-off? The defendant has referred to the “reasonably prudent internet user” as the standard for confusion. I do not think that is the test. The Supreme Court of Canada in *Ciba-Geigy Canada Ltd. v. Apotex Inc.* (1992), 44 C.P.R. (3d) 289 [at 301], said that the standard is that of the ordinary average customer. The plaintiff refers to this passage which I think accurately sets out the test:

The average customer will not be the same for different products, however, and will not have the same attitude at the time of purchase. Moreover, the attention and care taken by the same person may vary depending on the product he is buying: someone will probably not exercise the same care in selecting goods from a supermarket shelf and in choosing a luxury item. In the first case, the misrepresentation is likely to “catch” more readily.

<sup>98</sup> *Trade-marks Act*, *supra* note 88 at s. 7(a).

organized crime outlaw group and represented himself as a member, but did not do so within a commercial setting, the tort of passing off would not protect the group that owns the insignia or trade-mark. However, if this non-member or police officer wore that insignia or trade-mark during activities that involved the provision of “wares and services”, such as an officer wearing a Hells Angels patch during drug dealing, then the tort of passing off may apply and protect the rights of the group.<sup>99</sup> The emphasis on economic relations and enterprise within the concept of passing off demonstrates that this tort intends to regulate improper usage in the context of business, and not simply the common usage by individuals or a group of individuals who sport a name and symbol, such as a name or symbol of an organized crime outlaw group. This emphasis on the economic or commercial context limits any protections provided by passing off to organized crime groups with registered marks.

In *British Columbia Automobile Association v. Office and Professional Employees’ International Union, Local 378*,<sup>100</sup> the defendant union created web sites which used the name and trade-marks of the British Columbia Automobile Association. The British Columbia Supreme Court held that the first web site that the defendant union created, breached the *Copyright Act* due to its similar appearance to that of the British Columbia Automobile Association, and its use of the trade-marks of the Association;<sup>101</sup> and that it amounted to passing off of a trade-mark because the defendant created it with the intention of misleading people who looked for the web site of the Association.<sup>102</sup> The Court held that the second web site of the defendant amounted to a breach of copyright only.<sup>103</sup> In its assessment of whether the web sites of the defendant amounted to passing off, the Court held that the fact that the defendant *was not competing commercially* with the Association but rather “attempting to communicate its message to the public about an ongoing labour relations

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<sup>99</sup> To expand on or further explain this act of passing off, the police officer is passing off his “wares and services” – for example, his crystal methamphetamine – as being a product backed or endorsed by the Hells Angels. Drug sales conducted under the Hells Angels name are less subject to “drug burns” or “rip-offs” or theft. Someone who is not a Hells Angel would benefit from this reputation because they would be better able to manufacture product and sell it.

<sup>100</sup> *British Columbia Automobile Association v Office and Professional Employees’ International Union, Local 378*, *supra* note 97.

<sup>101</sup> *Ibid.* at paras. 39, 42, 44, 181 and 200.

<sup>102</sup> *Ibid.* at para. 212.

<sup>103</sup> *Ibid.* at paras. 45, 46 and 201.

campaign”, remained significant.<sup>104</sup> Based on these assertions of the Court in this case, passing off would protect insignia of an organized crime outlaw group from use by non-entitled parties. Therefore, law enforcement agencies could not use a seized mark of such a group *in commercial activities* (that is to say, the provision of “wares and services”), without committing the offence of passing off.

#### 4.7.7.2 Right to Use Identical Mark

Section 4 of the of the *Trade-marks Act* defines “use”:

4. (1) A trade-mark is deemed to be used in association with wares if, at the time of the transfer of the property in or possession of the wares, in the normal course of trade, it is marked on the wares themselves or on the packages in which they are distributed or it is in any other manner so associated with the wares that notice of the association is then given to the person to whom the property or possession is transferred.
- (2) A trade-mark is deemed to be used in association with services if it is used or displayed in the performance or advertising of those services.
- (3) A trade-mark that is marked in Canada on wares or on the packages in which they are contained is, when the wares are exported from Canada, deemed to be used in Canada in association with those wares.<sup>105</sup>

The concept of “use” requires the trade-mark to be used in association with wares at the time of a transfer or possession of property in the normal course of trade, or the use or display of the trade-mark in the advertising of services.<sup>106</sup>

When an applicant seeks to register a trade-mark, it must provide a statement regarding the use or proposed use of the trademark pursuant to section 30(a) of the *Trade-marks Act*.<sup>107</sup> This use relates to the specific wares or services with which the applicant has used, or proposes to use the mark.<sup>108</sup> If the use changes, the *Trade-marks Act* does not state that

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<sup>104</sup> *Ibid.* at para. 126.

<sup>105</sup> *Trade-marks Act*, *supra* note 88 at s. 4.

<sup>106</sup> *Ibid.* at s. 4(1).

<sup>107</sup> *Ibid.* at s. 30. Section 30 states:

30. An applicant for the registration of a trade-mark shall file with the Registrar an application containing

- (a) a statement in ordinary commercial terms of the specific wares or services in association with which the mark has been or is proposed to be used; ....

<sup>108</sup> *Ibid.* at s. 4.

protection of the owner of the mark ceases,<sup>109</sup> and the *Act* does not specify that an amendment to the use be filed.

Registered trade-mark owners have the exclusive right to use their trade-mark throughout Canada. Gangs that have registered their trade-marks in relation to wares or services have the right to use their trade-mark throughout Canada.<sup>110</sup>

Trade-mark protection in the *Trade-marks Act* only results from use of a mark as specified in the *Trade-marks Act*, and does not result from any common usage. These legal requirements in the definition of “use” in section 4 of the *Trade-mark Act* mean that gang members do not *use* registered insignia when they merely wear them. In fact, no one who simply wears insignia of a organized crime outlaw group – member or non-member – *uses* the insignia. Thus, these groups have no protection under the *Trade-marks Act* from non-members or law enforcement officials from simply wearing their trade-marks. However, if the non-members or officials wore the trade-marks in the normal course of trade, or used or displayed the trade-mark in the advertising of services,<sup>111</sup> then these groups do have protection according to section 4 of the *Trade-marks Act* which defines “use” generally, and section 20 which prevents use of a confusing mark.

#### 4.7.7.3 Right to Use Confusing Mark

Organized crime groups that have registered their trade-marks receive protection against others who attempt to register a similar mark. Pursuant to subsection 12(1)(d) of the *Trade-*

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<sup>109</sup> *Ibid.* at s. 49. Section 49 states:

49. If a mark is used by a person as a trade-mark for any purposes or in any of the manners mentioned in the definition “certification mark” or “trade-mark” in section 2, it shall not be held invalid merely on the ground that the person or a predecessor in title uses it or has used it for any other of those purposes or in any other of those manners.

<sup>110</sup> *Ibid.* at s. 19. Section 19 states:

19. Subject to sections 21, 32 and 67, the registration of a trade-mark in respect of any wares or services, unless shown to be invalid, gives to the owner of the trade-mark the exclusive right to the use throughout Canada of the trade-mark in respect of those wares or services.

<sup>111</sup> Examples of these advertising of services might include a situation where non-members wore the trade-mark, and thus purported to be an outlaw motorcycle gang member for instance, during the sales of gang related items or of motorcycles. They also might include officials who used a mark to advertise anti-gang support services. Whether the “normal” course of trade” includes illegal drug transactions is not known. Thus, the “right to use” may or may not include illegal transactions such as drug trafficking.

*marks Act*, a mark is not registrable if it is "...confusing with a registered trade-mark..."<sup>112</sup> Subsection 12(1)(d), therefore, prohibits law enforcement from creating and registering marks that would be confusing with registered gang trade-marks. Such creation of confusing marks might contribute to diluting the "power of the patch" if the confusing marks were not used or displayed as members of organized crime groups would use them.

Section 20 of the *Trade-marks Act* prohibits the use of a mark in sales, distribution and advertising, when such use causes confusion.<sup>113</sup> Subsection 6(2) of the *Trade-marks Act* defines "confusion":

6. ... (2) The use of a trade-mark causes confusion with another trade-mark if the use of both trade-marks in the same area would be likely to lead to the inference that the wares or services associated with those trade-marks are manufactured, sold, leased, hired or performed by the same person, whether or not the wares or services are of the same general class. ....<sup>114</sup>

Confusion may reduce the general fame and reputation of a mark because it is not used or displayed as the owner of the mark would want it used or displayed. Even the *likelihood* of confusion will violate the rights of a trade-mark owner.<sup>115</sup>

The *Trade-marks Act* specifies some of the considerations that a court or Registrar must consider in determining whether or not a mark or trade-mark causes confusion with another trade-mark:

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<sup>112</sup> *Trade-marks Act*, *supra* note 88 at s. 12(1)(d).

<sup>113</sup> *Ibid.* at s. 20. Section 20 states:

20. (1) The right of the owner of a registered trade-mark to its exclusive use shall be deemed to be infringed by a person not entitled to its use under this Act who sells, distributes or advertises wares or services in association with a confusing trade-mark or trade-name, but no registration of a trade-mark prevents a person from making

- (a) any bona fide use of his personal name as a trade-name, or
- (b) any bona fide use, other than as a trade-mark,
  - (i) of the geographical name of his place of business, or
  - (ii) of any accurate description of the character or quality of his wares or services,

in such a manner as is not likely to have the effect of depreciating the value of the goodwill attaching to the trade-mark. ...

<sup>114</sup> *Ibid.* at s. 6(2).

<sup>115</sup> *Remo Imports Ltd. v Jaguar Cars Ltd.*, 2007 FCA 258, [2007] F.C.J. No. 999 (Q.L.) [*Remo Imports Ltd. v Jaguar Cars Ltd.*] at para. 38; and *Veuve Clicquot Ponsardin v Boutiques Clicquot Ltée*, 2006 SCC 23, [2006] 1 S.C.R. 824 [*Veuve Clicquot Ponsardin v Boutiques Clicquot Ltée*] at para. 37.

6. (5) In determining whether trade-marks or trade names are confusing, the court or the Registrar, as the case may be, shall have regard to all the surrounding circumstances including

- (a) the inherent distinctiveness of the trade-marks or trade-names and the extent to which they have become known;
- (b) the length of time the trade-marks or trade-names have been in use;
- (c) the nature of the wares, services or business;
- (d) the nature of the trade; and
- (e) the degree of resemblance between the trade-marks or trade-names in appearance or sound or in the ideas suggested by them.<sup>116</sup>

Judges or registrars place themselves in the position of a “casual consumer somewhat in a hurry”<sup>117</sup> who is confronted with the two marks, and not in the place of the trade-mark owner.<sup>118</sup> They consider “all the surrounding circumstances”, including the similarities and dissimilarities between the marks.<sup>119</sup> Trade-mark owners cannot be idle. They must protect their marks from piracy, or risk losing the distinctiveness of their marks, and thus, also risk losing the legal protection of those marks.<sup>120</sup>

The trade area has relevance in determining whether confusion exists between marks. Thus, trade-mark owners must remain vigilant against the use of their marks not only within their own trade area, but in *unrelated trade areas* as well. A court may decide that the use of the mark in a different commercial sector has no relation or connection to the original commercial sector in which the mark was used. However, even if a court finds no connection so as to cause confusion, the use of a trade-mark or trade name in a different commercial sector may erode the distinctiveness of a mark.

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<sup>116</sup> *Trade-marks Act*, *supra* note 88 at s. 6(5).

<sup>117</sup> *Mattel, Inc. v. 3894207 Canada Inc.*, 2006 SCC 22, [2006] 1 S.C.R. 772 [*Mattel, Inc. v. 3894207 Canada Inc.*] at para. 56. The Supreme Court of Canada states:

(1) The Casual Consumer Somewhat in a Hurry

56 What, then, is the perspective form which the likelihood of a “mistaken inference” is to be measured? It is not that of the careful and diligent purchaser. Nor, on the other hand, is it the “moron in a hurry” so beloved by elements of the passing-off bar: *Morning Star Co-Operative Society Ltd. v. Express Newspapers Ltd.*, [1979] F.S.R. 113 (Ch. D.), at p. 117. It is rather a mythical customer who stands somewhere in between, dubbed in a 1927 Ontario decision of Meredith C.J. as the “ordinary hurried purchasers”: *Klotz v. Corson* (1927), 33 O.W.N. 12 (Sup. Ct.), at p. 13. See also *Barsalou v. Darling* (1882), 9 S.C.R. 677, at p. 693. ... [Emphasis original].

<sup>118</sup> *Ibid.* at para. 56.

<sup>119</sup> *Ibid.* at paras. 71-72; and *Trade-marks Act*, *supra* note 88 at s. 6(5).

<sup>120</sup> *Mattel, Inc. v. 3894207 Canada Inc.*, *supra* note 117 at para. 26.

In *Mattel, Inc. v. 3894207 Canada Inc.*,<sup>121</sup> Mattel sought to prohibit the use of the name “Barbie” by a small chain of Montreal restaurants called “Barbie’s.” “Barbie’s” served a variety of meals, and referred to its barbecue items as “barbie-Q.”<sup>122</sup> The Supreme Court of Canada upheld the decision of the Trade-marks Opposition Board that the circumstances did not create a likelihood of confusion in the marketplace between the BARBIE doll and “Barbie’s” because BARBIE’s fame primarily related to dolls and doll accessories, while “Barbie’s” dealt with food products, restaurant services, and banquet services.<sup>123</sup> However, in *Remo Imports Ltd. v. Jaguar Cars Ltd.*, the Federal Court of Appeal asserted that where no terms of registration confine a party to operate in a particular market, a likelihood of confusion between marks used in different markets, may exist.<sup>124</sup> Based on the decision in *Mattel, Inc. v. 3894207 Canada Inc.*, the use of a mark in a *different trade area* may not violate section 20 of the *Trade-marks Act*, which section prohibits confusion.

The parameters of confusion, particularly as confusion operates in different markets or unrelated trade areas, assume great importance for police or governmental agencies, and may have a significant effect on law enforcement techniques in relation to organized crime outlaw groups. Based on the statutory and common law, anyone who uses organized crime outlaw group insignia in trade areas other than those in which the group operates, may not be in violation of section 20 of the *Trade-marks Act*. Thus, if law enforcement agencies do not use a mark in a manner that results in confusion, these agencies may, without violating the law, use the mark of an organized crime outlaw group in an unrelated trade area, and in a manner which does not accord with the reputation of the group. For instance, law enforcement could use the mark to advertise anti-organized crime measures or establishes a business to sell something contrary to the biker image and uses the mark in this trade. Such usage may deteriorate the power of the reputation of the group.

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<sup>121</sup> *Ibid.*

<sup>122</sup> *Ibid.* at paras. 1 and 11.

<sup>123</sup> *Ibid.* at para. 91.

<sup>124</sup> *Remo Imports Ltd. v. Jaguar Cars Ltd.*, *supra* note 115 at para. 48.

#### 4.7.7.4 Prohibitions Against Depreciation of Goodwill

Section 22 of the *Trade-marks Act* provides legal protection against the dilution or depreciation of trade-marks – even for organized crime outlaw groups who register their insignia, but whose commercial transactions may be illegal at times. Section 22 states:

22. (1) No person shall use a trade-mark registered by another person in a manner that is likely to have the effect of depreciating the value of the goodwill attaching hereto. ....<sup>125</sup>

The *Trade-marks Act* does not explicitly protect famous marks – that is to say, section 22 does not require a trade-mark to be famous in order to grant relief, but relief would not likely be granted for a mark that was not well-known.<sup>126</sup> Trade-mark owners may seek relief pursuant to section 22 for depreciation of goodwill that results from unauthorized use of a mark that encouraged the purchase of dissimilar or other wares or services through association with that mark.<sup>127</sup>

In order to satisfy the requirements of section 22 of the *Trade-marks Act*, a trade-mark owner must demonstrate four elements. First, an owner must prove that a user or non-owner used the registered trade-mark of the owner in connection with wares or services. This use need not include only competitive use. Second, the owner must prove that the registered trade-mark is sufficiently well known to have generated significant goodwill. Third, the owner must prove that the user or non-owner used the registered trade-mark in a manner that likely affected that goodwill. Fourth, the owner must prove that the likely effect of the use would be the depreciation of the value of that goodwill.<sup>128</sup>

Courts have asserted that goodwill generates from years of “honest work” or “lavish expenditure.”<sup>129</sup> In *Clairol International Corp. v. Thomas Supply & Equipment Co.*, the Court described the meaning of “goodwill” and its “depreciation”:

<sup>125</sup> *Trade-marks Act*, *supra* note 88 at s. 22.

<sup>126</sup> Daniel R. Bereskin, “The Protection of Famous Marks in Canada: Mattel and Veuve Clicquot”, Case Comment, (2007) 40 U.B.C.L. Rev. 277 at para. 21.

<sup>127</sup> Robert G. Howell, “Depreciation of Goodwill: A ‘Green Light’ for Dilution from the Supreme Court of Canada in an Accommodating Infrastructure” (2008) 17 Transnational Law & Contemporary Problems 689 at 690.

<sup>128</sup> *Veuve Clicquot Ponsardin v. Boutiques Cliquot Ltée*, *supra* note 115 at para. 46.

<sup>129</sup> *Clairol International Corp. v. Thomas Supply & Equipment Co.*, [1968] 55 C.P.R. 176, 2 Ex. C.R. 552 [*Clairol International Corp. v. Thomas Supply & Equipment Co.*] at para. 41.

41 ...To paraphrase Lord Macnaghten's expression in *Trego v. Hunt* [(1896) A.C. 7], *the goodwill attaching to a trade mark is I think that portion of the goodwill of the business of its owner which consists of the whole advantage, whatever it may be, of the reputation and connection, which may have been built up by years of honest work or gained by lavish expenditure of money and which is identified with the goods distributed by the owner in association with the trade mark.*

42 Then what is meant by "depreciate the value" of such goodwill. To my mind this means simply to reduce in some way the advantage of the reputation and connection to which I have just referred, to take away the whole or some portion of the custom otherwise to be expected and to make it less extensive and thus less advantageous. As I see it goodwill has value only to the extent of the advantage of the reputation and connection which its owner enjoys and whatever reduces that advantage reduces the value of it. *Depreciation of that value in my opinion occurs whether it arises through reduction of the esteem in which the mark itself is held or through the direct persuasion and enticing of customers who could otherwise be expected to buy or continue to buy goods bearing the trade mark. It does not, however, as I see it, arise, as submitted by Mr. Henderson, from danger of loss of exclusive rights as a result of use by others as this in my view represents possible loss of exclusive rights in the trade mark itself rather than reduction of the goodwill attaching to it.*<sup>130</sup> [Emphasis added].

According to the assertions by the Court in *Clairol International Corp. v. Thomas Supply & Equipment Co.*, if organized crime outlaw groups or their members engage in commercial activities, such as dealing in controlled substances, in connection with the group or by using the group insignia, then the concept of goodwill may apply – albeit within the criminal milieu. The activities of organized crime outlaw groups, such as drug manufacturing or trafficking, that consistently avoid police detection and criminal prosecution generate reliability, secure the confidence and repeated business of criminals who seek to engage in those criminal activities without fear of infiltration. And, where there exists this “goodwill”, there exists the potential for depreciation.

Trade-mark law does not recognize the depreciation of goodwill through the use of a mark by others where that use is not in association with wares or services – not just the act of wearing a trade-mark. As discussed above in sub-sub-subsection “Right to Use Confusing Mark”, the concept of “use” in trade-mark law has a unique meaning. It requires a trade-mark to be

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<sup>130</sup> *Ibid.* The concepts of “goodwill” and “depreciation” as set forth in *Clairol International Corp. v. Thomas Supply & Equipment Co.*, *supra*, are referred to in *Tommy Hilfiger Licensing Inc. v. Produits de Qualité I.M.D. Inc.*, 2005 FC 10, [2005] F.C.J. No. 17 at paras. 128-31.

“used in association with wares” or “used in association with services.”<sup>131</sup> In addition, no violation of trade-mark law occurs if the use does not likely depreciate of the value of that goodwill.

Based on the definition in section 4 of the *Trade-marks Act*, and the interpretation of “use” in sections 20 and 22 in the case of *Compagnie Générale des Établissements Michelin-Michelin & Cie v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada)*,<sup>132</sup> the term “use” is not meant to include all uses by users of trade-marks that belong to other individuals.<sup>133</sup> The Federal Court in that case held that the meaning of “use” requires, in part, *the sale, distribution or advertisement of wares or services* in association with a confusing trade-mark or in a way that depreciates the goodwill of the trade-mark.<sup>134</sup> Thus, an organized crime outlaw group would receive no protection under section 22 of the *Trade-marks Act* if an individual did not sell, distribute or advertise wares or services, but rather, simply asserted an affiliation with a specific outlaw group or wore a group symbol, even though such exploitation would depreciate the value or power of the trade-mark of the organized crime outlaw group. Organized crime outlaws who have resorted to violence to protect the value or power of their patch against depreciation by others may not have done so due to the lack of legal recourse to protect trade-marks of organized crime outlaw groups. Indeed, even though a legal recourse may have existed, Hells Angels member Jean Violette beat Glen Louie in order to prevent Louie from wearing a Hells Angels belt buckle and using the Hells Angels name during drug deals.<sup>135</sup> Violette was likely driven by a lack of respect for the law and the power of his patch, rather than any uncertainty in interpreting the meaning of “use” as it relates to section 22.

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<sup>131</sup> *Trade-marks Act*, *supra* note 88 at s. 4.

<sup>132</sup> (1997), 71 C.P.R. (3d) 348, [1997] 2 F.C. 306 (F.C.) [*Compagnie Générale des Établissements Michelin-Michelin & Cie v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada)*] at paras. 17 and 26. The Federal Court adopts the interpretation of “use” for sections 20 and 22 of the *Trade-marks Act* in *Clairol International Corp. v Thomas Supply & Equipment Co.*, *supra* note 129.

<sup>133</sup> *Compagnie Générale des Établissements Michelin-Michelin & Cie v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada)*, *supra* note 132 at para. 29.

<sup>134</sup> *Ibid.* at para. 47.

<sup>135</sup> *R. v. Violette*, 2009 BCSC 1557, [2009] B.C.J. No. 2262 (Q.L.) (B.C. S.C.) [*R. v. Violette*] paras. 79-80 and 97-102.

#### 4.7.7.5 Copyright Challenges

Given that the power of the patch stems from exclusivity of use by only chosen members who will uphold its reputation, law enforcement agencies could seek to mass-produce and distribute insignia of organized crime outlaw groups in order to make it available to anyone to use in ways that do not uphold its reputation and that depreciate its goodwill or dilute it. Such mass-production and distribution would mean that non-members of organized crime groups would wear and use the insignia and name in ways that do not accord with the reputation of the group, and thus, weaken or change the reputation. However, such production and distribution may violate various provisions within the *Copyright Act* which protect “works” from reproduction by individuals other than the copyright holder, unless a defence can be established. Thus, the limitations on reproduction in the *Copyright Act* protect insignia of organized crime outlaw groups from duplication, and can stymie law enforcement efforts to diminish the power of the insignia of those groups.

Copyright is a creature of statute, and its statutory rights and remedies are exhaustive.<sup>136</sup>

Section 5 of the *Copyright Act* provides copyright for the expression of ideas in a variety of works.<sup>137</sup> Subsection 3(1) of the *Copyright Act* sets forth the rights of a copyright holder in works:

3. (1) For the purposes of this Act, "copyright", in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof, and includes the sole right
  - (a) to produce, reproduce, perform or publish any translation of the work,
  - ...
  - (e) in the case of any literary, dramatic, musical or artistic work, to reproduce, adapt and publicly present the work as a cinematographic work,
  - (f) in the case of any literary, dramatic, musical or artistic work, to communicate the work to the public by telecommunication,

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<sup>136</sup> *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339 [*CCH Canadian Ltd. v. Law Society of Upper Canada*] at para. 9.

<sup>137</sup> *Copyright Act*, *supra* note 89 at s. 5. Subsection 5(1)(a) states:

5. (1) Subject to this Act, copyright shall subsist in Canada, for the term hereinafter mentioned, in every original literary, dramatic, musical and artistic work if any one of the following conditions is met:

- (a) in the case of any work, whether published or unpublished, including a cinematographic work, the author was, at the date of the making of the work, a citizen or subject of, or a person ordinarily resident in, a treaty country; ....

- (g) to present at a public exhibition, for a purpose other than sale or hire, an artistic work created after June 7, 1988, other than a map, chart or plan,  
...  
and to authorize any such acts.<sup>138</sup>

This subsection prohibits the production and reproduction of a work, or a substantial part of a work, by anyone other than the copyright holder. Law enforcement officials who reproduced a “work”, such as insignia of an organized crime outlaw group, would be “...adding one more unit to the species beyond what existed before.”<sup>139</sup> In doing so, these officials would be *prima facie* infringing subsection 3(1) of the *Copyright Act*. They would also be violating section 27(1) of the *Copyright Act* as only the owner of a copyright may sell, offer for sale, or distribute a copy of a work.<sup>140</sup> And, anyone who distributes infringing copies of a copyrighted work for trade or to prejudicially affect the copyright owner, commits an offence under section 42(1)(c) of the *Copyright Act*.<sup>141</sup>

If the reproduction by law enforcement was made for critique or review in accordance with sections 29.1 of the *Copyright Act*, then mass production and distribution could occur without a violation of the *Copyright Act*. Sections 29.1 and 29.2 require a critique or review to be dealt with fairly and for various attribution requirements to be satisfied:

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<sup>138</sup> *Ibid.* at s. 3(1).

<sup>139</sup> David Vaver, “Need Intellectual Property be Everywhere? Against Ubiquity and Uniformity” (2002) 25 *Dalhousie Law Journal* 1 at 4.

<sup>140</sup> *Copyright Act*, *supra* note 89 at s. 27(1). Subsection 27(1) states:

27. (1) It is an infringement of copyright for any person to do, without the consent of the owner of the copyright, anything that by this Act only the owner of the copyright has the right to do.

<sup>141</sup> *Ibid.* at s. 42(1). Subsection 42(1) states:

42. (1) Every person who knowingly

- (a) makes for sale or rental an infringing copy of a work or other subject-matter in which copyright subsists,
- (b) sells or rents out, or by way of trade exposes or offers for sale or rental, an infringing copy of a work or other subject-matter in which copyright subsists,
- (c) distributes infringing copies of a work or other subject-matter in which copyright subsists, either for the purpose of trade or to such an extent as to affect prejudicially the owner of the copyright,
- (d) by way of trade exhibits in public an infringing copy of a work or other subject-matter in which copyright subsists, or
- (e) imports for sale or rental into Canada any infringing copy of a work or other subject-matter in which copyright subsists  
is guilty of an offence and liable
- (f) on summary conviction, to a fine not exceeding twenty-five thousand dollars or to imprisonment for a term not exceeding six months or to both, or
- (g) on conviction on indictment, to a fine not exceeding one million dollars or to imprisonment for a term not exceeding five years or to both.

29.1 Fair dealing for the purpose of criticism or review does not infringe copyright if the following are mentioned:

- (a) the source; and
- (b) if given in the source, the name of the
  - (i) author, in the case of a work,
  - (ii) performer, in the case of a performer's performance,
  - (iii) maker, in the case of a sound recording, or
  - (iv) broadcaster, in the case of a communication signal.

29.2 Fair dealing for the purpose of news reporting does not infringe copyright if the following are mentioned:

- (a) the source; and
- (b) if given in the source, the name of the
  - (i) author, in the case of a work,
  - (ii) performer, in the case of a performer's performance,
  - (iii) maker, in the case of a sound recording, or
  - (iv) broadcaster, in the case of a communication signal.<sup>142</sup>

However, the Federal Court of Canada has interpreted the concept of review or criticism narrowly. In *Compagnie Générale des Établissements Michelin-Michelin & Cie v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada)*, the Federal Court rejected the argument by the defendants that their use of the work in question was an entirely new work,<sup>143</sup> and that their use was a parody in the form of a criticism,<sup>144</sup> since the defendants did not provide the source of the work, and did not treat the original work in a fair manner.<sup>145</sup> The Federal Court asserted that parody should not be read into the *Copyright Act* as including a form of criticism,<sup>146</sup> However, the Quebec Court of Appeal in *Productions Avanti Ciné-Vidéo Inc. c. Favreau*,<sup>147</sup> has asserted that parody may have criticism as one of its purposes.<sup>148</sup> Thus, law enforcement could reproduce organized crime outlaw group insignia for criticism if they do so fairly and provide sources, but they

<sup>142</sup> *Ibid.* at ss. 29.1 and 29.2.

<sup>143</sup> *Compagnie Générale des Établissements Michelin-Michelin & Cie v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada)*, *supra* note 132 at paras. 57-58.

<sup>144</sup> *Ibid.* at paras. 61-63.

<sup>145</sup> *Ibid.* at paras. 8, 10, 11 and 69-70. The leaflet distributed by the defendant to Michelin workers depicted the Michelin Man or "Bibendum" with his foot raised in such a fashion as to imply that he would crush an unsuspecting Michelin worker, and contained text relating to workers losing their jobs without unionizing. An information bulletin and an information brochure distributed by the defendant displayed the word "Michelin."

<sup>146</sup> *Ibid.* at para. 66.

<sup>147</sup> 1999 CarswellQue 2742.

<sup>148</sup> *Ibid.* at para. 12. The Court stated:

12 Parody normally involves the humorous imitation of the work of another writer, often exaggerated, for purposes of criticism or comment. Appropriation of the work of another writer to exploit its popular success for commercial purposes is quite a different thing.

should avoid using parodies of works in any reproductions.

In addition to considering the nature of criticism in relation to a reproduction, courts have considered other factors in relation to the fair dealing exception. The Supreme Court of Canada in *CCH Canadian Ltd. v. Law Society of Upper Canada*<sup>149</sup> set forth a number of factors for courts to consider: the purpose of the dealing; the character of the dealing; the amount of the dealing; alternatives to the dealing; the nature of the work; and the effect of the dealing on the work.<sup>150</sup> The Court characterized the fair dealing exception in the *Copyright Act* as a right of the user,<sup>151</sup> but asserted that the exception or right must not be interpreted restrictively – a balance must exist between the rights of a copyright owner, and the interests of a user.<sup>152</sup>

Some of the factors enunciated in *CCH Canadian Ltd. v. Law Society of Upper Canada*, regarding the fair dealing exception apply to the use by law enforcement of a copyrighted work of an organized crime outlaw group, and seem to lead to the following conclusions: widely distributed, multiple copies of works tend to be unfair; a significant or large amount of material taken from a work contributes to unfairness; and, dealing with the work in a manner that likely competes within the market of the work, suggests unfairness. Thus, mass distribution by law enforcement of the trade-marks of organized crime outlaw groups might lead a court to conclude that the dealing with the gang work by law enforcement was unfair in a number of circumstances. For instance, it may be unfair if law enforcement did so *in an attempt to diminish the power of the mark*, or if the criticism of the work by law enforcement was in a public advertisement or during illegal commercial dealings in the same trade area as a gang *in order to negatively affect their reputation*. Mass distribution of the trade-marks of organized crime outlaw groups would require a large amount of the work being used or reproduced, and the dealing would purposely tried to undermine the reputation of the work. While there may exist a significant public interest in decreasing the power of organized crime

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<sup>149</sup> *CCH Canadian Ltd. v. Law Society of Upper Canada*, *supra* note 136. Notably, the Supreme Court of Canada in *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36, [2012] S.C.J. No. 36 (Q.L.) upheld and applied the test set for in *CCH Canadian Ltd. v. Law Society of Upper Canada*.

<sup>150</sup> *CCH Canadian Ltd. v. Law Society of Upper Canada*, *supra* note 136 at paras. 53-59.

<sup>151</sup> *Ibid.* at para. 48.

<sup>152</sup> *Ibid.*

outlaw groups and their insignia, the impact on the holder of the right is very significant and deleterious.

#### 4.7.8 Amendments to Trade-mark and Copyright Laws in Order to Diminish or Tarnish the Power of Gang or Organized Crime Outlaw Group Marks

The American legal efforts in *Rivera v. Carter*, past legal attempts in Canada, and potential legal pursuits, to ruin or diminish the power of the patch, necessitate a critique and re-evaluation of the legal tools that trade-mark laws provide for law enforcement agencies in Canada. Provisions within the *Trade-marks Act* and *Copyright Act*, as they presently exist, and amendments to some of these provisions, may prove useful in attempts to dismantle statutory protection for the marks of organized crime outlaw groups, and in attempts to dilute or diminish the violent and powerful reputation associated with their names and insignia. This sub-subsection recommends ways in which trade-mark and copyright laws can combat organized crime.

##### 4.7.8.1 Governmental Trade-mark Registration of Unregistered Gang or Organized Crime Outlaw Group Insignia<sup>153</sup>

While some organized crime outlaw groups have registered their names or insignia under the *Trade-marks Act* in Canada, or in accordance with related statutory provisions in other countries, others have not, and may have no or fewer common law trade-mark rights. As the discussion to this point has shown, organized crime outlaw groups which have not registered, perhaps ought to do so. The government of Canada, or its police agencies, could seek to register the unregistered and unprotected marks used by organized crime outlaw groups, in order to establish ownership and the right to use that insignia, and in order to control the reputation of that name and insignia.

The Supreme Court of Canada in *Masterpiece Inc. v. Alavida Lifestyles Inc.*<sup>154</sup> has held that “[r]egistration itself does not confer priority of title to a trade-mark.”<sup>155</sup> While the party

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<sup>153</sup> This idea of governmental registration of unregistered gang marks, originated from Professor Graham Reynolds, Schulich School of Law, Dalhousie Law School.

seeking to register an unregistered trade-mark must advertise its intention,<sup>156</sup> registration of an unregistered mark would only become an issue and be subject to judicial review if the user of an unregistered mark opposed the registration pursuant to section 38 of the *Trade-marks Act*.<sup>157</sup> Registration without challenge by an unregistered user, could confer rights in an unregistered trade-mark even if it had been used by another party.

In addition to potential problems posed by section 38 of the *Trade-marks Act*, section 30 of the *Trade-marks Act* presents a hurdle for governmental registration of unregistered mark in that it requires declarations by the applicant regarding the applicant's prior use of the mark that it proposes to register, and regarding a belief that it has the right to do so:

30. An applicant for the registration of a trade-mark shall file with the Registrar an application containing

(a) a statement in ordinary commercial terms of the specific wares or services in association with which the mark has been or is proposed to be used;

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<sup>154</sup> 2011 SCC 27, [2011] 2 S.C.R. 387.

<sup>155</sup> *Ibid.* at para. 35.

<sup>156</sup> Section 16 of the *Trade-marks Act*, *supra* note 88, sets forth the advertising requirements:

16. Every advertisement of an application published pursuant to subsection 37(1) of the Act shall set out

- (a) the trade-mark claimed;
- (b) a note of any disclaimer;
- (c) the name and address of the applicant and the representative for service, if any;
- (d) the application number;
- (e) the date of filing of the application and the date of priority claimed pursuant to section 34 of the Act, if any;
- (f) a summary of the information filed by the applicant pursuant to paragraphs 30(a) to (d) and (g) of the Act;
- (g) in the case of an application for a proposed trade-mark, a certification mark or a distinguishing guise, a note to that effect;
- (h) where the benefit of subsection 12(2) or section 14 of the Act is claimed, a note to that effect;
- (i) the particulars of any territorial restriction applicable pursuant to subsection 32(2) of the Act; and
- (j) the particulars of any translation or transliteration furnished to the Registrar in accordance with paragraph 29(a) or (b).

<sup>157</sup> Section 38 of the *Trade-marks Act*, *supra* note 88, allows for opposition to the registration of a trade-mark:

38. (1) Within two months after the advertisement of an application for the registration of a trade-mark, any person may, on payment of the prescribed fee, file a statement of opposition with the Registrar.

(2) A statement of opposition may be based on any of the following grounds:

- (a) that the application does not conform to the requirements of section 30;
- (b) that the trade-mark is not registrable;
- (c) that the applicant is not the person entitled to registration of the trade-mark; or
- (d) that the trade-mark is not distinctive. [Emphasis added].

(b) in the case of a trade-mark that has been used in Canada, the date from which the applicant or his named predecessors in title, if any, have so used the trade-mark in association with each of the general classes of wares or services described in the application;

(c) in the case of a trade-mark that has not been used in Canada but is made known in Canada, the name of a country of the Union in which it has been used by the applicant or his named predecessors in title, if any, and the date from and the manner in which the applicant or named predecessors in title have made it known in Canada in association with each of the general classes of wares or services described in the application;

(d) in the case of a trade-mark that is the subject in or for another country of the Union of a registration or an application for registration by the applicant or the applicant's named predecessor in title on which the applicant bases the applicant's right to registration, particulars of the application or registration and, if the trade-mark has neither been used in Canada nor made known in Canada, the name of a country in which the trade-mark has been used by the applicant or the applicant's named predecessor in title, if any, in association with each of the general classes of wares or services described in the application;

(e) *in the case of a proposed trade-mark, a statement that the applicant, by itself or through a licensee, or by itself and through a licensee, intends to use the trade-mark in Canada;*

...  
(i) *a statement that the applicant is satisfied that he is entitled to use the trade-mark in Canada in association with the wares or services described in the application.*<sup>158</sup> [Emphasis added].

If a governmental body or agency has not used a mark that it intends to register in Canada, and is aware that another party has used or is using the mark in Canada or another country, section 30 may present some difficulty. Sections 30 and 38 of the *Trade-marks Act*, these sections may have to be amended in order to permit the government of Canada, or its police agencies, to register an unregistered trade-mark without potentially violating these requirements of these provisions.

Once any registration is successful, the government of Canada or its police agencies could not be idle owners. They may have to use the marks in order to build up a new reputation that symbolizes the mark; to dilute or tarnish the existing reputation; and to gain the benefits or protections afforded by statutory laws and common law regarding trade-marks, such as

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<sup>158</sup> *Trade-marks Act*, *supra* note 88 at s. 30.

prohibitions against confusing marks, depreciation of goodwill and passing off. Law enforcement could use those marks in ways that did not accord with the violent and intimidating nature of the organized crime outlaw group, such as by mass distribution for ordinary non-violent persons to wear the marks; by using the mark to portray being in the group in a negative fashion; or by using the mark to advertise the power of the police in their anti-organized crime initiatives. Any use of an unregistered and unprotected mark by any one other than a member of the organized crime outlaw group, and in particular, use by law enforcement if the government registered that mark, would diminish the power of the patch. Thus, a mark associated with violence and used in criminal activities, could be diluted and tarnished, or its goodwill depreciated.

#### 4.7.8.2 The Expansion of “Offensive” and “Scandalous” Marks in Section 9 of the *Trade-marks Act*

In conjunction, subsections 9(1)(j) and 12(1)(e) of the *Trade-marks Act* prohibit the registration of offensive marks:

9. (1) No person shall adopt in connection with a business, as a trade-mark or otherwise, any mark consisting of, or so nearly resembling as to be likely to be mistaken for,

...  
(j) any scandalous, obscene or immoral word or device;

...  
12. (1) Subject to section 13, a trade-mark is registrable if it is not

...  
(e) a mark of which the adoption is prohibited by section 9 or 10; ....<sup>159</sup>

To date, courts seem not to have interpreted the term “scandalous” to include or in relation to criminal activity or offences.<sup>160</sup> The reference to nudity in a MISS NUDE UNIVERSE beauty pageant was not considered scandalous or immoral.<sup>161</sup> The definition likely must extend beyond innuendo or distastefulness, and into offensiveness. Unclear, is whether it includes illegality. The *Oxford Dictionary* defines “scandalous” as:

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<sup>159</sup> *Trade-marks Act*, *supra* note 88 at ss. 9(1)(j) and 12(1)(e).

<sup>160</sup> Research for this thesis could not reveal any case law in Canada that interpreted “scandalous” as including criminal activity or that interpreted “scandalous” in relation to criminal activity.

<sup>161</sup> *Bohna v. Miss Universe, Inc.* (1992) 43 C.P.R. (3d) 462, [1992] 3 F.C. 682 (F.C.) at para. 14, rev'd on other grounds (1994) 58 C.P.R. (3d) 381, [1995] 1 F.C. 614 (F.C.A.).

**adjective 1** causing general public outrage by a perceived offence against morality or law. **2** (of a state of affairs) disgracefully bad.<sup>162</sup>

However, a violation of “law” as set forth in this dictionary definition remains vague in the context of trade-mark law. It does not necessarily include a violation of the *criminal* law, and thus, a mark associated with criminal activity or that is used in the commission of a criminal offence, will not, with certainty, be considered “scandalous.” In addition, while many criminal offences may amount to scandals or may be publicly perceived as scandalous, other criminal offences may not.

Generally speaking, *Criminal Code* offences attempt to enshrine social mores, values and norms – that is to say, they attempt to codify some sense of morality into criminal laws. As the dictionary definition above notes, the term “scandalous” implies the presence of moral judgment within the *Trade-marks Act*. It remains far from analogous or synonymous with the term “criminal.” However, the presence of a prohibition of registration based on moral judgment in the *Trade-marks Act*, supports an argument for amending sub-section 9(1)(j), or 9(1) in order to prevent the registration of insignia of organized crime outlaw groups where that insignia is used to facilitate criminal activities – or rather, where it is used to facilitate offences against legislated morality. Subsection 9(1)(j) or section 9(1) could be interpreted by courts having the requisite jurisdiction to include in their prohibitions the registration of a mark that has been used by a member of an organized crime outlaw group in connection with a criminal offence, such as an offence committed in violation of the *Criminal Code*<sup>163</sup> or the *Controlled Drugs and Substances Act*.<sup>164</sup> The connection could be found by any court having the requisite jurisdiction to hear offences under the *Criminal Code* or the *Controlled Drugs and Substances Act*, or perhaps by any court having the requisite jurisdiction to resolve trade-mark disputes. Such amendment would remove the uncertainty within the definition of “scandalous” in relation to marks of organized crime outlaw groups.

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<sup>162</sup> *Oxford Dictionaries* (2009) online: AskOxford.com  
<[http://www.askoxford.com:80/concise\\_oed/outlaw?view=uk](http://www.askoxford.com:80/concise_oed/outlaw?view=uk)>.

<sup>163</sup> *Criminal Code*, *supra* note 12.

<sup>164</sup> S.C. 1996, c. 19 [*Controlled Drugs and Substances Act*].

The inability to register a mark used in connection with a criminal organization offence pursuant to section 9(1)(j) would ensure that insignia of organized crime outlaw groups would not receive protection in the commercial realm to commit offences in the non-commercial or criminal realm. However, registration of a mark may occur before the group has built its reputation or used its mark in connection with a criminal offence. Therefore, amendments to the *Trade-marks Act* must also ensure that a trade-mark can be expunged if it has been used in connection with a criminal offence, such as an offence under the *Criminal Code* or the *Controlled Drugs and Substances Act*.

#### 4.7.8.3 Stringent Proof of Purposes of a Mark in Section 30 of the *Trade-marks Act*

In conjunction, subsections 30(a) and 37(1)(a) of the *Trade-marks Act* require the registrant of a mark to complete a statement of purpose:

30. An applicant for the registration of a trade-mark shall file with the Registrar an application containing

(a) a statement in ordinary commercial terms of the specific wares or services in association with which the mark has been or is proposed to be used;

...

37. (1) The Registrar shall refuse an application for the registration of a trade-mark if he is satisfied that

(a) the application does not conform to the requirements of section 30, ....<sup>165</sup>

However, provided that this statement is obtained or given,<sup>166</sup> the *Trade-marks Act* does not make provision for an investigation or substantiation of this purpose. In order to prevent, or more strictly regulate, the use of marks by gangs to facilitate criminal activities, the *Trade-marks Act* could require more stringent statements of purpose regarding the commercial use of a mark. It could also require subsequent proof thereof. Such proof could be business records of sales or commercial transactions made using the mark, or evidence of advertising services that marketed the specific wares or services in association with the mark. Organized crime outlaw groups would not likely state illegal purposes on their statement of purpose, but they may have difficulties providing proof of a legitimate purpose and would not be able to register their marks.

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<sup>165</sup> *Trade-marks Act*, *supra* note 88 at ss. 30(a) and 37(1)(a).

<sup>166</sup> *Ibid.* at s. 37(1)(a).

Notably, even if an organized crime outlaw group registered its mark and provided a statement of purpose under subsection 30(a), section 49 of the *Trade-marks Act* still protects that mark if it is used for a different purpose, and section 49 does not prevent a change in purpose.

49. If a mark is used by a person as a trade-mark for any of the purposes or in any of the manners mentioned in the definition of “certification mark” or “trade-mark” in section 2, it shall not be held invalid merely on the ground that the person or a predecessor in title uses it or has used it for any other of those purposes or in any other of those manners.<sup>167</sup>

An amendment to section 49 could require registrants to provide an amended statement of purpose within a particular time frame in order to ensure that an organized crime outlaw group cannot specify an initial purpose, and then use its insignia for a different and illegal purpose.

#### 4.7.8.4 Limitations on Renewal of Registration in Section 46 of the *Trade-marks Act*

Section 46 of the *Trade-marks Act* sets forth the renewal procedures and times:

46. (1) The registration of a trade-mark that is on the register by virtue of this Act is subject to renewal within a period of fifteen years from the day of the registration or last renewal.

(2) If the registration of a trade-mark has been on the register without renewal for the period specified in subsection (1), the Registrar shall send a notice to the registered owner and to the registered owner’s representative for service, if any, stating that if within six months after the date of the notice the prescribed renewal fee is not paid, the registration will be expunged. ...<sup>168</sup>

Section 46 could require that registrants provide a new or affirming statement of purpose at the time of renewal, and could also require proof of the use of the mark from the time of its registration to the time of its renewal. Although section 46 presently does not contain any such requirement, this amendment may deter organized crime outlaw groups from renewing a trade-mark for their group insignia if they cannot prove a legal purpose, and if an illegal purpose exists.

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<sup>167</sup> *Ibid.* at s. 49.

<sup>168</sup> *Ibid.* at ss. 46(1) and (2).

#### 4.7.8.5 Forfeiture of a Trade-mark and Expunging a Trade-mark Used in a Criminal Offence

In some criminal proceedings where a person is convicted of an indictable offence, pursuant to section 490.1 of the *Criminal Code*,<sup>169</sup> and the related and almost identical section 16 of the *Controlled Drugs and Substances Act*,<sup>170</sup> a court that is satisfied on a balance of probabilities that items bearing trade-marks were offence-related, or that the offence was committed in relation to those items bearing trade-marks, may order those items bearing trademarks to be forfeited to Her Majesty the Queen, and to be disposed of by a designated official. Specifically, subsections 490.1(1) to (2.1) state:

490.1 (1) Subject to sections 490.3 to 490.41, if a person is convicted of an indictable offence under this Act or the *Corruption of Foreign Public Officials Act* and, on application of the Attorney General, *the court is satisfied, on a balance of probabilities, that any property is offence-related property and that the offence was committed in relation to that property, the court shall*

- (a) where the prosecution of the offence was commenced at the instance of the government of a province and conducted by or on behalf of that government, *order that the property be forfeited to Her Majesty in right of that province*

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<sup>169</sup> *Criminal Code*, *supra* note 12 at s. 490.1. Quotation of *Criminal Code* subsections 490.1(1) to (2.1), *infra* note 175.

<sup>170</sup> *Controlled Drugs and Substances Act*, *supra* note 164 at s. 16. Subsections 16(1) to (2.1) state:

16. (1) Subject to sections 18 to 19.1, where a person is convicted of a designated substance offence and, on application of the Attorney General, the court is satisfied, on a balance of probabilities, that any property is offence-related property and that the offence was committed in relation to that property, the court shall

- (a) in the case of a substance included in Schedule VI, order that the substance be forfeited to Her Majesty in right of Canada and disposed of by the Minister as the Minister thinks fit; and
- (b) in the case of any other offence-related property,

- (i) where the prosecution of the offence was commenced at the instance of the government of a province and conducted by or on behalf of that government, order that the property be forfeited to Her Majesty in right of that province and disposed of by the Attorney General or Solicitor General of that province in accordance with the law, and

- (ii) in any other case, order that the property be forfeited to Her Majesty in right of Canada and disposed of by such member of the Queen's Privy Council for Canada as may be designated for the purposes of this subparagraph in accordance with the law.

(2) Subject to sections 18 to 19.1, where the evidence does not establish to the satisfaction of the court that the designated substance offence of which a person has been convicted was committed in relation to property in respect of which an order of forfeiture would otherwise be made under subsection (1) but the court is satisfied, beyond a reasonable doubt, that that property is offence-related property, the court may make an order of forfeiture under subsection (1) in relation to that property.

(2.1) An order may be issued under this section in respect of property situated outside Canada, with any modifications that the circumstances require. ...

*and disposed of by the Attorney General or Solicitor General of that province in accordance with the law; and*

- (b) in any other case, order that the property be forfeited to Her Majesty in right of Canada and disposed of by the member of the Queen's Privy Council for Canada that may be designated for the purpose of this paragraph in accordance with the law.

...

(2) Subject to sections 490.3 to 490.41, if the evidence does not establish to the satisfaction of the court that the indictable offence under this Act or the *Corruption of Foreign Public Officials Act* of which a person has been convicted was committed in relation to property in respect of which an order of forfeiture would otherwise be made under subsection (1) *but the court is satisfied, beyond a reasonable doubt, that the property is offence-related property, the court may make an order of forfeiture under subsection (1) in relation to that property.*

(2.1) An order may be issued under this section in respect of property situated outside Canada, with any modifications that the circumstances require.<sup>171</sup> [Emphasis added].

These provisions enable the Crown to seek forfeiture of property, such as items bearing insignia of an organized crime outlaw group, that were seized by the police in an investigation, and perhaps, even property of a group that was not seized by the police during an investigation. It does not specify that the property need be tangible property, such as rights to a trade-mark. Ideally, in order to facilitate forfeiture of property used in connection with criminal organization offences, offence-related property in these forfeiture sections would be amended to include both tangible and intangible property so that forfeiture may occur in relation to the rights in the mark or work themselves, rather than simply items bearing the mark or the work.

In *Regina v. Hells Angels Motorcycle Corp.*,<sup>172</sup> the Crown applied to the Ontario Superior Court of Justice for forfeiture of personal property of convicted members of the Hells Angels Motorcycle Corporation on the basis that the property was "offence-related property"<sup>173</sup>

<sup>171</sup> *Criminal Code*, *supra* note 12 at ss. 490.1(1), (2) and (2.1).

<sup>172</sup> [2009] O.J. No. 3503 (Ont. S.C.J.) [*R. v. Hells Angels Motorcycle Corp.*].

<sup>173</sup> *Controlled Drugs and Substances Act*, *supra* note 164 at s. 2. Section 2 states:

2. (1) In this Act,

...

"offence-related property" means, with the exception of a controlled substance, any property, within or outside Canada,

- (a) by means of or in respect of which a designated substance offence is committed,
- (b) that is used in any manner in connection with the commission of a designated substance offence, or
- (c) that is intended for use for the purpose of committing a designated substance offence; ....

under section 490.1(2) of the *Criminal Code*, and related section 16(2) of the *Controlled Drugs and Substances Act*.<sup>174</sup> Pursuant to the *Criminal Code*, "offence-related property" means the following:

2. In this Act,

...

"offence-related property" means any property, within or outside Canada,

(a) by means or in respect of which an indictable offence under this Act or the *Corruption of Foreign Public Officials Act* is committed,

(b) that is used in any manner in connection with the commission of such an offence, or

(c) that is intended to be used for committing such an offence; ....<sup>175</sup>

This property included items, such as clothing and jewelry, that had the trade-marked symbols of the Hells Angels on them.<sup>176</sup> The Crown in *Regina v. Hells Angels Motorcycle Corp.* conceded that the property was not used at the moment that the offences for which the accused were convicted, occurred.<sup>177</sup>

The trial judge in the case, the Honourable Justice McMahon, had convicted some of the individuals charged with predicate offences in the indictment (that is to say, offences which underlay the other criminal organization charges). In addition, the trial judge had found that Hells Angels chapters in Canada constituted a criminal organization under section 467.1(1) of the *Criminal Code*. Section 467.1 of the *Criminal Code* contains a rather complicated definition that renders proof of a criminal organization quite difficult:

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

<sup>174</sup> *R. v. Hells Angels Motorcycle Corp.*, *supra* note 172 at paras. 1-2.

<sup>175</sup> *Criminal Code*, *supra* note 12 at ss. 2(a)-(c).

<sup>176</sup> *R. v. Hells Angels Motorcycle Corp.*, *supra* note 172 at paras. 1 and 23.

<sup>177</sup> *Ibid.* at para. 7.

more, or another offence that is prescribed by regulation.<sup>178</sup>

Section 467.1 does not criminalize the act of being in a criminal organization, nor does it criminalize being a criminal organization. Individuals who are members or associates of a criminal organization, as defined in section 467.1, must commit offences in connection with that organization in order to be convicted of an offence. The Honourable Judge McMahon had indeed found that some of the individuals charged had committed the predicate offences in connection with a criminal organization offences contrary to section 467.12 of the *Criminal Code* which prohibits the commission of an indictable offence "...for the benefit of, at the direction of, or in association with, a criminal organization..."<sup>179</sup>

Subsequent to the trial, in the forfeiture application, the Ontario Superior Court of Justice held that the items which bore the Hells Angel death head logo were "offence-related property", and were "intended to be used" for the commission of indictable offences:

**23** Are these items of clothing and jewellery, bearing the death head logo "offence-related property"? I find that these items are in a broad sense, "intended to be used" for the commission of indictable offences. Hells Angels chapters in Canada comprise a criminal organization of which one of the "main purposes is the facilitation or commission of serious offences including trafficking in cocaine and other drugs, extortion and trafficking in firearms". McMahon J. stated in his decision of *R. v. Ward*, as follows at paragraph 97:

Based on the evidence of Mr. Gault and Detective Sergeant Davis, and the words of Mr. Ward himself I am satisfied beyond a reasonable doubt that the Hells Angels Motorcycle Club of Canada is a criminal organization as defined by section 467.1(1) of the *Criminal Code*. I am satisfied beyond a reasonable doubt that one of the main purposes or activities of the Hells Angels Motorcycle Club in Canada is the facilitation or commission of serious offences including trafficking in cocaine and other drugs, extortion and trafficking in firearms. Further, I am satisfied that the facilitation of these offences has resulted in the direct and indirect receipt of material benefit by the Hells Angels Motorcycle Club and individual Hells Angels Motorcycle Club members who have benefited.

**24** The use of these items is intended to further the organizational purposes. It is

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<sup>178</sup> *Criminal Code*, *supra* note 12 at s. 467.1.

<sup>179</sup> *R. v. Hells Angels Motorcycle Corp.*, *supra* note 172 at para. 10. Section 467.12 of the *Criminal Code*, *supra* note 12, states:

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.

(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.

used to intimidate and extort, and to serve as a badge of trustworthiness in the conduct of drug deals. It matters not, that at the precise moment of extortion, the trademark is not displayed, or that the person actually handling drugs does not wear the item. Persons at the upper levels of the Hells Angel's hierarchy ensure that lower level associates do the dirty work.<sup>180</sup>

As a result of this determination, the Ontario Superior Court of Justice held that the property should not be returned to the Hells Angels corporation<sup>181</sup> pursuant to subsection 490.4(3) of the *Criminal Code*,<sup>182</sup> and related subsection 19(3) of the *Controlled Drugs and Substances Act*.<sup>183</sup> Both of these subsections allow for the restoration of property if the applicant person has an entitlement or right to the property, or "...appears innocent of any complicity in, or collusion in relation to, the offence."<sup>184</sup>

The *Trade-marks Act* could be amended so as to empower the Registrar of the Register of Trade-marks to expunge a registered trade-mark of an organized crime outlaw group if a court has ordered the forfeiture of items bearing that trade-mark based on a finding that they

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<sup>180</sup> *R. v Hells Angels Motorcycle Corp.*, *supra* note 172 at paras. 23 and 24.

<sup>181</sup> *Ibid.* at paras. 27-30.

<sup>182</sup> *Criminal Code*, *supra* note 12 at s. 490.4. Subsections 490.4(1) and (3) state:

490.4 (1) Before making an order under subsection 490.1(1) or 490.2(2) in relation to any property, a court shall require notice in accordance with subsection (2) to be given to, and may hear, any person who, in the opinion of the court, appears to have a valid interest in the property.

...

(3) A court may order that all or part of the property that would otherwise be forfeited under subsection 490.1(1) or 490.2(2) be returned to a person - other than a person who was charged with an indictable offence under this Act or the *Corruption of Foreign Public Officials Act* or a person who acquired title to or a right of possession of the property from such a person under circumstances that give rise to a reasonable inference that the title or right was transferred for the purpose of avoiding the forfeiture of the property - if the court is satisfied that the person is the lawful owner or is lawfully entitled to possession of all or part of that property, and that the person appears innocent of any complicity in, or collusion in relation to, the offence.

<sup>183</sup> *Controlled Drugs and Substances Act*, *supra* note 164 at s. 19(3). Subsections 19(1) and (3) state:

19. (1) Before making an order under subsection 16(1) or 17(2) in relation to any property, a court shall require notice in accordance with subsection (2) to be given to, and may hear, any person who, in the opinion of the court, appears to have a valid interest in the property.

...

(3) Where a court is satisfied that any person, other than

(a) a person who was charged with a designated substance offence, or

(b) a person who acquired title to or a right of possession of the property from a person referred to in paragraph (a) under circumstances that give rise to a reasonable inference that the title or right was transferred for the purpose of avoiding the forfeiture of the property,

is the lawful owner or is lawfully entitled to possession of any property or any part of any property that would otherwise be forfeited pursuant to an order made under subsection 16(1) or 17(2) and that the person appears innocent of any complicity in an offence referred to in paragraph (a) or of any collusion in relation to such an offence, the court may order that the property or part be returned to that person.

<sup>184</sup> *Criminal Code*, *supra* note 12 at s. 490.4(3).

are offence-related property. Presently in the *Trade-marks Act*, the Registrar has the power to expunge. However, such power is discretionary rather than mandatory. Sections 43 and 44 of the *Trade-marks Act* empower the Registrar to expunge the registration of trade-marks if a registered owner of a trade-mark does not provide representations or information required on an application for registration.<sup>185</sup> And, section 46 of the *Trade-marks Act* empowers the Registrar to expunge registration if a registered owner does not pay the prescribed renewal fee.<sup>186</sup> The proposed amendment would expand this pre-existing power to expunge based on orders of forfeiture.

The addition of such a provision or amendment could mean that if forfeiture were ordered in one jurisdiction in Canada, for instance by a provincial or superior court in one province, then a trade-mark would be expunged across Canada by the Registrar of the Register of Trade-marks. Thus, all members of an organized crime outlaw group would lose their power based on the illegal actions of one member. The American case of *Rivera v. Carter*<sup>187</sup> demonstrates a concern by the judiciary to limit the rights of the collective based on the actions of the few. However, a statutory provision in the Canadian *Trade-marks Act* could alleviate this concern by relying on the evidentiary requirement within the forfeiture sections of the *Criminal Code* to prove a connection between the offence and the trade-mark, or by containing the evidentiary requirements within the criminal organization provisions that mandate proof of a connection between the offence and the criminal organization<sup>188</sup> which is the trade-mark owner. Organized crime outlaw groups would have notice that if they provide their name and insignia to members, then they suffer the consequences of the actions of those members who use the name and insignia for illegal purposes.

#### 4.7.8.6 Expropriation by the Government of a Registered Trade-mark Used in a Criminal Offence<sup>189</sup>

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<sup>185</sup> *Trade-marks Act*, *supra* note 88 at ss. 43 and 44(1) and (3).

<sup>186</sup> *Ibid.* at ss. 46(1)-(3).

<sup>187</sup> *Rivera v. Carter*, *supra* note 7.

<sup>188</sup> *Criminal Code*, *supra* note 12 at ss. 467.12 and 467.13.

<sup>189</sup> This idea of expropriation of a registered trade-mark of a gang into the name of the government, originated from Professor Graham Reynolds, Schulich School of Law, Dalhousie Law School.

The *Trade-marks Act* could be amended to empower the Government of Canada, a province, or a territory, to expropriate a trade-mark if that trade-mark has facilitated or been used in connection with a *Criminal Code* or the *Controlled Drugs and Substances Act* offence; or if the trade-mark is found to be offence-related property. In addition, section 9 of the *Trade-marks Act* which prohibits the adoption and commercial exploitation of a number of predominantly public or governmental marks,<sup>190</sup> could be amended to prohibit the adoption or commercial exploitation of registered trade-marks that have been expropriated by the Government of Canada, a province, or a territory. A power of expropriation could exist separately from the power to expunge so as to allow the Government of Canada to control and prohibit the use of trade-marks in the event that the Registrar of the Register of Trade-marks did not exercise its power to expunge a trade-mark. Further, a power of expropriation would enable the Government of Canada to assume the rights in the mark or work themselves, rather than simply assume control over items bearing the mark or the work that had been ordered forfeited.

As noted above, subsection 490.4(3) of the *Criminal Code* and subsection 19(3) of the *Controlled Drugs and Substances Act*<sup>191</sup> allow for the restoration of property if the applicant person has an entitlement or right to the property, and has not participated in the offence relating to the seizure of the property. If the *Trade-marks Act* allowed the government or a governmental agency, to expropriate trade-marks, then the “lawful owner” of the insignia of any organized crime outlaw group, and arguably any items bearing that group insignia, would be the government or its agency. Thus, expropriation could prevent these groups from applying pursuant to sub-section 490.4 of the *Criminal Code*, for the return of property bearing their insignia.

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<sup>190</sup> *Trade-marks Act*, *supra* note 88 at s. 9(1); and *Canadian Olympic Association v Registrar of Trade Marks* (1982), 59 C.P.R. (2d) 53, [1982] 2 F.C. 274 (F.C.) at para 3. Section 9(1) prohibits the adoption of approximately 21 types of marks many of which relate to marks associated with governments or nations.

<sup>191</sup> *Criminal Code*, *supra* note 12 at s. 490.4(3) and *Controlled Drugs and Substances Act*, *supra* note 164 at s. 19(3).

#### 4.7.8.7 Mass Distribution of a Trade-mark<sup>192</sup>

The power of organized crime outlaw groups results, in part, from the association of a reputation for violence and intimidation with the group name or its insignia. Organized crime outlaw groups often allow only members to use the group name and wear the group insignia, in order to ensure that the group reputation perpetuates in accordance with group values, beliefs and behaviours. One way to diminish the power of the insignia of an organized crime outlaw group is to dilute it through mass production and distribution to individuals who will wear or use the insignia in ways that discord with the group's reputation for violence and intimidation. Indeed, the statutory protection for trade-mark owners under the *Trade-marks Act* in Canada, and the statutory provisions prohibiting dilution in the United States, demonstrate a recognition of the power of insignia within commercial settings, and the ability of non-owners to deteriorate or diminish this power.

If the *Trade-marks Act* and *Copyright Act* were amended to allow for expropriation of a registered trade-mark or copyright work by the government, then the legal difficulties evidenced in *Compagnie Générale des Établissements Michelin-Michelin & Cie v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada)*, regarding reproduction and parody would not exist. With expropriation provisions, law enforcement officials could disseminate insignia of an organized crime outlaw group in various forms en masse in an effort to dilute, and subsequently tarnish or blur, the reputation associated with that group's name and insignia.

If the *Trade-marks Act* or *Copyright Act* were *not* amended to allow for expropriation of a registered trade-mark by the government, then law enforcement officials could engage in mass distribution of the insignia of an organized crime outlaw group under the protection of section 25.1 of the *Criminal Code*. In order to ensure that officers can effectively enforce the law,<sup>193</sup> section 25.1 justifies acts or omissions of public officers, such as peace officers, who commit "offences" while enforcing the law, or while investigating a criminal offence or activity. Section 25.1 has restrictions. It does *not* empower officers to cause death or bodily

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<sup>192</sup> The development of the ideas pertaining to trade-mark and copyright issues within mass distribution of gang marks, came from Professor Graham Reynolds, Schulich School of Law, Dalhousie Law School.

<sup>193</sup> *Criminal Code*, *supra* note 12 at s. 25.1(2).

harm, to obstruct justice, or to violate the sexual integrity of an individual.<sup>194</sup> It does not excuse an officer from criminal liability associated with the illegal collection of evidence,<sup>195</sup> or associated with a violation of Part I of the *Controlled Drugs and Substances Act* and its regulations.<sup>196</sup> Subsection 25.1(8) and (9) state the requisite circumstances for justification for the commission of an offence:

- (8) A public officer is justified in committing an act or omission - or in directing the commission of an act or omission under subsection (10) - that would otherwise constitute an offence if the public officer
- (a) is engaged in the investigation of an offence under, or the enforcement of, an Act of Parliament or in the investigation of criminal activity;
  - (b) is designated under subsection (3) or (6); and
  - (c) believes on reasonable grounds that the commission of the act or omission, as compared to the nature of the offence or criminal activity being investigated, is reasonable and proportional in the circumstances, having regard to such matters as the nature of the act or omission, the nature of the investigation and the reasonable availability of other means for carrying out the public officer's law enforcement duties.
- (9) No public officer is justified in committing an act or omission that would otherwise constitute an offence and that would be likely to result in loss of or serious damage to property, or in directing the commission of an act or omission under subsection (10), unless, in addition to meeting the conditions set out in paragraphs (8)(a) to (c), he or she
- (a) is personally authorized in writing to commit the act or omission - or direct its commission - by a senior official who believes on reasonable grounds that committing the act or omission, as compared to the nature of the offence or criminal activity being investigated, is reasonable and proportional in the circumstances, having regard to such matters as the nature of the act or omission, the nature of the investigation and the reasonable availability of other means for carrying out the public officer's law enforcement duties; or
  - (b) believes on reasonable grounds that the grounds for obtaining an authorization under paragraph (a) exist but it is not feasible in the circumstances to obtain the authorization and that the act or omission is necessary to
    - (i) preserve the life or safety of any person,
    - (ii) prevent the compromise of the identity of a public officer acting in an undercover capacity, of a confidential informant or of a person acting covertly under the direction and control of a public officer, or
    - (iii) prevent the imminent loss or destruction of evidence of an indictable offence.<sup>197</sup>

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<sup>194</sup> *Ibid.* at s. 25.1(11).

<sup>195</sup> *Ibid.* at s. 25.1(13).

<sup>196</sup> *Ibid.* at s. 25.1(14).

<sup>197</sup> *Ibid.* at s. 25.1(8) and (9).

Section 25.1 does not specifically mention the kinds of “offences” that it contemplates, nor does it circumscribe the definition of “offences.” However, ideally, subsections 25.1(8) and (9) of the *Criminal Code* would be amended in order to explicitly provide authority to public officers to commit infringements or violations of the *Trade-marks Act* and offences under the *Copyright Act*.

#### 4.7.8.8 The Use of a Trade-mark and Trade-name in Different Trade Areas to Deteriorate Distinctiveness

The decisions in *Mattel, Inc. v. 3894207 Canada Inc.*<sup>198</sup> and *Remo Imports Ltd. v. Jaguar Cars Ltd.*,<sup>199</sup> indicate that the use of a mark in a *different trade area* may not amount to confusion which is prohibited by section 20 of the *Trade-marks Act*. Although the increased use of a mark in unrelated trade areas may not amount to confusion, it still may reduce the general fame and reputation of a mark. Law enforcement agencies that use insignia of an organized crime outlaw group in trade areas different from those used by the group, could dilute or diminish the power of a group’s insignia and name without violating trade-mark laws. The trade-mark owner, Mattel, in the case of *Mattel, Inc. v. 3894207 Canada Inc.*, recognized this potential outcome when it asserted that BARBIE transcends products it originally sought to distinguish.<sup>200</sup> Mattel argued that the fame of BARBIE exists in relation to a diversity of products such as dolls, lotions and perfumes, food products, bicycles, backpacks, books, and construction pads, and that nothing prevents Mattel from using the trade-mark in areas other than its primary market.<sup>201</sup> Goodwill within a reputation may cross over into other trade areas. The Supreme Court of Canada in *Mattel, Inc. v. 3894207 Canada Inc.* recognized that this argument was accepted in the dissenting judgment in *Pink Panther Beauty Corp. v. United Artists Corp.*<sup>202</sup> However, the Court rejected this argument, and

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<sup>198</sup> *Mattel, Inc. v. 3894207 Canada Inc.*, *supra* note 117.

<sup>199</sup> *Remo Imports Ltd. v. Jaguar Cars Ltd.*, *supra* note 115.

<sup>200</sup> *Mattel, Inc. v. 3894207 Canada Inc.*, *supra* note 117 at para. 4.

<sup>201</sup> *Ibid.* at para. 4.

<sup>202</sup> [1998] 3 F.C. 534 at para. 58. The Supreme Court in *Mattel, Inc. v. 3894207 Canada Inc.*, *supra* note 117 at para. 62 described this argument:

62 In *Pink Panther*, a majority of the Federal Court of Appeal allowed the registration of the “*Pink Panther*” as a trade-mark for a line of hair care and beauty product supplies over the opposition of an existing trade-mark holder which had produced a very successful series of films of the same name starring Peter Sellers as Inspector Clouseau. McDonald J.A., dissenting, complained that “it is precisely because of the fame and goodwill associated with the name ‘The Pink Panther’ that the

focused on the lack of confusion between BARBIE and the restaurant services when it dismissed the claim by Mattel.<sup>203</sup>

The dilution or diminishment of the insignia of an organized crime outlaw group through the creation of business activity in trade areas different from those in which a group operates, presents a significant economic commitment by law enforcement in its war against organized crime. It would require governmental action that goes beyond simply enforcing the law, and that mischievously meddles in business affairs. The nature of such a law enforcement endeavour may raise some ethical and fairness concerns relating to intentional governmental interference in the business of targeted individuals who may or may not have been previously found to be members of a criminal organization, and who may or may not have been convicted of a criminal organization offence. In addition, this undertaking may produce unintended consequences. If the power of the insignia of an organized crime outlaw group can be reduced by its use in unrelated trade areas or by businesses that *do not* contribute to its reputation, then the power of a group's mark may also be augmented by its use in unrelated trade areas or by businesses that *do* contribute to its reputation. Chris Brown describes the positive correlation or association that may exist between marks in different trade areas, and that become a derivative of dilution:

The difficulty in defining dilution and in delineating its objectives has led to the creation of a net that plaintiffs can cast over any similar shape moving in the water. While [Frank] Schechter originally conceived the problem to be addressed by dilution as the use of the identical mark of one company on another company's product, the current evolution of the doctrine in several circuits allows each mark holder his or her own penumbra of propertied expression. One commentator's professed shock that the person who coined the name Federal Espresso actually admitted to thinking of Federal Express and appreciating the connection exemplifies the sense of entitlement of those who want to protect similar brand names. *Despite extensive discussion of nodes and links, no article has yet demonstrated that the name Federal Espresso would cause harm to the brand Federal Express. Quite possibly it strengthens the original brand by building a fresh network of nodes. While everyone hearing Federal Espresso may automatically think of Federal Express, thereby increasing that brand's nodal*

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appellant has chosen that name for its business" (para. 58). However, his objection was rejected by the majority....

<sup>203</sup> *Mattel, Inc. v. 3894207 Canada Inc.*, *supra* note 117 at para. 74.

*connections, that outcome does not demonstrate that those hearing or seeing Federal Express will consequently think of Federal Espresso.*<sup>204</sup> [Emphasis added].

While Brown's comments relate specifically to the American concept of dilution, the phenomenon that he describes could seemingly occur with any mark. Such phenomenon necessitates the exercise of caution by law enforcement agencies that use of the names and insignia of an organized crime outlaw group in different trade areas. These agencies would have to ensure that the increase in notoriety, in and of itself, does not enhance the group reputation, rather than deteriorate it.

#### 4.7.8.9 The Commercial Use of a Mark of a Gang or Organized Crime Outlaw Group in Criminal Activities by Law Enforcement in Order to Diminish the Power of the Mark<sup>205</sup>

##### 4.7.8.9.1 The Use by Law Enforcement of a Seized Registered Trade-mark of a Gang or Organized Crime Outlaw Group

The use of names and insignia of organized crime outlaw groups by undercover officers in illegal commercial transactions such as drug transactions or extortions, would dilute, tarnish, blur, or depreciate the goodwill of those names and insignia if those undercover officers did not uphold their obligations in those enterprises. The reputation of an organized crime outlaw group serves to prevent "drug burns" and dishonesty among thieves. If undercover officers did not adhere to the "integrity" that is associated with group's names and trade-marks in their undercover activities, then that "integrity", the reputation, and the power of that name and insignia would diminish. That is to say, if undercover officers violated the "integrity" of a patch by ripping people off in a drug deal, or by not acting in a violent and intimidating way during an extortion, then they would diminish the power of the patch.

One of the difficulties for undercover officers who seek to diminish the power of the patch by using it in ways contrary to the reputation of the organized crime group, is gaining access to or use of paraphernalia that bear organized crime insignia. For items bearing trade-marks

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<sup>204</sup> Chris Brown, "A Dilution Delusion: The Unjustifiable Protection of Similar Marks" (2004) 72 U. Cin. L.R. 1023 at 1039.

<sup>205</sup> The ideas associated with law enforcement using the mark of a gang in undercover operations involving commercial transactions in order to diminish the power of the mark, originated from Professor Steve Coughlan, Schulich School of Law, Dalhousie Law School.

that have been seized, and have been forfeited to the Crown, such as occurred in *Regina v. Hells Angels Motorcycle Corp.*,<sup>206</sup> law enforcement agencies have access to real insignia of an organized crime outlaw group, and do not have to concern themselves with violating the *Copyright Act* in producing such items. However, legal obstacles within the concepts of use as defined in section 4 of the *Trade-marks Act*; passing off as enshrined into law by section 7; confusion as set forth in sections 6 and 20; and depreciation of goodwill as embodied in section 22, prevent law enforcement agencies from using seized or forfeited name or insignia of an organized crime outlaw group in commercial transactions – even illegal commercial transactions.

Section 25.1 of the *Criminal Code* may enable law enforcement agencies to overcome these obstacles. Although the use of a seized item bearing the registered trade-mark of an organized crime outlaw group by law enforcement would amount to an offence under the *Trade-marks Act* and *Copyright Act*, section 25.1 allows peace officers to commit “offences” in various circumstances with the proper authorization. This section could be amended to expressly allow officers to commit *Trade-marks Act* and *Copyright Act* infringements or violations, such as exist in sections 4, 7, 20 and 22, while enforcing the law or investigating a criminal offence or activity.

#### 4.7.8.9.2 The Use by Law Enforcement of an Unregistered Mark of a Gang or Organized Crime Outlaw Group

The right to use an unregistered mark of an organized crime outlaw group receives protection under the trade-mark law concept of passing off even if that mark is not formally registered under the *Trade-marks Act*.<sup>207</sup> Thus, the use by law enforcement of an unregistered mark of an organized crime outlaw group in commercial transactions may still amount to passing off, and thus, the commercial use of that mark may be an offence under section 7 of the *Trade-marks Act*. As argued above, section 25.1 of the *Criminal Code* could be amended in order to expressly allow officers to commit *Trade-marks Act* and *Copyright Act* infringements or violations while enforcing the law, or investigating a criminal offence or activity.

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<sup>206</sup> *R. v. Hells Angels Motorcycle Corp.*, *supra* note 172.

<sup>207</sup> “Trade-marks and the Internet: A Canadian Perspective”, *supra* note 91 at para. 23.

#### 4.7.8.9.3 The Use by Law Enforcement of a Reproduced Registered Trade-mark of a Gang or Organized Crime Outlaw Group

Copyright and trade-mark laws present a number of difficulties for law enforcement agencies that might seek to diminish the power of organized crime outlaw insignia by using it. Law enforcement agencies may not possess any, or may only possess a very small number of, copyright works or items with the registered trade-mark of an organized crime outlaw group, since they primarily acquire these items by seizing them in the course of criminal investigations. The more individuals who use a registered trade-mark of a gang or a copyrighted work contrary to its reputation, the more the reputation of that mark or work will diminish. However, there may not be enough works or items to effect an undercover operation, and law enforcement agencies cannot simply copy or reproduce the work. They must overcome sections 3 and 27 of the *Copyright Act* which prevent law enforcement from reproducing the work of a copyright owner. Reproduction of a substantial part of the work of an owner so as to make the original work immediately apparent in the infringing work, is *prima facie* prohibited unless reproduction amounts to fair dealing.<sup>208</sup>

Sections 3 and 27 of the *Copyright Act*<sup>209</sup> could be amended in order to allow the reproduction of works that have been used in a *Criminal Code* or the *Controlled Drugs and Substances Act* offence; that are offence-related property; or that an offence was committed in relation thereto. In addition, or alternatively, section 25.1 of the *Criminal Code* could be amended in order to expressly allow for the infringement of copyright works in instances where those works were used in connection with the commission of a criminal offence during an investigation; or where a court of competent jurisdiction has declared that those works were used in connection with a criminal offence. These amendment would allow law enforcement agencies to reproduce works to meet the needs of their undercover operations.

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<sup>208</sup> *Compagnie Générale des Établissements Michelin-Michelin & Cie v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada)*, *supra* note 132 at paras. 57-58.

<sup>209</sup> *Copyright Act*, *supra* note 89 at ss. 3 and 27.

#### 4.6.7 Evaluations and Recommendations

Laws that target both the economic vitality of organized crime, and the reputation and identity of organized crime groups, remain very significant in countering organized crime. The “heat” or presence of law enforcement around the activities of organized crime groups, and the involvement of the courts in ordering seizure and disposition of their property, makes organized crime members more wary, and may hinder their efforts to produce illegal substances and engage in illegal endeavours. Although, the seizure of their assets may have some, albeit limited,<sup>210</sup> impact on the overall criminal organization. However, the collective contribution of proceeds of crime and forfeiture laws, civil forfeiture laws, statutorily mandated community safety programs, and trade-mark and copyright laws, may have more impact. To date, trade-mark and copyright laws have not been amended to augment anti-organized crime measures.

The reputation for violence and intimidation within the name and insignia of organized crime outlaw groups empowers them to commit criminal acts, and trade-mark and copyright laws contribute to this end. Trade-mark and copyright laws can be used to protect reputations of organized crime outlaw groups as these reputations are manifested through their names and insignia, and thus, enhance organized crime violence. The purpose of trade-mark law in regulating commercial relations and transactions, to some degree, limits the protection provided to organized crime outlaw groups in their use of their insignia in criminal activities. However, in other ways, the provisions in trade-mark law that prohibit depreciation of goodwill, dilution, and passing off, and the ability of copyright law to restrict reproductions of works such as these group marks, insulate organized crime outlaw groups from law enforcement agency efforts to diminish the power of the group names and insignia. The proposed amendments to the *Trade-marks Act* and *Copyright Act* in subsection six “Using Trade-mark and Copyright Laws to Pierce the Power of the Patch” of this section, individually and in conjunction with one another, could prevent organized crime outlaw groups from receiving trade-mark protection for insignia used in criminal offences. If used as

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<sup>210</sup> “To What Extent is the UK’s Anti-Money Laundering and Asset Recover Regime Used Against Organised Crime?”, *supra* note 27 at 146. Sproat asserts that although anti-money laundering and assets recovery regimes have allowed the state in the United Kingdom to take £360 m from criminals from approximately 2006 to 2009, serious organized crime has approximately £20 000 m of capital, and launders approximately £64 000 m to £192 000 m during this same time period.

suggested, and amended as recommended, trade-mark and copyright laws may deter organized crime outlaw groups from registering their insignia at all, and prevent them from receiving statutory legal assistance in propagating their reputation and facilitating their criminal purposes. The dilution and tarnishment of the insignia and names of organized crime outlaw groups can negatively affect the power of organized crime outlaws within the criminal milieu and the fear that they instill in conventional society.

The amended proceeds of crime and forfeiture provisions, the use of civil forfeiture laws, new statutorily mandated community safety programs, and proposed amendments to trade-mark and copyright legislation, could prevent and limit the bolstering of organized crime identities; decrease internal cohesion within organized crime groups; and reduce the power of their reputations. These laws could pierce the “power of the patch.” In so doing, they could reduce organized crime and violence in society, and thus, reduce fear or panic. They could effect social control, contribute to social order, and foster respect for the law.

Based on the analysis of *Requisite Six* and the foregoing conclusions, this thesis makes the following recommendations:

***Recommendation Sixteen:*** *Individuals should only be subject to forfeiture orders if they have been found guilty of a criminal offence, and the property relates to or is connected to the commission of that offence.*

***Recommendation Seventeen:*** *Proceeds of crime and forfeiture legislation, also known as anti-money laundering and asset recovery regimes, ought to be used in order to seize offence-related property, such as the insignia and clubhouses of organized crime outlaw groups and members. When forfeiture under the Criminal Code cannot occur, civil forfeiture proceedings in this regard ought to take place.*

***Recommendation Eighteen:*** *Statutorily mandated community safety programs implemented by some provinces in an effort to prevent members of organized crime outlaw groups from wearing their patches, group insignia, or group colours in certain public places should be re-evaluated, and where possible, voluntary participation should be encouraged, such as exists in the Bar Watch and Restaurant Watch programs in British Columbia.*

***Recommendation Nineteen:*** *The Trade-marks Act and Copyright Act should be amended in a number of ways. These amendments should:*

- a. allow the government to register unregistered insignia of organized crime outlaw groups in order to assume control over the reputation of those groups;*

- b. expand the terms "offensive" and "scandalous" in section 9 of the Trade-marks Act in order to prohibit the registration of marks of organized crime outlaw groups where those marks are used in connection with criminal offences;*
- c. augment the laws that regulate registration and renewal of trade-marks, and requiring stringent proof of the purposes of a mark within section 30 of the Trade-marks Act;*
- d. increase the power of the Registrar to expunge and expropriate marks that facilitate or are associated with the commission of a criminal offence;*
- e. empower governments to expropriate of registered trade-marks where such marks have been used in connection with a criminal offence.*
- f. allow law enforcement to diminish the power of organized crime outlaw groups through mass distribution of their names and insignia; through the use of a group trade-mark or trade-name in different trade areas; and through the use of a group mark in illegal commercial transactions.*

## 4.8 REQUISITE SEVEN FOR ANTI-ORGANIZED CRIME MEASURES

### *Requisite Seven*

*Rooted in Deviance and Labelling Theory, and Social Psychology:*

Anti-organized crime approaches must avoid the imposition of formal negative labels, stigmatization and degradation in social and legal processes in order to prevent potential deviants or outlaws from being ousted from larger society, and thus, deepening the chasm between non-outlaw members of society and outlaw members of society.

#### 4.8.1 Overview

A number of anti-organized crime measures, those grounded in criminal law as well as those implemented by communities, result in the imposition of negative labels, stigmatization and degradation of organized crime outlaws and potential outlaws. According to insights from deviance and labelling theory and social psychology, preventative judicial restraints, proscription of criminal organizations and membership in those organizations, as well as some community action programs, may widen the schism between non-outlaw conventional members of society and organized crime outlaw members of society.

As discussed in section six of this Chapter “Requisite Five for Anti-Organized Crime Measures”, conflict exists among some requisites due to conflicting insights from different sociological and criminological theories. For instance, *Requisite Seven* does not advocate the imposition of labels, but *Requisite Five*, based in part on insights from differential association and social learning in subcultures, advocates reducing anti-social interactions among organized crime outlaws in order to prevent the perpetuation of their identity and the empowerment of their reputations. Banning anti-social associations is a possible anti-organized crime measure using the criminal law, but banning can involve the imposition of labels via proscription – that is to say, the formal labelling through criminalization – of certain organized crime groups. In this Chapter, the negative aspects of various anti-organized crime measures that impose labels will be canvassed and evaluated.

## 4.8.2 Anti-Organized Crime Measures and the Imposition of Negative Labels, Stigmatization or Degradation

### 4.8.2.1 Criminal Justice Processes Generally and Organized Crime Trials Specifically

As asserted in Chapter Three in section five “Deviance and Labelling Theory” at subsection two “Application of Concepts within Deviance and Labelling Theory to the Identity of Outlaws”, some empirical evidence asserts that public labelling further embeds deviance for some offenders.<sup>1</sup> In addition, ordinary or pre-existing criminal justice processes assign negative labels to accused who are charged with criminal offences, and further embed deviance such as gang membership.<sup>2</sup> Accused who are charged with criminal organization offences face very specific and very negative labels, and one expects that these accused may face more intense stigma, more severe ostracization, or more negative social interactions as a result. However, some research indicates that labelling alone within the criminal justice system may not account for gang membership and particularly gang membership by individuals of ethnic minority groups.<sup>3</sup> Further empirical evidence regarding the effects of the present *Criminal Code* provisions on criminal embeddedness need to be conducted to determine whether specific labels of “criminal organization” result in more severe consequences for those labelled. If such labels increase criminal embeddedness, then use of ordinary or pre-existing *Criminal Code* offences to deal with the criminal acts of organized crime outlaws may remedy this result.

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<sup>1</sup> Sean Maddan, *The Labeling of Sex Offenders: The Unintended Consequences of the Best Intentional Public Policies* (Lanham: University Press of America, 2008) at 32.

<sup>2</sup> Jón Gunnar Bernburg, Marvin D. Krohn & Craig J. Rivera, “Official Labeling, Criminal Embeddedness, and Subsequent Delinquency: A Longitudinal Test of Labeling Theory” (2006) 43 *J. of Research in Crime and Delinquency* 67 at 69 and 77. Bernburg, Krohn and Rivera assert that juvenile justice intervention increases gang membership by a factor of 5.2.

<sup>3</sup> Robert M. Gordon, “Criminal Business Organization, Street Gangs and “Wanna-Be” Groups: A Vancouver Perspective” (2000) 42 *Canadian Journal of Criminology* 39 at 55. Gordon asserts that individuals from ethnic minorities may be more often surveyed and arrested, and thus, prosecuted.

#### 4.8.2.2 Preventative Judicial Restraints Against “Anti-Social” or Dangerous Behaviour

The Canadian government created preventative judicial restraint measures in order to circumscribe the liberty of individuals believed to be a risk of committing a criminal organization offence. In section 810.01 of the Canadian *Criminal Code*,<sup>4</sup> a provincial court judge may impose a peace bond or recognizance on an individual for up to twelve months if there are reasonable grounds to fear that the person will commit a criminal organization offence,<sup>5</sup> and up to two years if the person has been previously convicted of a criminal organization offence and there are reasonable grounds to fear that the person will commit another criminal organization offence.<sup>6</sup> The court may impose significant controls on the liberty of the individual, such as treatment, electronic monitoring, geographical limitations, residency requirements, abstention provisions, as well as firearms and weapons prohibitions.<sup>7</sup> Like other recognizances, if the individual refuses to enter into the recognizance, the judge may commit the individual to prison for a term not exceeding 12 months.<sup>8</sup> Like other such recognizance provisions in the Canadian *Criminal Code*, a breach of such a recognizance amounts to a criminal offence and is punishable for up to two years imprisonment.<sup>9</sup>

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<sup>4</sup> *Criminal Code*, R.S.C. 1985, c. C-46 [*Criminal Code*] at s. 810.01. Section 810.01 states:

810.01 (1) A person who fears on reasonable grounds that another person will commit an offence under section 423.1, a criminal organization offence or a terrorism offence may, with the consent of the Attorney General, lay an information before a provincial court judge.

(2) A provincial court judge who receives an information under subsection (1) may cause the parties to appear before a provincial court judge.

(3) If the provincial court judge before whom the parties appear is satisfied by the evidence adduced that the informant has reasonable grounds for the fear, the judge may order that the defendant enter into a recognizance to keep the peace and be of good behaviour for a period of not more than 12 months.

(3.1) However, if the provincial court judge is also satisfied that the defendant was convicted previously of an offence referred to in subsection (1), the judge may order that the defendant enter into the recognizance for a period of not more than two years. ...

<sup>5</sup> *Ibid.* at s. 810.01(3). Section 2 of the *Criminal Code* defines “criminal organization offence”:

“criminal organization offence” means

(a) an offence under section 467.11, 467.12 or 467.13, or a serious offence committed for the benefit of, at the direction of, or in association with, a criminal organization, or

(b) a conspiracy or an attempt to commit, being an accessory after the fact in relation to, or any counselling in relation to, an offence referred to in paragraph (a); ....

<sup>6</sup> *Ibid.* at ss. 810.01(1)-(3-1).

<sup>7</sup> *Ibid.* at ss. 810.01(4.1)-(5.1).

<sup>8</sup> *Ibid.* at s. 810.01(4).

<sup>9</sup> *Ibid.* at s. 811.

Canada is not alone in its approach to formally label organized crime individuals via the criminal law. In the *Crime and Disorder Act 1998*,<sup>10</sup> and subsequent amendments in the *Serious Organised Crime and Police Act 2005*, the United Kingdom created anti-social behaviour orders which enable government council or a chief officer of police to apply for a court order prohibiting an individual from engaging in specified activities for up to two years.<sup>11</sup> The individual must have acted in an anti-social manner that caused or was likely to cause harassment, alarm or distress, and the order must be necessary for the protection of the public.<sup>12</sup> Failure to comply with an anti-social behaviour order may result in a summary conviction offence and imprisonment for up to six months or a fine or both; or it may result in an indictable offence and imprisonment for up to five years or a fine or both.<sup>13</sup> Such orders are available not only for organized crime members, but also for a variety of persons, such as youth, young offenders, parents of youth, and sexual or violent offenders.

Preventative judicial measures like those in section 810.01 of the *Criminal Code* do not amount to status offences,<sup>14</sup> and thus, do not punish a person for their state of being. However, these preventative judicial measures do effectively ostracize organized crime outlaws from the mainstream of society by imposing a label of “other” – sometimes even before these individuals commit a crime. Such orders cannot help but encourage or

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<sup>10</sup> (U.K.), 1998, c. 37.

<sup>11</sup> *Ibid.* at s. 1 as amended by the *Serious Organised Crime and Police Act 2005* (U.K.), 2005, c. 15 at ss. 139-43.

<sup>12</sup> *Ibid.* at s. 1(1). Section 1 of the *Crime and Disorder Act 1998* states:

1 Anti-social behaviour orders

(1) An application for an order under this section may be made by a relevant authority if it appears to the authority that the following conditions are fulfilled with respect to any person aged 10 or over, namely—

(a) that the person has acted, since the commencement date, in an anti-social manner, that is to say, in a manner that caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household as himself; and

(b) that such an order is necessary to protect persons in the local government area in which the harassment, alarm or distress was caused or was likely to be caused from further anti-social acts by him;

and in this section “relevant authority” means the council for the local government area or any chief officer of police any part of whose police area lies within that area.

<sup>13</sup> *Ibid.* at s. 1(10).

<sup>14</sup> *R. v. Budreo* (2000), 142 C.C.C. (3d) 225, [2000] O.J. No. 72 (Q.L.) (Ont. C.A.), leave to appeal refused (2000), 271 N.R. 197, [2000] S.C.C.A. No. 542 (Q.L.) at paras. 24-26.

entrench their subjects to internalize these labels, and taint their social interactions with pro-social or conventional members of society. Further, a significant problem exists in ordering alleged organized crime outlaws to comply with or be deterred by yet another mainstream law – especially laws or legal mechanisms that they, perhaps with some reason, perceive to be unjust.

The utility in employing preventative judicial restraint measures in order to thwart organized crime activities, remains questionable. Preventative judicial measures seem wise in that they do not require a criminal organization act to occur in order to control the liberty of a potential organized crime outlaw and preempt organized crime activities. However, the effectiveness of these preventative provisions can never really be evaluated, since the number of criminal organization acts that did *not* occur cannot be determined, and the avoided harm remains unknown. From a social constructionist perspective, governments that implement judicial restraint measures in order to frustrate and stifle organized crime acts, may be seen to be addressing the problem of organized crime outlawry, but their methods escape evaluation due to the unquantifiable nature of the events that they allegedly prevented. Without knowing the effectiveness of the restraints, it is hard to know whether formally labelling individuals is necessary and warranted. Due to the significant restraints on the liberty of individuals subject to these orders, without empirical evidence demonstrating their effectiveness and given the negative repercussions from labelling, they should not be employed.

#### 4.8.2.3 Proscription of Criminal Organizations and Membership in Those Organizations

Arguments for and against proscription are set forth in this Chapter in section two “Requisite One for Anti-Organized Crime Measures” at subsection eight “Proscription as a Solution to Definitional, Investigative, Evidentiary, and Prosecutorial Problems within Criminal Organization Legislation.” These arguments will not be reiterated here, other than to briefly note the effects. From the perspective of deviance and labelling theory, proscription of specific criminal organizations and of membership in those organizations amounts to the imposition of a formal label, and thus, potentially results in stigmatization,

ostracization and degradation of those labelled. These effects of proscription are not far removed from those of preventative judicial restraint measures in that those individuals who are not proven beyond a reasonable doubt to have committed an act that would otherwise amount to a criminal offence, are treated as criminals and are subject to significant restraints on their physical liberty and freedoms. However, specific and long-term empirical research in relation to the imposition of public labels or *Criminal Code* labels of “criminal organization” member or “criminal organization” is required to know the real effects of these labels on criminal embeddedness and recidivism. Some anecdotal evidence exists from a spokesman of the Hells Angels, Rick Ciarniello whose constitutional challenge of the criminal organization legislation was dismissed for lack of standing in the British Columbia Supreme Court.<sup>15</sup> Ciarniello alleged in an affidavit that as a result of the Ontario Supreme Court of Justice declaration in *R. v. Lindsay*<sup>16</sup> that the Hells Angels is a criminal organization pursuant to section 467.1 of the *Criminal Code*, he and other Hells Angels had suffered ostracism in the community.

[Ciarniello] gave specific examples of how people had treated him differently after the Ontario ruling: he recalled going one night to a Joey Tomatoes restaurant in Coquitlam, where he overheard a couple asking to be moved because “they did not want to sit next to a criminal, namely a member of the Hells Angels.” This made him uncomfortable, so he decided to leave the restaurant, he said.

“I have noticed a marked difference in the way that people respond to me when I am wearing my colors,” Ciarniello stated in his affidavit. “The mood has gone from friendly and casual curiosity to fear, loathing and avoidance such that I am made to feel uncomfortable wearing the HAMC [Hells Angels Motorcycle Club] insignia.”

He said staff members at the local Safeway near his Port Coquitlam home, where he has purchased groceries for 20 years, were not as friendly as they used to be, and he received similar treatment at a Shell gas station. His affidavit also claimed that, after the Ontario ruling, John Brice Sr. [then President of the East End Charter in Burnaby, British Columbia] was refused service as a customer of the Bank of Nova Scotia after two decades of doing business there.<sup>17</sup>

If the criminal law as it presently exists results in such negative stigma from formal labelling, one wonders whether proscription would be any worse. The actual effects of a

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<sup>15</sup> Neal Hall, *Hell To Pay: Hells Angels vs. The Million Dollar Rat* (Mississauga: John Wiley & Sons Canada, Ltd., 2011) [*Hell To Pay: Hells Angels vs. The Million Dollar Rat*] at 142-44.

<sup>16</sup> *R. v. Lindsay*, 2005 CanLII 24240, [2005] O.J. No. 2870 (Ont. S.C.J.).

<sup>17</sup> *Hell To Pay: Hells Angels vs. The Million Dollar Rat*, *supra* note 15 at 143.

proscribed organized crime label – that is to say, one imposed not by the public or the court, but by a government body – would also require evaluation in order to determine the true negative effects of proscription in comparison to public labelling or formal criminal justice labelling.

#### 4.8.2.4 Community Action Programs

Community action programs, like some criminal law anti-organized crime measures, also may label, stigmatize, degrade, and ostracize organized crime outlaws. As discussed in this Chapter in section four “Requisite Three for Anti-Organized Crime Measures” at subsection two “Examples of Community Education and Action Programs That Foster Pro-Social Bonds”, some Canadian provinces, such as British Columbia and Alberta,<sup>18</sup> club and restaurant owners in various communities<sup>19</sup> have voluntarily joined Bar Watch and Restaurant Watch programs. Bar Watch members allow police to enter their premises uninvited; to use metal detectors to locate weapons and identification scanners to identify patrons; and to escort “known gangsters” from their premises.<sup>20</sup> Restaurant Watch members agree to call police if they identify a gang member, gang associate, drug trafficker, or person with a propensity for violence on their premises; and they allow uniformed and plain clothes officers to conduct random checks on their premises for gangsters.<sup>21</sup> That members of the public actively look for “known gangsters” means that they accept a label that has been – accurately or inaccurately – imposed on these “known gangsters”, and they perpetuate that label by ostracizing the “known gangsters” from their establishments. These “known gangsters” are thus, socially forbidden to associate with presumed conventional members of society. Some gangs have retaliated against

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<sup>18</sup> CBC News, “Calgary Bars, Clubs Band Together to Keep Watch on Customers” (28 April 2009), online: CBC News <<http://www.cbc.ca/canada/calgary/story/2009/04/28/cgy-bar-watch-safety-security-cameras.html>>. Calgary, Alberta implemented a bar watch program similar to that in Vancouver in April of 2009.

<sup>19</sup> Royal Canadian Mounted Police, “Upper Fraser Valley Bar Watch – Committed to Community Safety” (10 March 2009), online: RCMP in B.C. <<http://bc.rcmp.ca/ViewPage.action?siteNodeId=50&languageId=1&contentId=8526>>. The Bar Watch program exists in various communities, and not only in downtown Vancouver or the Metro Vancouver area.

<sup>20</sup> Darryl Dyck, “Bar Watch Restaurant Defaced, Others Threatened” (20 March 2009), online: CBC News <<http://www.cbc.ca/canada/british-columbia/story/2009/03/20/bc-bar-watch-earls.html>> [“Bar Watch Restaurant Defaced, Others Threatened”].

<sup>21</sup> CBC News, “New Effort Aims to Keep Gangs Out of Vancouver Restaurants” (17 July 2008), online: CBC News <<http://www.cbc.ca/canada/british-columbia/story/2008/07/17/bc-vancouver-restaurant-watch.html>>. Twenty-nine restaurants had become members as of July 17, 2008.

participation in such programs by shooting at and writing threatening graffiti on Bar Watch establishments.<sup>22</sup> This retaliation may indeed demonstrate the gangsters' propensity for violence and intimidation, but it also demonstrates the maintenance of a negative label and the potential widening of the schism between organized crime outlaws or alleged organized crime outlaws and law-abiding citizens.

Another community action program that functions by relying on labels, is the Citizen Community Watch Program in British Columbia. Less than a month after a gang-related shooting at a restaurant in an affluent neighbourhood on the West side of Vancouver, British Columbia, police increased surveillance of organized crime outlaws by enlisting an "army" of volunteer citizens to keep a watchful eye for licence plates known by police to be associated with gang members, and to inform police who will dispatch a "quick-response" team that will be visible in bars and other places.<sup>23</sup> The Citizen Community Watch Program had 117 members in December 2010, and was used in the past to assist police in locating stolen vehicles. Police hope to increase the Program to 200 members, and use the squad in order to target gangster's licence plates. Vancouver Police Chief Jim Chu described the technique: "The volunteers will create an invisible net around high-profile gang hangouts and report to police when they spot a licence plate from the list."<sup>24</sup>

The effectiveness of these watchful eyes remains questionable. Such vigilance may assist in preventing violence by unleashing a police presence on a gang presence. It may assist police in locating gangsters after any violence has occurred, and thus, facilitate law enforcement and criminal charges. However, the real purpose of these community actions programs may be their ability to empower citizens who feel powerless and fearful of organized crime outlaws and their violence and intimidation. In relation to the Citizen Community Watch Program, Deputy Chief Warren Lemcke warns, "If you are a gangster coming into Vancouver, we're going to see you because we'll be watching."<sup>25</sup> These

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<sup>22</sup> Darryl Dyck, "Bar Watch Restaurant Defaced, Others Threatened" (20 March 2009), online: CBC News <<http://www.cbc.ca/canada/british-columbia/story/2009/03/20/bc-bar-watch-earls.html>>.

<sup>23</sup> Lori Culbert, "City Gets Creative to Combat Gangs" *Leader-Post* (17 December 2010), online: Leader Post <<http://www.leaderpost.com/news/City+gets+creative+combat+gangs/3992071/story.html>>.

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.*

programs also enable the community to band together, and collectively label or reassert or perpetuate a label for individuals whom police or another societal group has declared “gangsters”, or who have declared themselves to be “gangsters.”

Simply because an organized crime measure involves the community, does not mean that it has purely positive consequences for the *entire* community – both conventional members of society as well as organized crime outlaws. Empirical research is required to determine the extent of any negative effects of community action programs, such as Citizen Community Watch, and Bar and Restaurant Watch. However, in spite of the fact that such programs *do not* accord with some of the principles within deviance and labelling theory, these community action programs *do* accord with some of the principles within social control and bond theory as discussed in this Chapter in section four “Requisite Three for Anti-Organized Crime Measures” at subsections one “Anti-Organized Crime Measures That Foster Pro-Social Bonds”, and two “Examples of Community Education and Action Programs That Foster Pro-Social Bonds.” A conflict exists between empowering the community, and perpetuating negative labels. It is not easily resolved.

If labels were fairly and justly assigned to the “known gangsters” about whom conventional society members should beware, then community action programs that engage in such crime prevention may be justified. For instance, if a court of law indeed found, based on proof beyond a reasonable doubt, that a particular group is a criminal organization or a particular individual is a member of a criminal organization, then a label has been imposed pursuant to the administration of justice. And thus, arguably, community action programs that watched for convicted criminal organization offenders or members of declared criminal organization groups, would have some reasonable basis to perpetuate the imposed label. And, sentencing and post-sentencing reintegrative measures could then take place. However, if those criminal organization laws lack fair and just processes, as has been argued in section two “Requisite One for Anti-Organized Crime Measures”, then community action programs only perpetuate negative, unfair and potentially inaccurate labels, and thus, they further stigmatize, ostracize and degrade

those subject to the labels. Reintegration would remain difficult if those labelled rejected the labelers, and perceived the law to be unjust and unfair.

Proscription is another method of imposing a label pursuant to some regulated means that is subject to legislative and judicial review. As discussed in this Chapter in section two “Requisite One for Anti-Organized Crime Measures” at subsection eight “Proscription as a Solution to Definitional, Investigative, Evidentiary, and Prosecutorial Problems within Criminal Organization Legislation”, the Governor in Council on the advice of the Minister of Public Safety and Emergency Preparedness can proscribe terrorist groups and assess the change in status of such groups,<sup>26</sup> and proscription is subject to judicial review.<sup>27</sup> A similar means of labelling organized criminal groups could be legislated. Thus, community action programs could rely on the formal proscription of criminal organizations and members of those criminal organizations in casting their watchful eyes and conducting their “duties.”

#### 4.8.3 Evaluations and Recommendations

No method of “properly labelling” a criminal organization and a member of a criminal organization, exists. Part of the difficulty stems from the fact that a definition of “organized crime” or “criminal organization” is amorphous and elusive. Whether by the public, by a court of law using the present *Criminal Code* provisions, or by a legislative body subject to judicial review, the application of labels to organized crime outlaws is based on information that is available at the time, and is affected by the biases and perceptions of those applying the labels. Sometimes it is speculation, sensationalized, and not proven beyond a reasonable doubt. Further, as social constructionism asserts, the construction of reality or the imposition of a name or label on reality is subject to the chinks in the knowledge base of society and subject to the power of some to impose their view on “others.”

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<sup>26</sup> *Criminal Code*, *supra* note 4 at s. 83.05.

<sup>27</sup> *Ibid.* at s. 83.05(5)-(6.1).

In order to determine whether more severe labelling, greater stigmatization and more negative social interactions occur in relation to individuals publicly declared to be organized crime members or formally labelled as such in a court of law or by a legislative body, further empirical research must occur. Further research is also required in order to determine any negative effects of labelling offenders using preventative judicial restraint measures. Ordinary or pre-existing *Criminal Code* offences may remedy any enhanced criminal embeddedness, and thus, could be used instead of criminal organization offences and related provisions.

If community action programs are to be used, they should target individuals whom a court of law has determined to be a member of a criminal organization. Further, if the Canadian government employs proscription, then community action programs should only target individuals or groups so proscribed by a legislative body, such as the Governor in Council on the advice of the Minister for Public Safety or Solicitor General or both.

Based on the analysis of *Requisite Seven* and the foregoing conclusions, this thesis makes the following recommendations:

***Recommendation Twenty:*** *Empirical research should be conducted in order to determine whether more severe labelling, greater stigmatization and more negative social interactions occur in relation to individuals publicly declared to be organized crime members or formally labelled as such in a court of law or by a legislative body, as opposed to organized crime members who are not so declared or labelled.*

***Recommendation Twenty-One:*** *Community action programs should only target individuals whom a court of law has determined to be a member of a criminal organization, or who are members of a group proscribed by a legislative body, such as the Governor in Council on the advice of the Minister for Public Safety or Solicitor General or both.*

## CHAPTER FIVE CONCLUSIONS

Crime is an inherent and normal part of society because it reflects differences among the values and norms of individuals and groups. As social constructionism and deviance and labelling theory posit, those individuals or groups in power in society define or label those individuals who are deviant and criminal. They also define and label who is an outlaw.

Crime may ebb and flow, but it will not cease to exist because differences among groups and the presence of power over some by others, will not change. This societal state – that is to say, a societal state that includes a certain level of crime – is one of *mal-order*. Societal *disorder* occurs when a social problem develops and moral panic ensues. It occurs when a threat to social mal-order becomes heightened or acute. Societal disorder requires an increased response by a community, its government, its media, and its individual members to the perceived social problem. Organized crime outlawry has been perceived as a social problem in Canada.

Just as crime and criminals are an inherent and normal part of society, so are organized crime outlaw groups and their outlaw acts. And, organized crime too, will not end. However, it may abate with legal and non-legal anti-organized crime measures.

Theory tells us what these anti-organized crime measures should do. The seven requisites synthesized from the criminological and sociological theories discussed in Chapter Three of this thesis and applied to the organized crime outlaws described in Chapter Two of this thesis, set forth ways in which anti-organized crime measures can prevent an organized crime outlaw from participating in anti-social learning of the norms and values of an organized crime outlaw group, and from adopting or internalizing the norms and values of that group. These requisites suggest ways to stop or hinder organized crime outlaws from perpetuating and reinforcing the identity of the group – namely, by preventing or limiting the use or display of this identity in a manner that accords with the values and norms of

the group. The implementation of the requisites in Chapter Four can preclude the creation or formation of organized crime outlaw identities, and it can pierce the power of organized crime outlaw group identities by hindering their associations with one another, by limiting the use of their reputations for violence and intimidation, and by negatively affecting their reputations for violence and intimidation.

The present approach to combating organized crime by the Canadian government does not give effect to all of the requisites discussed in this thesis. The government in Canada responded to the organized crime problem as social constructionism predicts it would – namely, by passing legislation that lacks substance and practicality in order to calm moral panic, to appear to address the social problem, and to legitimize the present institutions of the state. This response focuses on the law as the only or the main remedy to the problem, and in so doing, fails to include a substantive, coordinated, collective, and comprehensive community approach to organized crime in society. This failure contributes to the problem of organized crime in society because it allows organized crime outlaws and organized crime outlaw groups to perpetuate.

The government cannot legislate the organized crime problem away. It cannot reduce, manage or control organized crime outlaw groups simply by legislating a definition of “criminal organizations” or “organized crime outlaw group” and criminalizing activities in which those groups engage or are commonly believed to engage. Such an approach should not occur for four main reasons. First, the differences among the characteristics, attributes, formation, rules and regulations among organized crime outlaw groups makes a legal definition very difficult to formulate, and even more difficult to prove. Laws that make the commission of an offence in connection with a criminal organization more aggravating than other offences, require proof requirements of not only the criminal organization, but also of the connection of the offence to that organization. Further, to be fair, such provisions should require proof beyond a reasonable doubt. Such evidentiary hurdles hinder prosecutions because proof of a criminal organization and proof of connection requires complex and significant amounts of evidence that is difficult to

obtain by investigators and is difficult to present to courts based on the usual laws of evidence and procedure.

Second, legislated definitions seek to define the essence of the outlaw groups, rather than the nature of their outlaw acts. They essentially criminalize *who organized crime outlaws are*, rather than the criminal acts that they commit and how they commit them. The essence of organized crime outlaw groups is the fact that they have a group identity and the role of that identity in how they commit crime – namely, by using the violence and intimidation association with the reputation of the organized crime outlaw group name or insignia to facilitate their acts. The presence and use of this identity is what distinguishes them from other criminals. It is who they are that distinguishes them from other criminals. However, organized crime outlaws commit *crime* – they commit criminal offences as they existed in the *Criminal Code* prior to the implementation of any special or specific criminal organization offences.

Third, because organized crime outlaws commit ordinary or pre-existing criminal acts, anti-organized crime measures should not legislate a special definition, since pre-existing offences in the *Criminal Code* can be used to prosecute the criminal acts of these outlaw groups. Courts can impose more punitive sanctions if the criminal acts are more severe in comparison to others in the same offence category. Criminal organization provisions provide some benefits to law enforcement, such as not having to establish investigative necessity to obtain judicial authorization to intercept private communications for criminal organization offences. However, a convoluted, ineffective and unfair definition does not provide a sound foundation on which to justify increased police power. For these three reasons, legislating a definition of “criminal organization” fails to meet the lessons learned from social constructionism and social control and bond theory that comprise *Requisite One*.

Fourth, the current legislative provisions in the *Criminal Code* already come very close to criminalizing the state of being of organized crime outlaws. As discussed in section two of Chapter Four, these provisions impose more punitive sanctions and set forth

aggravated factors based on the fact that an individual is a member of a criminal organization and that he has committed an offence in connection with that organization. "Ordinary" criminals or non-criminal-organization members are not subject to these increased punitive measures. The criminalization of *who people are* amounts to a status offence, and remains legally, socially and politically unpalatable. That being said, the insights from social constructionism and social control and bond theory that comprise *Requisite One* indicate that proscription of organized crime outlaw groups will only capture the groups that the government was targeting when it legislated the current definition of "criminal organization" in the *Criminal Code*. Proscription more directly addresses the problem groups that the government sought to capture in its definition. It is likely the most effective way to capture "criminal organizations" and "gangs" and "organized crime outlaws" since it makes it a crime to be exactly who they are, and does not try to force their group into a convoluted and problematic statutory definition. However, as deviance and labelling theory and concepts from social psychology assert in *Requisite Seven*, anti-organized crime approaches should avoid the imposition of formal negative labels, stigmatization and degradation in social and legal processes in order to prevent potential deviants or outlaws from being ousted from larger society, and thus, to not deepen the chasm between non-outlaw members of society and outlaw members of society. The imposition of a formally sanctioned definition likely does just that, and thus, should not be used as an anti-organized crime measure.

Criminal laws based on definitions of "criminal organizations" or "organized crime outlaws" may succeed in their aims when the law targeting organized crime outlaws is used for and against organized crime outlaws only, and does not ensnare non-organized crime outlaws or non-outlaws. Only when organized crime outlaws alone are subjected to more aggravated punitive sanctions due to adequate proof requirements at sentencing hearings, and non-outlaws are not mistakenly subjected to penalties that did not mean to ensnare them, will anti-organized crime laws be substantive, fair and just. Only then can these measures give effect to general deterrence, and foster belief and commitment of law-abiding citizens to formal societal values as synthesized from social constructionism and social control and bonding theory and stated in *Requisite One*.

Criminal laws can also contribute to the goals in *Requisite Four* that stem from social control and bond theory, differential association and social learning in subcultures, and social psychology. For instance, some provisions of the *Corrections and Conditional Release Act*<sup>1</sup> allow for the re-integration and rehabilitation of organized crime offenders who are serving significant sentences – that is to say, federal time. Also, probation and conditional sentence order conditions imposed pursuant to the *Criminal Code* can also provide for re-integration and rehabilitation of organized crime offenders who are serving sentences of two years less a day. Institutional incarcerative settings can provide pro-social learning in pro-social learning environments for organized crime outlaws who are not eligible to serve sentences in the community. In these ways, criminal laws can maintain or foster positive social and symbolic interactions or situated activities between organized crime outlaws and members of conventional society.

Criminal laws can also contribute to the prevention of stigmatization, ostracization, and sensationalizing organized crime outlaws through media, and the control or management of glorification of organized crime outlaw lifestyles and the power of their reputations. These goals stem from social constructionism as set forth in *Requisite Two*. For example, criminal laws can impose restraints on media through publication bans, provided that these restraints accord with principles of freedom of expression in the *Charter*. Non-criminal law measures and non-law measures that involve the media could likely have a much more significant impact on organized crime outlaw groups. For instance, the media can effect anti-organized crime advertising campaigns in order to discourage membership; to create new non-criminal identities for these offenders if the offender has a willingness to change; and to sensationalize the powers and victories of law enforcement in order to de-sensationalize organized crime outlawry. Such non-criminal law and non-law measures would also involve members of the community, and thus, reinforce pro-social values and norms among the law-abiding and increase their internal cohesion.

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<sup>1</sup> S.C. 1992, c. 20 [*Corrections and Conditional Release Act*].

Criminal laws can also contribute to the goals based on differential association and social learning in subcultures, and deviance and labelling theory as set forth in *Requisite Five*. Suppression techniques instituted through bail orders and sentencing conditions can limit and prevent differential association and anti-social learning within the subcultures of outlaws, and thus, reduce the internal cohesion and power of organized crime outlaws, and reduce the reinforcement of their identities through ongoing anti-social interactions with one another. Thus, to some degree, the criminal law can prevent the perpetuation of their identity and the empowerment of their reputations by stopping members from associating with one another.

Non-criminal law measures rather than criminal law measures, also may have negative impact on organized crime outlaw groups in very significant ways. For instance, amendments to *Trade-marks Act* and *Copyright Act* laws as proposed in section seven of Chapter Four could give effect to *Requisite Six* which contains lessons learned from differential association and social learning in subcultures, and from social psychology. Namely, amendments to trade-mark laws and copyright laws could prevent and limit the bolstering of organized crime identities by limiting or preventing the use of gang names and insignia. Limits on such usage could decrease the internal cohesion and the power of the reputations of organized crime outlaw groups.

Non-law measures, rather than criminal law measures, could give effect to the assertions from social control and bond theory and social psychology as set forth in *Requisite Three*. Namely, community education and action programs, such as SNAP®, the Interministry Committee on the Prevention of Youth Violence and Crime in British Columbia, and bar watch and restaurant watch programs, could foster pro-social bonds among societal members in communities with organized crime problems by facilitating attachment to conventional others; commitment to obeying societal rules; involvement in conventional activities; and belief in a common and conventional value system.

While the means exist to give effect to many of the requisites in Chapter Four, these means must be implemented. Laws that allow for restorative justice measures should be

employed. Resources to implement programs for organized crime outlaws and those at risk of becoming such outlaws, must be provided. Further, empirical research is required to ensure that proposed anti-organized crime measures will effect their actual goals. However, there appears to exist a lack of empirical research regarding organized crime outlaw identity formation generally and particularly in relation to adults. There appears to be a lack of programs or measures designed to prevent individuals from adopting and internalizing organized crime outlaw identities; a lack of measures that specifically seek to negatively affect or prevent the use of the power of organized crime group identities; and a lack of specific restorative, reintegrative and rehabilitative programs that are tailored to organized crime outlaws after they have internalized the values and norms of an organized crime outlaw group. And, there exists a lack of empirical research to demonstrate the effectiveness or ineffectiveness of such programs.

As this review of the anti-organized crime measures discussed in Chapter Four demonstrates, the criminal law plays a role in effecting anti-organized crime measures. However, the law alone should not be the chief focus in developing solutions to organized crime problems in society. Criminal laws can effectively *contribute* to reducing, managing, or controlling organized crime. However, they are but one tool in an arsenal of measures that can prevent and reform the formation of organized crime outlaw identities, diminish the power of the reputations of organized crime outlaw groups, and reintegrate and rehabilitate organized crime outlaws. The focus of anti-organized crime measures must shift to the reasons for organized crime outlaw identity formation, and the ways in which organized crime outlaw groups use and perpetuate this identity through their reputation for violence and intimidation. Reconstruction of the concept of organized crime outlaw and organized crime outlaw group to reflect the importance of their identity and reputation will allow for a refocusing and reformulation of anti-organized crime measures that are substantive, fair and just, and it will reduce reliance on unfair, unjust, and ineffective criminal laws to resolve problems posed by organized crime groups in society.

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## APPENDIX A SUMMARY OF RECOMMENDATIONS

**Recommendation One:** Parliament should employ pre-existing Criminal Code and other statutory provisions in order to enforce the law against organized crime outlaws and organized crime outlaw groups.

**Recommendation Two:** Parliament should have expanded, and continue to expand as necessary, law enforcement powers in relation to organized crime outlaw investigations.

**Recommendation Three:** Parliament should proscribe the specific groups that it deems criminal organizations.

**Recommendation Four:** Law enforcement agencies, communities and media groups should work cooperatively in launching anti-organized crime initiatives, such as anti-organized crime advertising campaigns that target all members of the community which has or is developing an organized crime problem. Namely, such campaigns should target all community members – youth who are not involved in gangs, youth who are involved in gangs, law-abiding adults, organized crime outlaw group members, as well as potential organized crime members.

**Recommendation Five:** The media should impose self-regulations to guide its depictions of crime and organized crime, and to deliver effective anti-organized crime messages.

**Recommendation Six:** Empirical research ought to be conducted in relation to and prior to any anti-gang advertising campaign that the law enforcement agencies, communities, and/or media groups implement.

**Recommendation Seven:** Criminal laws that have anti-organized crime mandates should be used in conjunction with community-based education and action programs.

**Recommendation Eight:** Community-based education and action programs that have anti-organized crime mandates should be empirically evaluated in the short-term, as well as in the long-term in order to determine whether they foster pro-social bonds among societal members, and specifically, to determine whether they achieve the goals of attachment to conventional others; commitment to obeying societal rules; involvement in conventional activities; and belief in a common and conventional value system.

**Recommendation Nine:** Community-based education and action programs that do not have anti-organized crime mandates, such as school programs, extracurricular programs, social clubs, athletic associations, should also be empirically evaluated in order to determine whether they foster pro-social bonds among societal members, and specifically, to determine whether they achieve the goals of attachment to conventional others; commitment to obeying societal rules; involvement in conventional activities; and belief in a common and conventional value system.

**Recommendation Ten:** Restorative justice services ought to be made available at any time during an organized crime outlaw's involvement in the criminal justice system – they should be offered and reoffered continually. However, these services should be implemented, or attempted to be implemented, during the correctional phase of the administration of criminal justice.

**Recommendation Eleven:** Restorative justice services should be tailored to meet the individual needs of the organized crime outlaw.

**Recommendation Twelve:** Empirical research must be conducted on restorative justice programs that seek to rehabilitate and reintegrate organized crime outlaws into conventional society in order to determine and implement the most appropriate program for a particular organized crime outlaw.

**Recommendation Thirteen:** Courts should impose non-association orders in bail orders where the prosecution has proven and the court has found on a balance of probabilities that the accused persons are members of a “criminal organization” charges as defined in the Criminal Code, and that they committed their offences in connection with this “criminal organization.”

**Recommendation Fourteen:** Courts should impose non-association orders in sentences where the prosecution has proven and the court has found beyond a reasonable doubt that the accused persons are or were members of a “criminal organization” charges as defined in the Criminal Code, and that they committed their offences in connection with this “criminal organization.”

**Recommendation Fifteen:** Where courts order non-association orders, community support and resources ought to be provided to organized crime outlaws in order to facilitate pro-social interactions conventional societal members and institutions.

**Recommendation Sixteen:** Individuals should only be subject to forfeiture orders if they have been found guilty of a criminal offence, and the property relates to or is connected to the commission of that offence.

**Recommendation Seventeen:** Proceeds of crime and forfeiture legislation, also known as anti-money laundering and asset recovery regimes, ought to be used in order to seize offence-related property, such as the insignia and clubhouses of organized crime outlaw groups and members. When forfeiture under the Criminal Code cannot occur, civil forfeiture proceedings in this regard ought to take place.

**Recommendation Eighteen:** Statutorily mandated community safety programs implemented by some provinces in an effort to prevent members of organized crime outlaw groups from wearing their patches, group insignia, or group colours in certain public places should be re-evaluated, and where possible, voluntary participation should be encouraged, such as exists in the Bar Watch and Restaurant Watch programs in British Columbia.

**Recommendation Nineteen:** *The Trade-marks Act and Copyright Act should be amended in a number of ways. These amendments should:*

- a. allow the government to register unregistered insignia of organized crime outlaw groups in order to assume control over the reputation of those groups;*
- b. expand the terms “offensive” and “scandalous” in section 9 of the Trade-marks Act in order to prohibit the registration of marks of organized crime outlaw groups where those marks are used in connection with criminal offences;*
- c. augment the laws that regulate registration and renewal of trade-marks, and requiring stringent proof of the purposes of a mark within section 30 of the Trade-marks Act;*
- d. increase the power of the Registrar to expunge and expropriate marks that facilitate or are associated with the commission of a criminal offence;*
- e. empower governments to expropriate of registered trade-marks where such marks have been used in connection with a criminal offence.*
- f. allow law enforcement to diminish the power of organized crime outlaw groups through mass distribution of their names and insignia; through the use of a group trade-mark or trade-name in different trade areas; and through the use of a group mark in illegal commercial transactions.*

**Recommendation Twenty:** *Empirical research should be conducted in order to determine whether more severe labelling, greater stigmatization and more negative social interactions occur in relation to individuals publicly declared to be organized crime members or formally labelled as such in a court of law or by a legislative body, as opposed to organized crime members who are not so declared or labelled.*

**Recommendation Twenty-One:** *Community action programs should only target individuals whom a court of law has determined to be a member of a criminal organization, or who are members of a group proscribed by a legislative body, such as the Governor in Council on the advice of the Minister for Public Safety or Solicitor General or both.*