

# Financial Exploitation of Crime 1997

## **Financial Exploitation of Crime**

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### **Background**

[1] The Uniform Law Conference first considered the issue of the financial exploitation of crime in 1983 when the Criminal Law Section adopted a resolution which advocated the study, with the view to developing a legislative response, of the "phenomenon of the publication of literary accounts of crime to the financial advantage of the criminal or his assigns". When it reported in 1984, the Committee recommended that a uniform statute be prepared that would require publishers to deposit all monies otherwise payable to a criminal into a trust fund to be established by the legislation. <sup>1</sup> This fund would then distribute its proceeds on a percentage basis\_25% for the accused's legal fees, 15% for the accused's dependants, 30% to the victim or his or her dependants and the remaining 30% to the province to cover the cost of policing, prosecution and the incarceration of the accused. <sup>2</sup> As a result of this report, an unanimous resolution was passed by the Criminal Law Section to the effect that the report of the Committee be referred to the Uniform Law Section "with a view to establishing a joint committee to review the matter."

[2] In response to this resolution, the provincial and federal Attorneys General were canvassed to see if there was sufficient interest in undertaking a project. As insufficient interest was expressed, nothing further seems to have been done on this topic until 1994 when Saskatchewan presented a resolution that the "Chair of the Criminal Law Section pursue this issue with the chair of the Uniform Law Section". <sup>3</sup> In the ensuing discussions it was decided to obtain an opinion on the constitutionality of any proposed legislation. That opinion was presented to the Conference in 1995. <sup>4</sup> Having decided that the provinces had jurisdiction to legislate in relation to this subject, it was decided to commission a paper that would discuss the various legislative options.

[3] In 1996 an Options Paper was presented to the Conference. <sup>5</sup> The Paper suggested that there were three possible models of the legislation, each with their own advantages and disadvantages. In addition, draft legislation from two models--one that relied upon civil actions being successfully brought by victims against the criminal and another than set up an administrative system to distribute a percentage of profits earned by the criminal to victims irrespective of the quantum of victims' damages--were attached to the Options Paper. A majority of the Conference voted in favour of the Administrative Re-Distribution model. Despite this vote the Conference continued to be concerned about the need for the proposed legislation. Accordingly, it was agreed to refer the matter back to the federal and

provincial Attorneys General.

[4] At meetings of the Deputy Ministers in November of 1996 and of the Attorneys General in February 1997, the draft legislation that had been submitted to the Uniform Law Conference was generally approved, with the preference being for the Administrative Re-Distributive model. There were only two recommendations for improvement. The first was that the legislation should not allow the criminal to earn any profits whatsoever through the exploitation of a crime. The second was that the legislation should provide for a defence in certain cases. Both of these recommendations have been included within section 9 of the draft legislation presented to this Conference.

### **The Reason for the Legislation**

[5] It has always been the law that a criminal could not directly benefit from his or her crime by keeping the proceeds of that criminal activity. Today, that rule is embodied in Part XII.2 of the Criminal Code. In addition, some years ago this principle was expanded when the courts created a common law rule that prohibited any person who murdered another from benefiting from the deceased's estate: *Lundy v. Lundy* (1895), 24 S.C.R. 650.

[6] The difference in these two cases is that in the former the profit earned by the criminal comes directly from the crime itself whereas in the latter it comes directly from a transaction that is itself completely legal and only indirectly from the crime. Nevertheless, the courts have treated both cases as arising from the same principle--that as a matter of public policy criminals should not be allowed in law to profit from their own crime. This principle was described in the British decision of *Cleaver v. Mutual Reserve Fund Life Association*, [1892] 1 Q.B. 147, a case concerned with indirect profits, in the following terms: "No system of jurisprudence can with reason include among the rights which it enforces rights directly resulting to the person asserting them from the crime of that person".

[7] What is therefore being proposed by the Criminals' Exploitation of Violent Crime Act is the application to new circumstances of a principle that has already been recognized by the courts and by legislators. This extension is required because the new circumstances--the recollection of a criminal's own crimes for payment--are the ones that have the potential for criminals earning the greatest profit and for generating the greatest public outrage.

[8] Consistent with the principle, the legislation is not concerned at all with the legality or illegality of the recollection itself but only that such recollection should not profit the criminal. Moreover, as part of the same principle, the concern is not with the fact that a criminal earns money but with the fact that the money could only have been earned because the criminal committed, and was found guilty of, a criminal offence. Finally, because the focus of the legislation is on prohibiting criminals from recounting their crimes, the legislation does not affect any other person--except insofar as the criminal seeks to avoid the application of the legislation.

## **Constitutional Considerations**

[9] As part of the process of creating the legislative scheme, three constitutional issues had to be considered. These were: (1) whether the provinces or the federal Parliament had the power to create the legislation; (2) whether the particular legislative scheme set out below infringed section 96 of the Constitution Act, 1867; and, (3) whether the legislation could survive a challenge under section 2(b) of the Canadian Charter of Rights and Freedoms and, if not, whether the legislation could nevertheless be sustained under section 1 of the Charter. Each of these issues were discussed in the Options Paper and will briefly be reviewed hereafter.

[10] With regard to the federalism issue the Options Paper concluded that although the legislation contains a penalty, it cannot be said that that penalty is the focus of the legislation. In other words, the legislation neither prohibits the recollection itself nor the financial exploitation of a crime, and neither does it punish either of these things. Instead, it merely puts a mechanism into place to prevent criminals from profiting from their crimes. Accordingly, it was concluded in the Options Paper that a court would most likely conclude that the legislation was not supported by the federal criminal law power and that the provinces most likely have jurisdiction.

[11] Section 96 of the Constitution Act, 1867 prevents the provinces from giving superior court jurisdiction to people appointed by the provinces. The Options Paper concluded that the jurisdiction given under the legislation to the government appointed agency--the jurisdiction to distribute the criminal's money irrespective of whether the distribution conformed to the damages actually sustained or not--would likely be characterized as a power that has been created since confederation and therefore not one that was broadly conformable to the jurisdiction exercised by s. 96 courts at that time. If this conclusion is correct, it would mean that the province would be allowed to assign the administration of the legislation to adjudicators appointed by the province rather than to the courts.

[12] With regard to the Charter issues, the Options Paper suggested that a court would probably find that the legislation infringed section 2(b), but that since the criminal was left with some profits the legislation could be characterized as minimally impairing the criminal's freedom of expression. The proposed defence in section 9 of the enclosed draft takes a different tack. Rather than assuming an infringement of section 2(b), and therefore subjecting the legislation to the possibility that a court might conclude that it cannot be sustained under section 1 of the Charter, the section provides a good argument that no section 2(b) rights are infringed at all. Moreover, rather than making the validity of the legislation the issue that a court must determine, the section seeks to redirect the issue toward the interpretation and application of the legislation. Thus, if a court is of the opinion that "the retention of the consideration would infringe the freedom of expression and that the infringement would be unjustified" it can exclude criminals from the operation of the legislation completely. Alternatively, it can adjust the amount of money it allows the

legislation to take from a criminal in order to minimally impair a particular criminal's Charter rights.

[13] Whether this tack succeeds can only be determined when the matter is finally considered by a court--and to my knowledge no provision such as this has yet been considered. What I suspect a court would do is to apply the legislation first before determining whether it has infringed an applicant's s. 2(b) rights. If this is done, and a court determines that a person's right to freedom of expression infringes section 2(b) and that it is not justified, then it will have to conclude that the legislation does not apply to the criminal. In this case, there cannot be considered to be a Charter breach. Only in those cases where a court does not allow a criminal to take advantage of the legislation can there be a potential Charter breach--but in this case it seems unlikely that a court would then decide that, even though the legislation either does not infringe the criminal applicant's right to freedom of expression or that such infringement is justified, that the legislation nevertheless is invalid as a breach of the Charter. If this conclusion is correct, then even a worse case scenario would not result in a declaration of invalidity of the legislation but merely a finding that the legislation cannot apply to a particular fact situation. As a result, the legislation can survive to prevent other criminals from profiting from their crimes.

## **Criminals' Exploitation of Violent Crime Act**

### **Definitions**

#### **1. (1) In this Act,**

"convicted" includes a verdict that the accused committed the act or made the omission that formed the basis of the offence with which the accused was charged but was not criminally responsible on account of mental disorder and a finding of guilt on the part of a person under the Young Offenders Act (Canada);

"recollection of a violent crime" includes a recollection of circumstances relating to the crime, an expression of thoughts or feelings about the crime and a re-enactment of the crime;

"victim", subject to the regulations, means a person who suffers any harm from a crime, whether or not the harm is direct or indirect or physical, mental or economic;

"violent crime" means,

(a)an offence under the Criminal Code (Canada) that was an indictable offence for which the offender might have been sentenced to imprisonment for five years or more and that involved,

- (i)the use or attempted use of violence against another person, or

- (ii) conduct that endangered or was likely to endanger the life or safety of another person or inflicted or was likely to inflict severe psychological damage upon another person,

(b) an offence or attempt to commit an offence mentioned in section 271 (sexual assault), 272 (sexual assault with a weapon, threats to a third party

or causing bodily harm), or 273 (aggravated sexual assault) of the Criminal Code (Canada),

(c) an offence in a jurisdiction other than Canada that corresponds to an offence described in clause (a) or (b).

(2) For the purposes of this Act, a person is convicted of a crime even if he or she has received an absolute or conditional discharge or a conditional pardon but not if he or she has received a free pardon.

**Comment:** Section 1 contains the definitions for the Act. These definitions restrict the application of the Act in two principal ways, both of which are designed to reduce the chances that the legislation will be struck down as being contrary to the Charter. First, the legislation does not apply to people who have only been accused of a crime, but only those who a court has concluded have committed the act or made the omission that formed the basis of the offence. Second, the Act does not apply to all criminal offences, or to any provincial offences, but only those offences that are serious enough that their recollection will outrage people.

### **Limitation of application of Act**

2. This Act does not apply with respect to consideration given for a law enforcement purpose by a law enforcement agency, the federal government or the government of a province, territory or municipality.

Comment: This section ensures that law enforcement agencies still have the ability to pay criminals for their recollections so long as the payment is for law enforcement purposes.

### **Paying for a criminal's recollection**

3. (1) No person shall give consideration in exchange for the recollection of a violent crime to a person who has been convicted of the crime or his or her agent.

(2) A person who has an obligation to give consideration that would contravene subsection (1) shall, without delay, give the consideration to the (Agency) instead of to the person to whom it would otherwise be owed.

(3) The situations to which this section applies include situations in which consideration is given outside the province if the consideration is given by a resident of the province.

(4) This section does not apply with respect to consideration that is given to an official or agency in another jurisdiction that is prescribed in the regulations as the (Agency)'s counterpart in that jurisdiction.

**Comment:** Section 3 establishes that it is the earning of a profit as a result of the recollection of a crime, rather than the recollection itself, about which the legislation is concerned. This section also requires all such profits to be given to a government appointed agency, rather than to the criminal, and sets out a method to co-ordinate the different regimes in the different provinces.

### **Selling a criminal's recollection**

4. (1) No person who has been convicted of a violent crime or agent of such a person shall accept consideration in exchange for the recollection of the crime.

(2) A person who has a right to receive consideration that would contravene subsection (1) shall, without delay, direct the person from whom they have a right to receive the consideration to give the consideration to the (Agency).

(3) The situations to which this section applies include situations in which consideration is accepted outside the province if the consideration is accepted by a resident of the province.

(4) Subsection (2) does not apply if the person who has a right to receive consideration directs the person from whom they have a right to receive the consideration to give it to an official or agency in another jurisdiction that is prescribed in the regulations as the (Agency)'s counterpart in that jurisdiction.

**Comment:** This section ensures that the obligation to direct money earned through the financial exploitation of crime not only applies to those paying the criminal but also applies directly to the criminal. The section also ensures that the criminal cannot avoid the legislation by receiving profits outside of the province and accordingly also deals with the circumstance of payment in another jurisdiction.

### **Persons deemed to be agents**

5. (1) For the purposes of sections 3 and 4, the following persons shall be deemed to be agents of the person convicted of the crime:

1. A person who has been assigned rights of the person convicted of the crime to receive consideration in exchange for the recollection of the crime.

2. A corporation if the person convicted of the crime has a substantial interest in or connection to, the corporation as defined in the regulations.

(2) For the purposes of sections 3 and 4, a relative of the person who has been convicted of the crime shall be deemed, in the absence of evidence to the contrary, to be an agent of the person.

**Comment:** This section encompasses two goals. First, there has to be a mechanism to ensure that a criminal is not allowed to avoid the operation of the legislation merely by assigning his or her rights to receive consideration to another person. Since relatives are the most likely person to whom a criminal can assign rights, relatives are deemed to be included in this prohibition. However, since the Act would only apply to persons convicted of a crime, which does not by itself extend the legislation to relatives of criminals, those people have the right, on proper proof, to show that they are not assignees from the criminal but recalling the circumstances of the crime in their own right.

### **Consideration to be distributed to victims**

6. (1) The (Agency) shall distribute the consideration it receives in respect of the recollection of a violent crime for which a person was convicted to the victims, of whom the (Agency) has notice, of that crime and other crimes for which the person was convicted

(2) The consideration shall be distributed to the victims in proportion to the harm they have suffered as a result of the crimes.

(3) The proportion of harm suffered by the victims shall be determined by the (Agency) in accordance with the regulations.

(4) The (Agency) may deduct its reasonable costs from consideration it receives.

**Comment:** This section is the essence of the Administrative Model, and distinguishes this model from the approach taken in the United States. Rather than requiring victims to sue, to prove their damages, and to take only their damages out of the money that is to be paid to the criminal for his or her recollection, this section allows the government appointed agency to distribute all money available to it to the victims in proportion to the harm suffered. Because it can deduct costs from consideration it receives, the agency can be cost neutral.

### **When consideration distributed to victims**

7. (1) Upon the expiry of the three year period following the first receipt of consideration for distribution to the victims of the crimes for which a person was convicted, the (Agency) shall distribute all such consideration it received in that three year period.

(2) The (Agency) shall distribute consideration for victims received after the three year period at the times prescribed in the regulations.

**Comment:** This section dictates when the government appointed agency is entitled to first begin paying out money to victims. A three year period allows some funds to build up in the government appointed agency to allow for a distribution, and to allow the criminal to make an application under s. 10.

### **Interim distributions**

8. (1) The (Agency) may make interim distributions of the consideration it receives during the three year period referred to in subsection 7 (1).

(2) An interim distribution may be made only if, in the opinion of the (Agency), the interim distribution will not prejudice any person to whom consideration would otherwise be distributed upon the expiry of the three year period.

(3) If interim distributions have been made, the distribution upon the expiry of the three year period shall be made so that the total amount distributed on an interim or final basis to each victim is what they would have received had the interim distributions not been made.

**Comment:** This section counterbalances the rigidity of the previous section, and thus allows the government appointed agency to pay out some or all of the money that it has received in the three year period. To assist victims who have not yet been identified are not adversely affected by this payout, the government appointed agency is allowed to adjust future payments.

### **Distribution if no victims**

9. If the (Agency), at the time it would otherwise distribute consideration it receives, does not have notice of any such victims, the (Agency) shall pay the consideration into the consolidated revenue fund [fund for legal aid, fund for victims].

**Comment:** This section ensures that criminals are not allowed to financially exploit their crimes even if there are no victims to benefit from that exploitation.

### **Unjustified infringement of freedom of expression**

10. (1) A person may, upon at least 30 days notice to the (Agency), apply to the (name of court) for an order directing the (Agency) to give consideration it has received, or any part of it, to the person to whom the consideration would have been given had it not been given to the (Agency).

(2) The court may add, as a party to the proceeding, a victim to whom any part of the consideration would be distributed in the absence of an order under this section.



(3) The court shall make an order under this section only if, after taking into account the importance to society of not having persons financially exploit crimes they have committed and of having victims of crime compensated for harm they have suffered, the court is of the opinion that the retention of the consideration would infringe the freedom of expression and that infringement would be unjustified.

(4) In determining whether to make an order under this section in relation to consideration for the recollection of a crime, the court shall consider the following:

1. The details of the crime.
2. The purpose of the recollection.
3. Whether, and to what degree, victims of the crime may suffer further harm from the recollection.
4. The value of the recollection to society.

(5) If the court directs the (Agency) to give consideration it has received, or any part of it, to the person to whom the consideration would have been given had it not been given to the (Agency), the court may also allow consideration that may be given in the future or any part of such consideration, to be given to that person instead of to the (Agency).

(6) Sections 3 and 4 do not apply with respect to consideration that the court allows to be given under subsection (5) or under the corresponding provision in the legislation of another jurisdiction.

(7) An order under this section may not be made in relation to consideration that, at the time the (Agency) received notice of the application, had already been distributed either as final or interim distributions.

**Comment:** This section recognizes the Charter problems that this legislation potentially raises, and seeks to deal with this problem by allowing various criminals, on a case-by-case basis, to escape the application of the legislation. In making this determination, the court must balance the criminal's section 2(b) rights with the purposes of the legislation and must consider certain items specified in the legislation. In the course of determining whether the criminal is subject to the legislation or not, the Court has the option to decide to take all of the criminal's profits for re-distribution or only to take part of those profits. The section also deals with the effect of an order made under this section on the obligations under sections 3 and 4 and on money already distributed to victims in the event that the criminal is allowed to keep some of profits.

### **Immunity of (Agency)**

11. The (Agency) and its employees and agents are not liable for any act done in good faith in the performance or intended performance of any duty or power under this Act, or for any neglect or default in the performance or intended performance in good faith of such duty or power.

**Comment:** This section seeks to protect that agency and its employees and agents from liability so long as their action or inaction was in good faith.

## **Offences**

12. (1) A person who contravenes subsection 3 (1) or 3 (2) is guilty of an offence and on conviction is liable to a fine not exceeding the greater of \$5,000 and the amount of the consideration that the person gave in contravention of subsection 3 (1) or failed to give as required under subsection 3 (2).

(2) A person who contravenes subsection 4 (1) or 4 (2) is guilty of an offence and on conviction is liable to a fine not exceeding the greater of \$5,000 and the amount of the consideration accepted in contravention of subsection 4 (1) or with respect to which the person failed to make a direction as required under subsection 4 (2).

(3) The payment of a fine under subsection (1) or (2) does not affect any liability a person may have to the (Agency) arising from their failure to give consideration to the (Agency) or to direct that consideration be given to the (Agency).

(4) A fine under subsection (1) or (2) shall, upon being collected, be paid to the (Agency) and shall be deemed to be consideration received in respect of the recollection of the violent crime to which the offence related.

(5) A person who fails to give the (Agency) information as required under a regulation made under clause 13 (e) is guilty of an offence and on conviction is liable to a fine not exceeding \$5,000.

**Comment:** This section ensures that the obligations under section 3 and 4, to direct the profits the criminal has earned as a result of the recollection of a crime, and the obligation arising under ss. 13(e), are going to be complied with. It also ensures that fines are characterized as consideration so that they can either be distributed like consideration or they can be used by the agency as a source to recover their costs.

## **Regulations**

13. The Lieutenant Governor in Council may make regulations,

- (a) modifying the definition of victim in subsection 1 (1);
- (b) prescribing an official or agency in another jurisdiction as the (Agency)'s counterpart in that jurisdiction;
- (c) permitting the (Agency) to give consideration it receives to the (Agency)'s counterpart

in another jurisdiction;

(d) governing the application of this Act with respect to consideration described in clause (c) and with respect to consideration received by the (Agency) from the (Agency)'s counterpart in another jurisdiction;

(e) requiring the following persons to give the (Agency) information described in the regulations at the times and in the manner set out in the regulations,

- (i) persons who are required under subsection 3 (2) to give consideration to the (Agency),
- (ii) persons who are required under subsection 4 (2) to direct that consideration be given to the (Agency);

(f) defining a substantial interest in or connection to a corporation for the purposes of paragraph 2 of subsection 5 (1);

(g) governing the determination of the proportion of harm suffered by the victims under subsection 6 (3);

(h) prescribing the times at which the (Agency) shall distribute consideration for victims under subsection 7 (2);

(i) governing the final distribution of consideration in circumstances in which interim distributions have been made and there is not enough consideration remaining to comply with subsection 8 (3);

(j) requiring interest to be credited by the (Agency) to consideration received by the (Agency) and governing the determination of such interest;

(k) requiring interest that would have been credited had interim distributions not been made to be taken into account in the final distribution of the consideration and governing how such interest shall be taken into account;

(l) authorizing the (Agency) to convert non-monetary consideration into money or to accept money instead of non-monetary consideration and governing such conversion or acceptance.

**Comment:** This section has three purposes. First, it allows each province to create the fine details that the legislation requires in order to operate properly. Second, it allows for slight differences in the application of the legislation in each province. Third, it allows each agency to interact with agencies in other provinces.

### **Commentary**

This draft does not attempt to deal with issues relating to protection of privacy legislation

which may differ from jurisdiction to jurisdiction.

Throughout this draft the term "Agency" appears in parenthesis. It is intended that this phrase be replaced, in each jurisdiction's statute, with the name of the official or agency that will function as the "Agency" in that jurisdiction. Since it is anticipated that most provinces will assign jurisdiction of this Act to an existing Agency, no provision was made in the Act itself for the creation of a new Agency. If it is intended to assign jurisdiction of this Act to a new agency, the legislation will have to be amended accordingly.

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Footnote: 1            Committee on the Financial Exploitation of Crime, 'Committee Report on the Financial Exploitation of Crime' (Uniform Law Conference of Canada, Calgary: 1984), p. 7.

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Footnote: 2            Surprisingly, it appears that the provinces were to get their 30% despite the fact that many of the criminals who seek to profit from their crimes would have been incarcerated in federal penitentiaries.

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Footnote: 3            Since the Attorneys General had last been approached, two changes had taken place. First, the rules of the Conference had been changed, so that it was no longer necessary to approach the Attorneys General before projects were undertaken. Second, Ontario had proceeded with its plans to enact legislation preventing the exploitation of crimes by criminals. Because of this latter fact and the fact that the provinces had shown more concern through legislative initiatives for the better treatment of victims, there was confidence that the provinces would be interested if the Conference proceeded with this project.

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Footnote: 4            Joint Session of Uniform Law Section and Criminal Law Section, 'Financial Exploitation of Crime' (Uniform Law Conference of Canada, Quebec: 1995).

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Footnote: 5            This paper can be found at  
<http://www.law.ualberta.ca/alri/ulc/96pro/e96k.htm>

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