Financial Exploitation of Crime 1996

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Civil Section Documents - Financial Exploitation of Crime

I. INTRODUCTION

[1] This paper will provide and discuss various legislative options for dealing with the financial exploitation of crime.

[2] F or the purposes of this topic, the term "financial exploitation of crime" has a specific meaning. Although there are many crimes that are committed in order to obtain a financial benefit, the term does not refer to the direct benefits that criminals can obtain through the commission of a crime but the indirect benefits that some criminals can acquire through recounting the crime after it has been committed. This distinction is an important one, since the prevention of direct profits of crime is within the legitimate jurisdiction of the federal Parliament under section 91(27) of the *Constitution Act, 1867*. It is submitted, however, that the regulation and prevention of indirect profits.not being

concerned with the prevention of the crime itself but only with things that are themselves legal.is within provincial legislative jurisdiction.[1]

[3] Although legislators in the United States and in Canada seem to have two motivations for enacting this legislation.to prevent the criminal from making money from his or her crime and to assist victims of crime.it is submitted that the former is the real motivation for this legislation. This submission is supported by the following points. First, the law already gives people who have suffered harm as a result of a criminal act a number of different ways of obtaining compensation. [2] Second, legislation that deals with the financial exploitation of crime only applies to victims of crime rather than to all victims. Third, legislation prohibiting the exploitation of crime seems always to arise to prevent a criminal from making money from his or her crime rather than to ensure that victims of crime are being properly compensated. [3] Finally, if the legislative debates for the introduction of legislation in Ontario are examined, it is clear that the overriding concern for the legislators in that province is that criminals not be allowed to profit from their crimes. [4]

[4] Once it is accepted that the primary purpose of the legislation is to prevent criminals from profiting from their crime, the other motivation can be seen in its true light. That is, once the state takes away from criminals the profits that they have earned through the exploitation of their crimes, it usually decides to give at least some of that money to the victims rather than keeping it themselves. This approach is probably taken at least as much from a good political sense as it is from a sense of justice that victims have the first right to such money.

II. BACKGROUND

[5] The Uniform Law Conference first considered 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. [5]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. [6] 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."

[6] 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". [7] In the ensuing discussions it was decided to obtain an opinion on the constitutionality of any proposed legislation. That opinion, which is discussed in more detail below, was presented to the Conference in 1995. [8] Having decided that the provinces could act, it was decided to commission a paper that would discuss the various legislative options.

III. CONSTITUTIONAL ISSUES

[7] It must be noted at this time that the regulation of indirect profits from crime to prevent criminals from exploiting their crime is, in this country, a relatively novel area for legislative action. That fact necessarily means that the options available must be shaped by constitutional concerns. Although, therefore, the Conference has already been provided with a constitutional opinion, it is necessary to reiterate more precisely what that constitutional opinion provided so that it can be determined what legislative possibilities are available. Generally, the constitutional position can be summarized as follows.

1. Criminal Law

[8] The class of criminal law has generally been described as requiring legislation that relates to matters within the traditional field of criminal law, namely public peace, order, security, health and morality, [9] in the form of a prohibition and a penalty. *S*[10] While there is some support in the case law that the taking of some of the proceeds of a criminal exploitation will not be considered to be a penalty as that term applies to section 91(27), [11] the better indication is that it depends upon the particular circumstances. [12] While it may be safe to conclude that any such legislation would contain a penalty, it is more difficult to conclude that the remainder of the ingredients of a valid criminal statute may be said to exist.

[9] The reason for this is that, despite the existence of a penalty, it would be very hard to say that any such legislation is designed to criminalize the exploitation of a crime, [13] even though it may be said, in the broadest sense, that legislation dealing with the exploitation of crime may be said to have been promoted because of moral outrage. [14]Moreover, it has never been suggested that legislation be designed to actually prohibit any exploitation by, for example, prohibiting criminals from recounting their criminal experiences. If legislation did try to prohibit any such exploitation, it would no doubt be considered an infringement of section 2(b) of *the Canadian Charter of Rights and Freedoms* and would likely be impossible to justify as a reasonable limit in a free and democratic society.

[10] It must be concluded, therefore, that the only relationship that any proposed legislation would have with criminal law is that it deals with people who have committed criminal offences. That, clearly, is not sufficient to justify federal legislative action under section 91(27) of the *Constitution Act, 1867*.

2. Canadian Charter of Rights and Freedoms

[11] In addition to determining what level of law-making authority has jurisdiction in this area, it must also be determined whether such laws are inconsistent with *the Canadian Charter of Rights and Freedoms*. In this regard, it must noted that the Supreme Court of Canada has stated that, so long as the activity dealt with in the legislation can be characterized as expression, if the legislator intended that the legislation restrict attempts to exercise section 2(b) rights, then "there has been a limitation by law of s. 2(b) and a s. 1 analysis is required to determine whether the law is inconsistent with the provisions of the Constitution." [15] In other words, so long as at least one of the purposes of the legislation is to take some or all of the profits from a criminal for exploiting a crime "which crime is usually exploited by an individual using his or her right of expression" it must be accepted that a *Charter* right has been infringed.

3. Section 1 Justification

[12] Once a *Charter* breach has occurred, it must be determined whether that breach can be justified under section 1. In making this determination, the courts apply the *Oakes* test [16] of whether the objectives sought to be achieved by the legislation are pressing and substantial in a free and democratic society and whether the means chosen by the legislator are proportional to its objective. In other words, in determining whether the legislation can be upheld despite the *Charter* breach, the courts will examine both the purpose for enacting the legislation and the drafting of the legislation.

[13] Although it has been submitted above that the real purpose behind the legislation is to prevent criminals from exploiting their crime and thereby earning profit, because of the particular way that legislation of this type is often drafted, it also appears as if the legislators had intended to create this legislation in order to provide financial assistance for victims of crime. Ironically, this latter purpose is probably more likely to be viewed by a court to be a pressing and substantial concern in a free and democratic society.

[14] Whether the purpose of the legislation is to prevent criminals from profiting or to assist victims of crime, there are a number of *Charter* problems that can complicate the drafting of the legislation. For the purposes of determining whether legislation can be justified at this stage, courts generally look to three different questions: (1) whether there is a rational connection between the way the legislation has been drafted and its

objective; (2) whether the means sought to achieve the legislative objective minimally impair the *Charter* right affected; and, (3) whether the effect of the legislation is so severe as to outweigh the legislator's pressing and substantial objective. Assuming that legislation can be drafted that satisfies the first criterion, the problem lies in the application of the final two.

[15] If the purpose of the legislation is to prevent criminals from profiting from their crimes, then that objective can be met by taking some of the criminal's money. If too much money is taken, or if money is taken and retained for such a long time that it amounts to taking the criminal's money, then it is submitted that the courts may find that the legislation does not satisfy the minimal impairment test. [17] It has also been suggested,[18] and I submit correctly so, that if the legislation seeks to take money from authors whose crime or whose exploitation of crime is not likely to give rise to moral outrage, then the courts might very well conclude that the deleterious effect of the legislation is disproportionate to its salutary effect. [19]

[16] If the purpose of the legislation is to assist victims, then the best way that can be done while least affecting the criminal's right to expression is to facilitate victims in their suit against the criminal. This can be done, for example, by ensuring that all convictions will be treated by the civil courts as proof of the liability of the criminal to the victim [20] and by setting out in legislation the amount of money that victims can receive for various types of non-pecuniary damages. [21] Certainly if money is merely taken from the criminal and held in trust for a long period of time just so that victims may be better able to recover their damage award, that impact on the criminal's right to expression may be disproportionate to the benefits to the victims.

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IV. OPTIONS

[17] The various options that are available to implement the purposes discussed above must be considered in light of the constitutional imperatives. In particular, legislation may have to be designed so that it can be justified under section 1 of the *Charter.* In order to do this, the legislation may have to be designed so that it does not:

1.provide that all of the money earned through the exploitation is taken from the criminal;
2.provide that money is taken from criminals of all types;
3.hold the criminal's money for a long period of time.

1. Who Should be Covered by the Legislation

[18] Who should be the subject of the legislation depends, at least in part, on the particular purposes for which legislation is enacted. If, for example, the purpose of the

legislation is to prevent criminals from exploiting their crimes in order to make a profit, it may be sufficient to restrict the legislation "persons who have been convicted of a criminal offence". It should not be necessary, in the vast majority of cases, to make those who have only been accused of committing crimes the subject of the legislation, since most people are unlikely to sell their story about the crime while still maintaining their innocence in the criminal courts.

[19] Moreover, if the legislation is consistent with its purpose, the legislation should expressly state that if a person is acquitted of a crime by a court, or if the charges are otherwise dismissed or withdrawn, that person is not covered by the terms of the Act. The person may still be found liable in a civil action, because of the lower burden of proof, but that action should not be the concern of special legislation designed to hinder defendants merely because they have once been charged of the crime. Similarly, the legislation should not cover third parties who write about a crime since, not having committed the criminal offence, there is no possibility that that person could be civilly liable.

[20] The more difficult problem is with regard to those persons who have been found to be not criminally responsible on account of mental disorder or not fit to stand trial. The similarity between these two circumstances is that the person who is accused of committing a criminal offence avoids legal sanction because of a particular mental state. However, it is suggested that that mental state not be the determining factor. Since in arriving at the conclusion that a person is not criminally responsible on account of mental disorder, the judge or jury actually make a finding that the accused has committed the act or made the omission, [22] there does not seem to be any reason why a civil court could not use that conclusion as determinative of civil liability. On the other hand, however, no such determination is made with regard to someone who has been found not to be fit to stand trial. In the absence of that finding, it is suggested that legislation be designed so that it does not cover persons in this situation. There are two reasons why this is so. First, in the absence of a finding that the criminal committed the act, that finding would have to be made in any event at a civil trial. Once the victim(s) has a civil judgment against the person found not criminally responsible on account of mental disorder, the normal execution procedures can be used to ensure that, to the extent of the judgment(s), the criminal does not profit from his or her crime. Second, given the mental state of those who are found not to be fit for trial, it is very unlikely that such persons would later seek to exploit the crime so as to profit from it.

[21] I f the legislation has a broader scope, that is to assist victims rather than merely to prevent criminals from profiting from the crime, then the types of persons covered by the legislation could be similarly broadened. Rather than merely preventing criminals from profiting from their crimes, the legislation could logically also include those who have been accused of a crime since whether or not they are found guilty in the criminal arena

they may be later found to be liable in the civil sphere. However, if legislators were really interested in assisting victims, then they would also include those who have been accused or found to be guilty of provincial offences (so long as those offences have caused harm to a person) and people who have committed crimes and provincial offences but have not been charged. [23]

[22] Whichever purpose a legislator adopts for its legislation, there does not appear to be any need to include, as the Ontario *Victims' Right to Proceeds of Crime Act, 1994* [24] (attached as Appendix A) did, a reference to spouses and other relatives. Clearly these references were included out of an abundance of caution to ensure that the criminal could not, as Clifford Olson did, assign to his spouse the rights to receive the financial benefit from Olson's recollection of his crime. The problem not only is that this type of provision is inconsistent both with preventing criminals from profiting and with helping victims, but that it could operate to work a grave injustice. For example, if a woman is the victim of spousal abuse and writes about it after her husband has been tried and convicted in a criminal court, the Ontario legislation will operate so as to keep all the earnings on her recollections for at least five years. If what the legislature really wants is to stop a criminal from trying to avoid the provisions of the legislation, all that is needed is a prohibition against assignment, with the penalty either being: (1) a provision that deems all money earned through the assignment to be the money of the criminal; (2) a fine, large enough to prevent most assignments; or, (3) the provision that the assignment is voidable on the application of an injured party or the Attorney General.

[23] It is recommended that:

1. only those people who have actually been convicted of a criminal offence, including those who have been found to be not criminally responsible on account of mental disorder, be subjected to legislation preventing the exploitation of crimes.

2. people who have only been accused of crimes, people who have committed crimes but have not been charged, relatives, and persons found not fit to stand trial, not be subject to the legislation.

3. that a provision be included to ensure that those who are subject to the legislation cannot avoid it by assigning their profits to some third party.

2. What Offences Should be Covered

[24] If, as noted above, a decision is made that the purpose of the legislation is to assist victims, then it naturally follows that all offences that cause harm, whether they are criminal in nature or provincial offences, should be included within the legislation. However, if the purpose of the legislation is to prevent criminals from profiting from their crime, then a further decision may be made as to whether the legislation should seek to

prevent criminals from profiting from crimes of all types.

[25] This issue arises because of a further examination of the purposes of this legislation. As was noted above, [25] legislation in the United States was adopted as a result of the outrage that occurred when the Son of Sam received money for relating the stories of his crimes. A similar outrage occurred in this country when Clifford Olson received money for telling the police where eleven bodies were buried. [26] Finally, anticipating the response of a salacious press and public, people have expressed alarm that Paul Bernardo and Karla Holmolka may financially benefit from the re-telling of their particularly gruesome crimes. [27] In short, the outrage that people have expressed when criminals have financially exploited their crimes has been reserved for those people who have committed particularly heinous crimes.

[26] This conclusion is confirmed by the fact that there have been a number of publications in Canada and in the United States where criminals have written about their crimes.none of which have been attended by public outrage. The following is a list of some of the most important Canadian publications.

1.Roger Caron, *Go-Boy* (McGraw-Hill Ryerson Ltd: Toronto, 1978). On this voyage of self-discovery, the author depicts a number of bank robberies that he committed.

2.Micky McArthur, *I'd Rather Be Wanted Than Had* (Stoddart Publishing Co. Limited: Toronto, 1990), depicting various robberies and assaults.

3.Victor Malarek, *Hey, Malarek*, (Macmillan: 1984). In the course of describing the difficulties of his childhood, the author also described how and why he robbed a grocery store.

4.P. Starr, *Tempting fate: a cautionary tale of power and politics*, (Stoddart: Toronto, 1993). The author describes how she came be convicted of fraud, breaches of trust, and breaches of the *Election Finances Act.*

5.Evelyn Lau, *Runaway[:] Diary of a Street Kid* (Harper Collins Publishers Ltd.: Toronto, 1989). The author describes how she went from being an honour student to a prostitute and drug user.

6.Francis Simard, Bernard Lortie, Jacques Rose and Paul Rose, *Pour en Finir avec Octobre* (Stanké: Montréal). In addition to describing some of the motivations behind the formation of the F.L.Q., the authors describe how two people were kidnapped and one of them ended up being killed.

7.Julius Melnitzer, *Maximum, Minimum, Medium: A Journey Through the Canadian Prisons* (Key Porter Books, Toronto: 1995). The author alludes to his defrauding of various people, and banks, of millions of dollars.

Rather than being greeted by an outraged public, many of these authors have received public awards. In fact, because of *Go-Boy*, Roger Caron received the Governor General's Award for Non-Fiction. Evelyn Lau's *Runaway* received numerous awards and was made into a movie by the C.B.C. Victor Malarek is now a respected investigative reporter on the C.B.C.

[27] The difference between these books and those forms of exploitation that outrage people is, it is submitted, in the types and numbers of crimes committed. Once that distinction is accepted, a choice has to be made as to whether all criminals have to be treated in the same manner or whether the legislation should be designed to prevent only those criminals that have committed the most egregious crimes from exploiting their crimes.

[28] Of course, it must be noted that by engaging in this type of distinction, legislative drafters must seek to define the difference between good literature, or literature that will not provoke an outrage, and bad literature; a task that those in the United States who sought to define pornography found to be impossible. Whatever distinction is accepted, it must be reiterated that the constitutional law of this country may demand that legislative drafters at least try to draw a workable distinction¾however hard it may be to apply in the end. Since the *Charter* requires that the section 2(b) rights of criminals be minimally impaired, that might mean, as noted above, [28] that the legislators are bound to prevent only those criminals whose crimes give rise to moral outrage from financially exploiting their crimes to make a profit.

[29] Using the distinctions that are found in the *Criminal Code*, there are a number of distinction that could be drawn between offences that should and should not be covered. For example, on decreasing scale of the number of criminals included, legislation could be limited to:

1.those who have been convicted of an offence that carries a penalty of five or more years imprisonment;

2.those who have been convicted of an offence and actually sentenced to five or more years imprisonment;

3.either of the two options above, limited to people who have committed violent crimes against a person;

4.those who have committed a serious personal injury offence, as that phrase is used in the dangerous offender provisions of the Criminal Code, including acts of high treason, treason, first degree murder or second degree murder, whether or not the offender is actually found by a court to be a dangerous offender;

5.those who have actually been found to be a dangerous offender.

[30] If legislation is going to include people who have been found to be not criminally responsible on account of mental disorder, then that inclusion eliminates the second and fifth options since the *Criminal Code* does not provide a sentence for such people. Moreover, since the first option includes most of the authors referred to above, it is suggested that it is too wide.

[31] This leaves the third and the fourth option as acceptable ways to define the types of offences that should be covered by the legislation. Accordingly, it is recommended that, at the minimum, legislation be drafted to apply to who have committed a serious personal injury offence, as that phrase is used in the dangerous offender provisions of the Criminal Code, including acts of high treason, treason, first degree murder or second degree murder, whether or not the offender is actually found by a court to be a dangerous offender.

3. The Description of the Crime

[32] Just as it may be desirable or even necessary to limit the types of crimes that are covered by the legislation, it may also be desirable or necessary to take money only from authors who recall the particulars of the crime in an offensive way. A couple of examples will illustrate this point.

[33] When Roger Caron or Evelyn Lau wrote their book, it was written primarily for therapeutic reasons. Consequently, both of these writers were rewarded rather than punished by the public. However, one gets the impression from reading Micky McArthur's book that it was written primarily to gloat about his crimes.

[34] The obvious benefit of such a distinction is that it continues to encourage those who: (1) wish to explore their motives for committing crimes; (2) wish to show the world why they did certain things; or, (3) wish to make their argument to the world that they were wrongly convicted, to continue to write or talk about their crime.

[35] The difficulty with this approach, however, and it may be a fatal difficulty, is that it is very difficult to draft legislation so as to draw a distinction between "good" and "bad" criminal recollections and equally difficult to apply legislation that distinguishes between such concepts. [29] In the end, therefore, people who have to deal with any such legislation

may be very uncertain as to what they can and cannot do, with the result being increased litigation . Moreover, if criminals are given a way out of the legislation, many will take this route. All of this litigation, which no doubt will involve victims in their effort to ensure that the profits earned by the criminal will be diverted by legislation to a government agency, will increase the emotional and financial costs for victims.

[36] It is recommended, therefore, that legislation not attempt to include or exclude criminals from the application of the legislation because of the particular way that their crimes are described.

4. Methods for Effecting Legislative Purpose

[37] Given the constitutional limits as discussed, there are five possible methods for preventing criminals from exploiting their crimes to obtain a financial benefit. Those within provincial legislature authority are: (1) preserving the funds; (2) the administrative re-distribution; and (3) the assisted legal action. Those within federal legislative authority are: (1) Penitentiary Gag Order and (2) Copyright Expropriation. Each of these, together with their respective benefits and detriments, will be discussed below.

a. Provincial Legislation

(i) Preserving the Funds

[38] All legislation existing in North America can be categorized under this heading. As can be seen from the attached review of the legislation in the United States (Appendix C) there are three different methods of preserving money that is payable to the criminal in a fund for the benefit of victims.

[39] The one that exists in the majority of the states, and which has been adopted by the Province of Ontario as its *Victims' Right to Proceeds of Crime Act, 1994,* [30] requires that the party to the contract which allows the criminal to profit from his or her crime pay the money to a governmental fund rather than to the criminal. The only modifications to this method are the ones that exist in California and New York. In California legislation merely imposes a trust upon proceeds accruing to the criminal while in New York the legislation merely requires that a state board be informed of contracts allowing criminals to profit from crime so that the Board, in turn, can notify the victims.

[40] The basis upon which all of these enactments operate is that once the money has been preserved (or once a victim has been notified that the criminal who caused him or her damage has assets), the victim can initiate legal proceedings against the criminal and obtain damages. There are two distinct advantages in relying upon victims to sue the criminal: it requires the victims to self-identify and it relies upon the courts to determine

the extent of each victim's damages.

[41] While this may be a satisfactory basis upon which to operate legislation of this type in the United States, where awards for non-pecuniary damage claims may approach the astronomical amount of money that can be earned through, for example, book sales, it is a model that is far less suitable for Canada. This can be illustrated by the Bernardo case. In that case Bernardo was charged and convicted of kidnapping, sexually assaulting and murdering two young girls. Recent case law indicates that for the loss of their children's care, guidance and companionship the parents of the children may each receive in the neighbourhood of $15,000-$20,000. [31] Without any knowledge of the type of book that Mr. Bernardo may be capable of writing, it is expected, because of the notoriety of the case and because of its temporal proximity, that Mr. Bernardo would earn a great deal more money than that.

[42] Not only will notorious criminals be much more likely to financially benefit from legislative schemes that rely upon the victim's legal action, but in undergoing any such action the victim will have to expend financial resources and go through the trauma of an assessment of damages. In situations where the assessment is of the worth of a child, this process must be a very painful one indeed. The situation is exacerbated in Ontario where contingency fees are not presently allowed, *S* [32] and where the *Compensation for Victims of Crime Act* [33] gives the Criminal Injuries Compensation Fund a right of subrogation to any action that the victim brings against the criminal to the extent of the value of the compensation awarded under the Act. [34]

[43] That, however, is not the full extent of the problem. The purpose of preserving funds is to ensure that it is worth the victim's effort and money to bring the lawsuit. However, in order to give victims sufficient time to bring their lawsuit, legislation of this type typically provides for the retention of the money earned by the criminal for a long time.often up to six years. This means that for all of that time the criminal has been deprived of income. Not only is this risky from a *Charter* point of view, given that this delay in income may not be justifiable, but it also has some negative policy implications. These are:

1. although a five or six year delay would be hard on any person, it is particularly onerous on someone who is trying to earn a living as a writer. Both Roger Caron and Evelyn Lau are in this category;

2. it may mean that a person may get out of prison, with no income other than that earned by writing books, and be unable to use the income from his work to assist in his rehabilitation. Julius Melnitzer, except for the fact that he appears to be able to write about things other than his crime, would be within this category; and,

3. A government agency needs to look after this money until such time as a victim with a judgment can take it off its hands. This involves additional costs (which presumably may be taken out of the proceeds) and risks.

(ii) Administrative Re-distribution

[44] One way of avoiding the problems that are endemic to the fund preserving model is to have a government agency.presumably the one that is in charge of holding and accounting for the money that would otherwise have been paid to the criminal.find the victims and distribute the money to them. Rather than having a system where the damages that have been awarded are paid out of the monies available, with the risk that the criminal will still end up profiting from his or her crime, the enabling legislation can provide that victims are entitled to a percentage of the money paid to a government agency.irrespective of the amount of that money. The only task left to the government agency, therefore, would be to apportion to each victim the total money payable to the victims as a group.

[45] In addition to ensuring that the criminal does not in fact profit from his or her crime, this system has the advantage that victims will probably not have to undergo the same sort of examination of the worth of their damages (since an apportionment need be made only when there are multiple victims and, even then, the examination need not be so probing since the determination is as to relative worth rather than absolute worth) nor will they have to undergo the embarrassment of having the value of their family members set out in money terms. Finally, it is submitted that this administrative model suits the Canadian nature more than one which relies upon lawsuits.

[46] Despite these advantages, there are a number of possible disadvantages. Since the scheme would be a legislative invention, there are at least two constitutional issues that need be considered. These are that the scheme may be inconsistent with sections 96 and 91(23) of the *Constitution Act, 1867*. Each of these will be considered in turn.

(a) Section 96

[47] On its face, section 96 merely requires that the federal Parliament appoint judges of the Superior, District and County Courts in each province. As interpreted, however, this section protects the jurisdiction of those courts by preventing both the federal and provincial legislatures from establishing other courts with the jurisdiction that was, in 1867, exercised by the superior, district and county courts. In order to determine whether this section has been infringed, the courts have devised the following three part test:

1.whether the jurisdiction to be given is broadly conformable to powers exercised by superior, district or county courts at or after Confederation;

2.whether the jurisdiction to be exercised is a judicial power; and,

3.if the jurisdiction to be exercised is judicial in nature, whether the jurisdiction can nevertheless be justified as a necessary functional requirement within the institutional context. [35]

[48] While it may be argued that an administrative agency under legislation preventing the exploitation of crime would be doing the same thing as a court in assessing and awarding damages, there are certain differences. First, the method of assessment would be different. Rather than attempting to quantify the victim's damages, an administrative officer would merely attempt to ascertain the victim's relative share of the money. In fact, if there is only one victim, there would not have to be any assessment at all (unless the percentage of money that the criminal is to be allowed to keep is to be determined by the governmental agency rather than by legislation). Second, the amount of money that a victim could receive under this legislation would not be limited to the extent of their damages at law. For example, even if a victim suffered relatively minimal damage, he or she would still be entitled to his or her share of the criminal's profits of a best selling book. Third, since courts take money away from the criminal and the administrative model would only distribute money among the victims, the method of determining the victim's share of the monies need not be the same nor as strict as a court's. Finally, the argument that the administrative model is not broadly conformable to the powers exercised by the provincial superiors courts may be enhanced by a legislative provision stating, as some U.S. state legislation does, that the rights contained in the legislation are in addition to and not a substitution for rights existing at common law (or under the *Civil Code*).

[49] These same points support the argument that the administrative officer that allocates money among victims is not exercising a judicial function. This argument would be enhanced if the legislation provided that the criminal is not a party to the proceedings and cannot appear to make representations. [36] Such a provision would be possible since under the legislation, so long as there are victims, the criminal must lose a certain percentage of his or her money in any event.

[50] If these arguments fail, it is unlikely that a court will find that the powers exercised by the administrative officer can be justified because they are necessary to the broader institutional context. The simple reason this is so is that the legislation as anticipated doesn't fit within a much broader purpose, such as labour relations, *See footnote 37*education [38] or transportation. [39] Rather, this legislation, if implemented according to this model, would merely be an alternative to the fund preserving model which, as noted, is based upon the notion that victims will sue criminals in the superior courts.

(b) Section 91(23)

[51] The second issue is the extent of federal legislative authority under section 91(23) of the *Constitution Act, 1867,* the class of "copyright" and the effect that class might have on any provincial legislation. Although there has not been a lot of judicial interpretation of the limits of this class, using the principles that have been developed elsewhere it is possible to make a few observations.

[52] Generally, the law of copyright can be characterized as the method by which Parliament bestows negative rights: the right to prevent people from copying material that is protected and the right to prevent people from using copyrighted material without paying for it. [40] Given this description, there are two conclusions that can be drawn. The first of these conclusions will be dealt with immediately below, while the second conclusion (dealing with federal jurisdiction over copyright) will be dealt with later in this paper.[41]

[53] Given Parliament's legislative limitations under section 91(23), it would seem reasonable to conclude that legislation that leaves a copyright intact but which requires that the copyright holder give up a portion of the proceeds earned through the use of these negative rights must be characterized as being in relation to a matter of property and civil rights rather than to matters of copyright. This conclusion follows from the fact that the right to earn money from a copyright has neither been dealt with by federal legislation nor is it a negative right that, it is argued, can be dealt with by federal copyright.

[54] In other words, just as Parliament does not have jurisdiction under section 91(27) merely because a criminal is involved, Parliament should not have jurisdiction under section 91(23) merely because legislation may involve material over which copyright has been granted. Moreover, even if this were not the case
"such that a court might conclude that laws that impair the usefulness of a copyright are laws in relation to matters of copyright [42] it is also possible for the courts to conclude that such legislation also relates to matters of property and civil rights and that, until the federal Parliament has occupied the field, valid provincial legislation can still operate.

[55] Notwithstanding this last conclusion, it should be noted that there are those who are of the opinion that "it is not open to the Province to create a property right the consequence of which is to deprive the author of a portion of the ownership of the work that he or she has written."

[56] Whether this conclusion is correct or whether Parliament is in fact restricted under section 91(23) to bestowing negative rights only has yet to be determined by any court. Until that time, any final conclusions that can be made in this area must be speculative only.

(iii) Assisted Legal Action

[57] Assuming that it is not constitutionally possible to implement the administrative re-distribution model, the only option that is available is relying upon victims suing the criminal for damages. As noted above, however, there are some defects in that system. The final alternative, therefore, is one that continues to rely upon the benefits of that system while eliminating the defects. This can be done by legislatively providing assistance to victims in their lawsuits against the criminal.

[58] As the law now stands, courts will accept the existence of a conviction of a criminal charge as *prima facie* proof, in a civil context, that the criminal committed the act for which he or she was charged. [43] As a result, in actions by victims against criminals there is theoretically no difficulty in establishing liability. The primary problems, as noted above, are with the cost, the difficulty and the embarrassment in proving damages. If that situation were legislatively altered, most of the defects of that system would be eliminated.

[59] The proof of pecuniary damages is relatively easy, since the only proof that is needed are the receipts of out-of-pocket expenses or the direct testimony of income that has been lost. In order to prove non-pecuniary damages, a plaintiff must show how much a rape meant or how valuable a child was to a parent. In many of these cases experts are required to give testimony, and this involves a great deal of added expense to the litigation. In other circumstances, where the court is involved in valuing the life of a child, this process can be wrenching and embarrassing.

[60] This difficulty could be eliminated if victims could rely upon legislation that gives them, in certain circumstances, a fixed sum of money for a particular injury. This type of legislation already exists in Alberta, where the *Fatal Accidents Act* [44] gives certain close relatives the right to a statutory maximum amount of money for bereavement. Although that particular legislation suffers from the one defect that its monetary limits are set too low, that defect can easily be remedied by legislation that places the statutory limit in a regulation rather than in the legislation and that also includes a requirement that the limit be examined every few years to determine its suitability. [45]

[61] Ironically, under this type of legislation the different legislative purposes merge into one. So long as the monetary amount is set high enough, a reasonable likelihood will exist that criminals will not be able to profit too much from their crimes. Moreover, because it will be easy to prove both liability and damages, victims will not only get a larger judgment but can expend less money and go through less emotional turmoil in getting that judgment. Finally, since there is no reason why legislation of this type needs to be restricted to victims of crime, legislation that fixes the damages for non-pecuniary harm can be of benefit to all victims and not just those who were harmed as a result of a

criminal act.

[62] Unfortunately, the one weakness of this legislation is that it can apply to both victims of crime and victims of civil wrongs. Thus, while the legislature could conceivable raise the damages that are due to victims for non-pecuniary damages to such a level that criminals are not likely to profit, that may mean that tortfeasors will pay much larger damage claims merely to make sure that victims in the criminal context can take most of the criminal's money. While there is nothing theoretically wrong with this, it may be considered by many legislators to be an unattractive option either because it may not be seen as being directed toward the prevention of profits by criminals or because it may have repercussions for the insurance industry.

[63] While it is no doubt possible to draft such legislation in a way that it only applies to victims of a criminal act, even this possibility is not attractive. In order to limit the benefit of such legislation to victims of crime, it would be necessary to expressly exclude victims of civil wrongs. Given that crimes and torts do not necessarily result in different injuries, a distinction of this kind may not be politically sustainable.

[64] It is recommended:

1. that since the assisted legal action model does not meet the requirement that legislation be specifically directed toward preventing criminals making profit, that model not be implemented.

2.that both the fund preserving model and the administrative model have certain advantages and either model can be used in provincial legislation (draft legislation is included in appendices E and F respectively).

b. Federal Legislation

(i) Penitentiary Gag Order

[65] Clifford Olson, who was convicted in 1982 of the murder of eleven boys, has apparently written two books about those murders. [46] These are *Profile of a Serial Killer.The Clifford Olson Case* and *Inside the Mind of a Serial Killer.A Profile.* Those books, which apparently deal with the rape and murder of a number of young boys in graphic detail, have never been published. Despite attempts by Mr. Olson to send these books to members of the media, as described in a Statement of Claim (enclosed as Appendix D), such attempts have been thwarted by the Penitentiary in which he presently resides pursuant to sections 71, 96, and 98 of the *Correction and Conditional Release Act*. [47]

[66] There are at least two advantages to such legislation. First, it can be used to only restrict the section 2(b) rights of those authors that really provoke outrage. Second, it

actually prevents books from being published rather than merely taking the profits that the criminal author would earn from a published book.

[67] Unfortunately, this approach has two problems.

[68] First, it is susceptible to a *Charter* challenge. Although the reduction in people affected by the legislation may be seen to be a minimal impairment, from the point of view of the particular criminal author affected his or her section 2(b) rights are completely obliterated. Moreover, if Parliament wanted to minimally impair those rights it would allow the criminal to publish (all or part of his or her material) while taking a share of his or her profits.

[69] It is because of the particular and excessive impact on him that Clifford Olson has brought an action in the Federal Court challenging the authority of the warden to impose these restrictions. Although the federal Crown denies in its defence (Appendix D) that a *Charter* breach has occurred, the real defence seems to rely upon section 1 of the *Charter*. In that regard the Crown argues that the only way it can allow Mr. Olson to be transferred to reduced security, which will assist in his treatment and rehabilitation, is to reduce his notoriety within the prison population. Mr. Olson is, therefore, prevented by the Penitentiary from sending his books outside of the prison since any publication of those books would increase his notoriety.

[70] Although the Federal Court judge who heard the challenge decided that the infringement could be upheld under section 1 (Appendix D), that decision is now under appeal. If the legislation continues to be upheld on appeal, and if the suggestion above has been adopted such that any legislation designed to prevent criminal from exploiting their crimes is limited to those crimes that cause moral outrage, [48] legislation that gives wardens authority to determine if criminals are entitled to recall their criminal experiences may prove to be all the legislation that is needed.

[71] The second problem with this approach is that it may not provide a guarantee that people who have been convicted of a criminal offence will not be able to make a profit. Karla Holmolka provides the perfect illustration of this problem. As most people know, Ms. Holmolka has pleaded guilty and was sentenced to twelve years in jail for her part in the murder of two people. Because the sentence is so short, Ms. Holmolka can avoid any gag order by delaying her efforts to exploit her crime until such time as she is released from jail, safe in the knowledge that the notoriety of her crime will be such that she will still be able to make a profit from it at that time. The only thing that may stop her from doing this is the fact that, when she entered into her plea bargain with the Crown, she agreed that she would not attempt to profit from her crime. While this may or may not be effective to prevent Ms. Holmolka from seeking to exploit her crime, and it is unclear how

such a promise can be enforced, [49] this type of provision is not always included in plea bargains.

[72] Since legislation allowing gag orders is already in place, preventing certain criminals from profiting from their crimes, no recommendation need be made about this option.

(ii) Copyright Expropriation

[73] Even if, as noted above, [50] Parliament only has jurisdiction under section 91(23) of *the Constitution Act, 1867* to confer rights of copyright that are negative in character, it is submitted that Parliament still has jurisdiction to prevent criminals from exploiting their crimes so as to earn a profit. This follows from the fact that just as it is within Parliament's jurisdiction to give a person these negative rights, it must be within Parliament's jurisdiction to deny particular persons the ability to acquire a copyright or to decree that it owns the copyright to certain works rather than the author of the work.

[74] This conclusion is particularly important in light of a proposed amendment to *Copyright Act* (Appendix B) that would give the Crown in right of Canada the copyright in works that have been "created, prepared or published by or in collaboration with the person who has been convicted of an offence under the *Criminal Code* that may be proceeded against by way of indictment" so long as the work "is principally based on the indictable offence or the circumstances of its commission". [51] Unfortunately, there are a number of problems with this proposed legislation.

[75] First, so long as a work comes within the terms of the legislation, copyright exploitation will be automatic. Consequently, there will be no way to prevent the legislation from applying to works that do not give rise to a sense of outrage. For example, books such as those written by Roger Caron and by Julius Melnitzer, depending upon how the relevant phrases of the legislation are interpreted, could come within the terms of the legislation.

[76] Second, the *Charter* will likely have some impact on the validity of the legislation. This is so despite the fact that the *Charter* does not protect property rights. Thus, while the expropriation itself may be allowed, the argument probably will be that if the Crown does nothing with the work once it has acquired the copyright, it is preventing the criminal from expressing him or herself. Moreover, once it is known that the Crown will refuse to exercise the rights of ownership once it has copyright, other criminals may be convinced not to write at all.which is probably a further infringement of section 2(b) rights.

[77] Third, the *Charter* argument will likely be reinforced by the existence of article 15(1)(c) of the *International Covenant on Economic, Social and Cultural Rights* [52] which recognizes the rights of everyone to benefit from the protection of the moral and material interests resulting from any...literary or artistic production of which he is the author.

[78] Finally, if the federal Crown does exercise its newly acquired copyright in a work, written by a criminal about his or her crime, it may be compelled by the *Charter* to attempt to make a profit on the work. In this instance the Crown would be put in the position of exploiting crime.an only slightly less offensive sight than criminals doing the same thing.

[79] It is recommended that the option giving the federal Parliament the ability to expropriate the copyright on the recollection of crime publications not be adopted.

V. MISCELLANEOUS ISSUES

1. Limitation Periods

[80] The normal limitation period to sue for those criminal actions that have caused personal harm is two years. [53] The problem with requiring victims to comply with this type of limitation period is that, particularly when victims first go to court, criminals do not have a lot of money. Therefore, in both of those models where the legislation requires the victim to obtain a judgment against the criminal, victims are required to commence an action within the limitation period without any real prospect that the judgment can be satisfied. Since no lawsuit is required in the administrative model, there should be no corresponding limitation problems.

[81] This requirement to sue within a particular period of time is particularly onerous in the fund preserving model where the victim also has to risk the cost of proving damages. In the assisted legal action model, it is expected that victims will be more willing to sue within the normal limitation period, because of the simpler and less costly process, and merely continue to renew their judgment until such time as the criminal obtains funds that can be attached.

[82] Particularly if the choice is made to create legislation on the fund preserving model, there are a few options to the standard limitation period. First, as in the Ontario legislation, the limitation can be extended for a few years to give victims a greater chance of filing their suit in time. The problem with this option is that it creates a lack of uniformity of limitation periods while still not assuring the victim that by the time the new limitation expires it is financially advantageous to sue. Second, the legislature can create a flexible limitation, starting with, for example, the time when the money is first sent to the government agency. The problem with this option is that, as actually happened in Ontario, the first money that the criminal earns may be so small that it will never give victims financial incentive to sue. Finally, the legislation can give the government agency (1) the power to declare to all victims when the limitation period is to begin or (2) a discretion to extend the limitation period in particular instances. This power or discretion is particularly useful in those circumstances where the limitation period would have already started but the financial incentive to sue does not yet exist.

[83] While these options all have some benefit for victims, none of them is completely satisfactory. In particular, it must be recognized that the longer the victim has to sue the longer the criminal must do without his or her money. The validity of this deprivation that the criminal must suffer will not doubt be tested by a *Charter* application.

[84] For those provinces that opt to create legislation based on the fund preserving model, it is recommended that an amalgam of some or all of the options be adopted. At the very least, therefore, the limitation period can begin when the governmental agency actually receives some money. This is consistent with the second option. However, to ensure that a victim is not deprived of his or her opportunity merely because the limitation period began to run with a small amount of money, the courts should be given the ability to extend the limitation period: if the victim has a reasonable likelihood of success on the suit; if the only reason the suit was not brought within the limitation period was that it was uneconomical to do so; and, if the criminal is reasonably likely to profit from his or her crime in the near future.

[85] On a related issue, it should be noted that the government agency cannot pay out any money to the victims, or return the money to the criminal, until some time after the limitation period expires. The only exception is when, as explained below, the agency is able to return the money early. However, if the agency is aware that an action is pending, but the plaintiff/victim has not yet received judgment, in all fairness the government agency should have the ability to extend the time for payment until a judicial resolution has been made on all outstanding actions. To ameliorate the effect that this may have on those victims who had already received their judgment, the agency should also have the power to distribute to those judgment creditors a portion of the *pro rata* amount that is payable to them.so long as such payment does not have an adverse impact on the ability of those victims who are in the process of obtaining judgment but have not yet done so.

2. Remainder of the Profits

[86] Under the Ontario legislation as presently drafted, money earned by the criminal through the recollection of his or her crimes is given first to those victims who sue and obtain a judgment. If no-one sues, or if the judgments are lower than the amount earned, all remaining money is given back to the criminal after the statutory period has expired.

[87] If the purpose of the legislation is to assist victims, and the victim either does not want to sue or is able to recover from the criminal all of the money that he or she has been awarded by a civil court, then there is nothing wrong with this. On the other hand, if the purpose of the legislation is to ensure that criminals do not profit from their crime, then the legislation may have failed to effect its purpose. This failure arises in those instances where the profit earned by the criminal greatly exceeds the money that courts would award the victims.

[88] The option that many of the U.S. state legislatures have chosen is to provide that, in addition to going to victims, the money earned by the criminal is to be used to pay off other debts. The types of things that have been included in legislation, and which may be of interest to legislators in this country, are: other civil debts; cost of legal defence; and, cost of housing in prisons and penitentiaries. If it is decided to use the remainder of the criminal's earnings for other purposes, it should be recalled that there may be a *Charter* problem if the legislature takes too much of the criminal's profits.

[89] The best way to ensure that the *Charter* does not invalidate the legislation because of this provision is to ensure that the legislation does not appear to be a colourable attempt to take all of the criminal's money. In that regard, it will probably be best if the money is directed toward those obligations over which the criminal would otherwise be liable rather than services that are ordinary provided by the state. The criminal's civil debts come within this category, as do the criminal's liability to his or her dependants.

[90] Unfortunately, by stretching the legislation to encompass these other obligations, there is a concern that at some point the legislation will cease to be true to its legislative purpose. Thus, after the victims have been paid all money owing to them, and the only payments being made by the government agency are to civil creditors and dependants, by continuing to collect money from the criminal that is to be sent to civil creditors the agency in essence operates as a publicly funded collection agency. In some cases, particularly with regard to the criminal's dependant's, this obligation may continue for a long period of time and without much money involved.

[91] Accordingly, although there people other than victims who may deserve to the benefit of legislation that prevents criminals from profiting from their crime, it is recommended that the legislation only operate for the benefit of victims. Moreover, and this applies primarily under the Fund Preservation Model, once the victims have been paid the money they are owed, no more money should be paid under the legislation to the government agency.

3. Early Return or Pay-out of Money

[92] One other thing that should be considered in the context of the fund preserving method is the ability of the governmental agency to send the criminal his or her money back before the end of the limitation period. The reason why this power is necessary is that the situation can easily arise where the criminal's only victims have already sued in civil court and been awarded a judgment for less than the money held by the governmental agency. Rather than keep the remainder of the money until the limitation period has expired, the agency should be entitled (perhaps after advertising or after getting a court order) to send the remainder of the money back to the criminal.

[93] Similarly, if the monetary value of existing judgments against the criminal is less than the amount of money that the government agency has, and if there is no reasonable possibility that any other claims may arise, there is no reason why the government agency should have to wait until the end of the limitation period to pay out the money to the victim(s).

[94] It is recommended that the government agency have the authority to disburse money to the victims, or the criminal's portion of any proceeds to him or her, before the limitation period so long as the early return of such money will not adversely affect the interest of any victim.

4. Anti-Avoidance

[95] One aspect of anti-avoidance, the prohibition against the criminal assigning his or her right in a story for the purposes of avoiding legislation that prevents the exploitation of crime, has been dealt with above. *See* There is one other type of avoidance that should be discussed: the ability of the criminal to escape the strictures of legislation altogether by entering into contracts outside of the province.

[96] The Ontario legislation is drafted in such a way that it requires people who enter into contracts with criminals to pay money to a governmental agency instead of to the criminal. This type of legislation (or legislation that imposes a trust on such people, or an obligation on them to advise the governmental agency about the contract) is only effective under the *Constitution Act, 1867* if the legislative matter is within the province.

[97] If, therefore, the contract is entered into outside of a province (or the criminal or the person whose obligation it is to pay the money to the criminal resides outside of the province), a strong argument exists that neither the criminal nor the publisher is bound by the legislation even though, for example, books written by the criminal for the purpose of exploiting a crime are sold in that province. The way to resolve this problem, of course, is to ensure that the provinces and territories commonly create legislation that would prevent criminals from profiting from their crimes.

[98] Unfortunately, a wily criminal has another option.he or she can enter into their contract and produce their books offshore. In the absence of legislation in that jurisdiction that covers crimes committed outside of the jurisdiction, the only way that the criminal can be prevented from profiting is by ensuring that the various provincial laws relate to matters within their jurisdiction. The only option.if for example books are sold in this jurisdiction.is to direct the legislation toward booksellers.

[99] While it is possible, with carefully crafted legislation, to attach the profits earned by every criminal that seeks to profit from his or her crime, it is submitted that there are good reasons why legislation should not be so drafted. First, any legislation that seeks to

prevent criminals from profiting from crimes by dealing with a large, diverse group such as booksellers is going to make the administration of the legislation much more difficult than if a small, defined group of persons had obligations under the Act. Second, in exchange for the difficulty of administering the legislation, it is not expected that there will be a great number of criminals who will be so sophisticated that they will set out to avoid the Act. In this regard it must be recalled that, even if the legislation covers all criminals rather than merely those criminals whose actions have outraged the public, there will still only be a few instances where any provincial legislation can operate to prevent criminals from exploiting their crime. Finally, even if a criminal is sophisticated enough to think about going offshore, the most easily used jurisdictions (U.S. states) already have legislation that would prevent a criminal from profiting from his or her crime.

[100]O ther than having legislation in each province that prevents criminals from profiting from their crimes, it is recommended that the legislation not be drafted to apply to contracts entered into outside of the jurisdiction of each province where at least one of parties to the contract is not a resident of the province.

5. Victims in other Jurisdiction

[101] None of the legislation that I have seen expressly states that even though the victims reside in another jurisdiction (or that the crime occurred in another jurisdiction), the legislation still applies. Given that this type of legislation is new to this country, and because its application to crimes committed in other jurisdictions is uncertain, a situation could easily arise where a criminal who committed a crime in another jurisdiction decided it would be profitable to recollect the crime in this jurisdiction.

[102] Given the uncertainty and the ensuing litigation that may arise if this type of situation is not expressly dealt with, it is suggested that it would be advantageous to expressly deal with this situation. The advantage of including such people within the scope of the legislation is that all criminals and victims are treated, within this jurisdiction, on an equal basis. The disadvantage, however, if the administrative re-distribution model is chosen, is that it would be increasingly difficult and expensive to administer the legislation. Moreover, if such a clause is included, care must be taken to avoid supporting laws in other countries that we would otherwise consider to be unacceptable.

[103] It is recommended:

1. that the legislation should expressly apply to the benefit of victims that reside in other jurisdictions, even if the crime took place in another jurisdiction, so long as the contract has been entered into in the province or if one of the parties to the contract resides in the province.

2.that the legislation will only benefit these victims if the legislation that creates the crime

that caused the victim harm is not contrary to the public policy of Canada and so long as the conviction was obtained according to the principles of fundamental justice.

6. Information Required by State

[104] In all the forms of the fund preserving model, the focus of the legislation is on finding out about relevant contracts and then preserving the money payable under those contracts for victims. In most cases, however, the relevant government agency is given no information about who the victims are.

[105] The reason why it does not is that it relies upon civil judgments to self-identify victims. However, if it is decided to alter that basic form of legislation, for example, giving the governmental agency a power to declare when limitations periods are to commence or the discretion to extend such periods, or if the agency has the power to return the money early to the criminal, then the governmental agency is going to have to have additional information to make these decisions. This information is also necessary if the administrative model is chosen, since under this model the government agency will not only be allocating money among the victims but, so that it can do that job, it will also have to identify all possible victims.

[106] A decision can be made to allow the governmental agency to acquire that information itself, but it is unlikely that many governments these days would consider adding to public sector work and thus to governmental costs. The alternative, of course, is to require the people with knowledge to provide the information.

[107] The type of information that should be required to be produced, either by the criminal or by the person with whom he or she has contracted, is as follows:
1.name and last known address of the criminal;
2.names and last known address of the victims;
3.location and date of crime(s), and connection between the crime and the victim;
4.other information that may assist victims to evaluate whether it is worthwhile to sue the criminal; and
5.a copy of any material with which the criminal seeks to exploit his or her crime.

The legislation should also clearly state that this information, when provided to the government agency, can be given to the victims.

[108] It is recommended that the legislation expressly require both the criminal and the person contracting the criminal to provide to the governmental agency all information that will be necessary for the effective and efficient implementation of the legislation.

7. Retroactivity

[109] Although it probably will not be desired, nor practically possible, to make the

legislation retroactive, some thought should be made about how the legislation is going to impact on ongoing profit made by criminals. By this I mean profits from, for example, books whose contract was entered into and executed before the legislation was created but which continue, due to sales that take place after the legislation, to make profit for the criminal.

[110] Although this type of provision may well provide victims with more money, there are a number of disadvantages with this provision.

1.If the legislation is of a type that relies upon a civil suit, the right to victims to sue for damages will, in the vast majority of cases, have already been defeated by limitations legislation.

2.Even if the limitation problem can be resolved by legislation, or by adopting the administrative model, re-awaking the memories of the crime may cause more harm than the small amount of money that many of the criminal's recollections continue to bring.

3.Even if these problems can be resolved, there will have to be some time limit on the right to take profits from criminals who have sought to profit from their crime. This is so because there are many books that still survive where both the criminal and the victim are long dead, and there is no sense taking the profits earned in the sale of these books.

[111] It is recommended that legislation only apply to those criminal recollections that take place after provincial legislation comes into force.

APPENDIX A

VICTIMS' RIGHT TO PROCEEDS OF CRIME ACT, 1994

S.O. 1994, c. 39 [55]

Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

Definitions

1. (1) In this Act,

"accused or convicted person" means a person accused or convicted of a crime;

"crime" includes an alleged crime;

"related person" means, in relation to an accused or convicted person,

(a)an agent or other personal representative of the accused or convicted person,

(b)an assignee of the accused or convicted person,

(c)a spouse or former spouse of the accused or convicted person, and

(d)a person who has at any time been related to the accused or convicted person, whether by birth, adoption or marriage;

"victim" means a person who suffers injury within the meaning of the Compensation for Victims of Crime Act, harm or pecuniary loss as a direct result of a crime.

Series of crimes

(2) A series of crimes shall be deemed to be a single crime for the purposes of determining a victim's rights to payment and for the purposes of the administration by the Public Trustee of money received.

Same

(3) The Public Trustee shall determine, in his or her discretion, whether two or more crimes by an accused or convicted person constitutes a series of crimes for the purposes of this Act. In making this determination, the Public Trustee is not required to consider the interests of a person entitled to be paid under a contract described in section 2.

Applicable contract

2. (1) This section applies with respect to a contract under which money is to be paid to an accused or convicted person or to a related person,

(a)for the use of the recollections of the accused or convicted person respecting a crime;

(b)for the use of documents or other things in the possession at any time of the accused or convicted person that may be related to a crime;

(c)for an interview with the accused or convicted person or with a related person in which the person recounts matters respecting a crime;

(d)for an appearance by the accused or convicted person or by a related person, other than an appearance to address victims' groups or incarcerated persons.

Obligation to inform Public Trustee

(2) Each party to a written contract shall give a copy of it to the Public Trustee. Each of

the parties to an oral contract shall reduce it to writing and give a copy to the Public Trustee.

Payment to the Public Trustee

(3) A person who is required under a contract to pay money to the accused or convicted person or to a related person shall pay it instead to the Public Trustee.

Same

(4) If the accused or convicted person or a related person receives money under a contract, the person shall be deemed to hold the money in trust for the Public Trustee and shall promptly pay it to the Public Trustee.

Deemed compliance

(5) A person who pays money to the Public Trustee under this section shall be

deemed to have complied with the contract in connection with which the payment is made, to the extent of the payment to the Public Trustee.

Offence

(6) A person who fails to comply with this section is guilty of an offence and upon conviction is liable to a fine not exceeding $50,000.

Public Trustee to hold funds

3. (1) The Public Trustee shall hold the money he or she receives under section 2 in trust for the persons specified in this Act.

Fees and charges

(2) Subsections 8(2) and (3) of the Public Trustee Act apply, with necessary modifications, with respect to money received by the Public Trustee.

List of payors, etc

(3) The Public Trustee shall make available to the public for inspection on request a list of persons who make payments relating to contracts, the payments received by the Public Trustee and the name of the accused or convicted person in relation to whom the payments are made and received.

Notice to victims

4. (1) Upon first receiving money under section 2 relating to a crime, the Public Trustee shall publish a notice in a newspaper of general circulation in the community in which the crime was committed or was alleged to have been committed indicating that the Public Trustee has received money relating to the crime and advising victims of their rights

under this Act.

Same

(2) Despite subsection (1), if the Public Trustee is satisfied that he or she can contact all the victims of a crime otherwise than by advertising, the Public Trustee may use whatever method he or she considers appropriate to notify the victims.

Same

(3) The Public Trustee may give such further notice to victims as he or she considers advisable.

Advertising cost

(4) The cost of advertising to notify victims may be charged against the money received by the Public Trustee.

Limitation period extended

5. Despite subsection 61(4) of the Family Law Act and section 45 of the Limitations Act, a person who considers themself to be a victim may bring an action for the recovery of damages against an accused or convicted person if the person does so within five years after the date on which the Public Trustee first receives money under section 2 in respect of the crime.

Application for payment

6. (1) A person who obtains judgment in an action against an accused or convicted person relating to a crime may apply to the Public Trustee for payment of the amount of the judgment and costs from the money the Public Trustee holds in trust.

Payment to victim

(2) The Public Trustee shall pay the amount necessary to satisfy the award of judgment and costs in accordance with this section,

(a)if the Public Trustee is satisfied that the person is a victim of a crime committed or alleged to have been committed by the accused or convicted person; and

(b)if the Public Trustee has received money under section 2 relating or possibly relating to the crime.

Insufficient funds

(3) If the amount of the judgment and costs payable to all victims of a crime exceeds the amount of money held in trust in respect of the crime, the Public Trustee shall distribute the money to the victims on a pro-rated basis.

Additional funds

(4) If the Public Trustee receives additional money under section 2 after making a payment under this section, the Public Trustee shall pay the additional money to the victim to the extent necessary to satisfy the award of judgment and costs.

Consequence of acquittal

(5) If the Public Trustee is notified that a person accused of committing a crime has been acquitted while an application under this section is pending and if no further appeal of the acquittal is taken, the Public Trustee shall not make any further payment otherwise required by this section.

Application for release of funds

7. (1) A person entitled to receive money under a contract referred to in section 2 may apply to the Public Trustee for payment from the money the Public Trustee holds in trust relating to the contract.

Payment

(2) The Public Trustee shall pay the amount owing to the person under the contract in accordance with this section,

(a)if the Public Trustee has paid the judgment and costs payable under section 6 to all victims of the crime who have applied for payment; and

(b)if the Public Trustee is satisfied as to the entitlement of the person under the contract.

Insufficient funds

(3) If the amount payable under all contracts relating to a crime to persons applying under this section exceeds the amount of money held in trust in respect of the crime, the Public Trustee shall distribute the money to the applicants on a pro-rated basis.

Restriction on payments

8. (1) The Public Trustee shall not make a payment under this Act relating to a crime until five years and six months have elapsed after the Public Trustee first receives money under section 2 relating to the crime.

Exception

(2) A person who would be eligible to receive a payment from the Public Trustee but for subsection (1) may apply to court, on notice to the Public Trustee, to authorize a payment before the time provided in subsection (1).

Same

(3) Despite subsection (1), the court may authorize the payment if the court is satisfied that doing so is fair in the circumstances.

Postponed payment

(4) The Public Trustee, in his or her discretion, may postpone making any payment relating to a crime or a contract, other than a payment authorized under subsection (3), if the Public Trustee has notice of an action against an accused or convicted person that has not been finally disposed of.

Notice

(5)The Public Trustee shall be deemed not to have received notice of an action unless a party to the action gives the Public Trustee a copy of the statement of claim.

Status of Public Trustee

(6)The Public Trustee shall not be made a party to an action for the sole purpose of enabling a person to make an application for payment under this Act.

Regulations

9.The Lieutenant Governor in Council may make regulations,

(a) governing applications under this Act and providing for application fees to be paid to the Public Trustee;

(b)governing the payment of money under this Act;

(c)respecting such other matters as the Lieutenant Governor in Council considers advisable for the administration of this Act.

Commencement

10.This Act comes into force on a day to be named by proclamation of the Lieutenant Governor.

Short title

11.The short title of this Act is the Victims' Right to Proceeds of Crime Act, 1994.

APPENDIX B

AN ACT TO AMEND THE CRIMINAL CODE AND COPYRIGHT ACT (PROFIT FROM

AUTHORSHIP RESPECTING A CRIME)

Bill C-307

Her Majesty, by and with the advice and consent of the Senate and house of Commons of Canada, enacts as follows:

CRIMINAL CODE

1. The definition of "proceeds of crime" in section 462.3 of the *Criminal Code* is amended by striking out the word "or" at the end of paragraph (*a*), by adding the word "or" at the end of paragraph (*b*) and by adding the following after paragraph (*b*)

(*c*)the creation within or outside Canada of a work that recounts or depicts the commission of an actual offence of which a person has been convicted or that is based substantially on the commission of such an offence or the circumstances surrounding it, if

(i)the offence is one that may be proceeded against by indictment, and

(ii)the person convicted of the offence or a member of his family or a person dependent on him receives or becomes entitled to receive the property, benefit or advantage as a result of the authorship of or any collaboration or cooperation in the creation or publication of the work.

2. The Act is amended by adding the following after section 729:

729.1 Where a person is convicted of an offence that may be proceeded against by indictment, there is deemed to be included in and be a part of the sentence an order of the court that the convicted person and any work related to the offence is subject to section 12.1 of the *Copyright Act.*

COPYRIGHT ACT

3. The *Copyright Act* is amended by adding the following after section 12:

12.1 (1) Where a work is created, prepared or published by or in collaboration with a person who has been convicted of an offence under the *Criminal Code* that may be proceeded against by way of indictment, and the work is principally based on the indictable offence or the circumstances of its commission, any copyright in the work that would otherwise vest in the convicted person shall belong to Her Majesty and shall subsist for the time that the copyright would subsist if it belonged to the convicted person.

(2) Subsection (1) applies to any work published at any time following the time that the convicted person is charged with the indictable offence or with any other offence on the basis of the same circumstances.

(3) For greater certainty, copyright in a work that would otherwise vest in a convicted person but vests in the Crown by the application of subsection (1) does not revert to the convicted person on the completion of any sentence imposed with respect to the offence but continues to vest in the Crown.

APPENDIX C

U.S. LEGISLATION DEALING WITH INDIRECT PROFITS FROM CRIME

The following is a brief review of the way the various states in the United States prevent criminals from profiting from their crimes. Where a reference is made to a particular state, the reference only indicates that the state mentioned has one example of the type of legislation indicated and not that it is the only example.

United States

There are three types of legislation in the United States.the majority model, New York model and the California model. Although each of these models will be briefly outlined below, it is worth pointing out at this stage that all three models have one thing in common.they rely upon the fact that victims of crime can and do sue the criminals for damage caused.

(1) Majority Model

At the outset it must be noted that almost every enactment in the various states of the United States dealing with proceeds of crime can be characterize according to four criteria. First, it always requires every "person, firm, corporation, partnership, association or other legal entity" (or words of that type) contracting with any criminal to pay money owing on the contract to a board. Second, the board holds the money in escrow until it can be distributed to the victims. Third, there is a limitation period beyond which the board will not hold the money.

Based on these characteristics, it is clear that the legislation in the United States was the mould for the existing legislation in Ontario.

Despite this general relationship, there are some differences in this model among the various states and between those states and Ontario. The most important of these

differences are listed below.

1.Many states (California, Florida, Arizona) of this type only cover people who have been convicted of a crime, including pleas of nolo contendere (Florida). The lien thus attaches (as was expressly provided in the Florida legislation) at the time of the conviction. In many other states, (Idaho, Kansas, Kentucky), however, the legislation will also cover an accused. Surprisingly, in Connecticut the legislation only deals with an accused.

2. Some states (California, Iowa) expressly limit the effect of the legislation to felonies. It is equally likely, however, that the legislation will simply refer to "a crime in this state" without limiting it to a felony.

3. Some states expressly provide that a person who is acquitted on grounds of insanity (California) or is unfit to proceed as a result of mental disease (Missouri), is still liable to lose his or her profits. Missouri expressly provides that a guardian shall be appointed for criminals under this category.

4. A few states (Nevada) only take a percentage.for example three-fourths.of the money received by the accused or convicted person.

5. Some states (Montana), in addition to defining a victim as a person who suffers bodily injury or death as a result of criminally injurious conduct, also include people who suffers injury or death as a result of "good faith efforts to prevent criminally injurious conduct" and "good faith efforts to apprehend a person reasonably suspected of engaging in criminally injurious conduct."

6. Most states have legislation that defines profits from crime in a similar manner to the Ontario Act, that is a "reenactment of such crime, by way of a movie, book, magazine article, radio or televisions presentation, live entertainment of any kind, or from the expression of such person’s thoughts, feelings, opinions, or emotions regarding such crime". One exception, however, is the Iowa Code that describes fruits of the crime as "any profit which, were it not for the commission of the felony, would not have been realized."

7.In Maryland, even though the legislation sets out what a notoriety of crimes contract is, the Attorney General is given authority to determine whether a contract comes within the terms of the legislation. In Michigan the money is not paid automatically to the board, but is only paid when an attorney or the attorney general makes an application to have profits held in escrow.

8.Many statutes provide that the costs of notice, and the costs of administering the fund, shall be paid out of the funds held.

9.Most states require that the money be paid to a board upon the making of a contract

that is covered by the Act. Legislation in Iowa decrees instead that the Attorney General can bring an action to require all proceeds to be held in an escrow account.

10.Many states (Idaho) have a provision that advertising takes place "at least once very six months for five years from the date it receives such moneys".

11.The limitation period is usually five years (Alabama, Georgia, Arizona). In Louisiana, though, the period is three years. Kansas has an interesting way of dealing with limitation problems. Instead than creating a five year period, which ensures that

claims are not lost merely because the victim did not want to bring an action against an impecunious criminal, the legislation keeps the normal two year period for torts but says that it is extended for six months from the time that the victim has received notice that funds are being held by the board.

12.In some legislation the proceeds are apportioned among various groups. For example, in Florida the felon’s dependants get 25%, victims get 25%, and the remainder is used to pay for such things as court costs (including cost of prosecution) and any damages caused while fleeing, and cost of incarceration. In Minnesota 10% of the money is allocated to the criminal’s minor children.

13.In some states (Alabama, Arizona, Georgia, Arkansas), escrow money reverts to the state after the limitation period if there are no actions pending. In other states (Colorado), the legislation provides that if there are funds remaining after the limitation period with no actions pending, the state shall calculate the cost of maintenance of the person in the state correctional institutions and deduct that cost from the funds held. Louisiana distributes the money between the victims (75%) and crime victim reparations fund (25%).

14. In some states the legislation expressly states that upon a dismissal of charges or an acquittal, the monies revert to the accused person (Georgia, Kansas, Mississippi). In other states (Idaho, Mississippi) criminals are entitled to their money back if they are acquitted or if there is money in the account after five years and there are no actions pending.

15.In some states the legislation deals with the situation of an accused being found unfit to proceed to trial (Georgia, Arizona)

16.Some states expressly state that the accused or convicted person can make an application for some of the monies held by the state for the purpose of retaining legal counsel (Arkansas, Iowa, Hawaii)

17. In Louisiana the legislation expressly provides that if the escrow account contains insufficient funds to meet the needs of the judgments, the victims who have received judgment can be paid out on a pro-rata basis. Other states make it clear that this pro-rate amount is based on the amount of their judgments.

18. Some states (Maryland), expressly state that the Attorney General has authority to ask for an injunction to prevent people from violating the Act.

19.Minnesota limits the application of its act to instances where crimes have been committed in that state. Where crimes have been committed in another state, its legislation expressly provides that the law in that other state shall apply.

20.In addition to having the power to request and obtain information from attorneys and law enforcement officers, Montana legislation gives its board the power to subpoena witnesses and administer oaths.

(2) New York Model

Probably as a result of the fact that the United States Supreme Court *in Simon & Schuster, Inc. v. New State Crime Victims Board Members*, 112 S.Ct. 501 invalidated the first New York enactment dealing with profits from crime, the New York statute now in effect seems to be motivated almost purely for compensatory reasons. Thus, rather than requiring money to be paid to the board, the legislation merely requires that the board be informed of contracts allowing criminals to profit from crime. Once informed, the board seeks to notify all known victims of the crime. Victims then have three years from the discovery of any profits from the crime to bring an action, but can only recover the value of the profits of the crime. It appears that one of the main functions of the board, after victims have been notified that profits from crime might exist, is to assist victims in applying for various remedies.

(3) California Model

This model creates an involuntary trust of the proceeds of the sale. The beneficiary of the trust are people who are entitled to recover damages from the felon for physical , mental or emotional injury or pecuniary loss or, if they have died as a result of a criminal act, people who are entitled to receive at least 25% of the value of their estate. Beneficiaries still must bring an action to recover their interest in the trust, which is held for five years. The legislation expressly states that if there are two or more beneficiaries, they share the proceeds equitably taking into account the impact of the crime upon them. Payment of fines to the state are paid in priority to beneficiaries, except that 10% of profits are reserved for them. The legislation also states that the remedies provided in the legislation are in addition to any other legal remedies that may be available to victims.

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APPENDIX E

DRAFT LEGISLATION. PRESERVING THE FUNDS

Criminals' Exploitation of Violent Crime Act [56]

Table of Contents

Definitions

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; [57]*S*

"eligible judgment" means a judgment that is eligible under section 6;

"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;

"violent crime" means,[58]

(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).

Paying for a criminal's recollection

2. (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 (Government Agency) [59] 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 in the circumstances prescribed in the regulations as circumstances in which consideration is not necessary to ensure that all eligible judgments are satisfied.

(5) 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

(Government Agency)'s counterpart in that jurisdiction.

Selling a criminal's recollection

3. (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 (Government 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) This section does not apply in the circumstances prescribed in the regulations as circumstances in which consideration is not necessary to ensure that all eligible judgments are satisfied.

(5) 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 (Government Agency)'s counterpart in that jurisdiction.

Persons deemed to be agents

4. (1) For the purposes of sections 2 and 3, the following persons shall be deemed to be agents of the person convicted of the crime:

1.An assignee of 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 2 and 3, 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.

Use of consideration by (Government Agency)

5. (1) The (Government Agency) shall retain one half of the consideration it receives in respect of the recollection of a violent crime to satisfy eligible judgments against the person convicted of the crime.

(2) The (Government Agency) shall distribute one half of the consideration it receives to the persons to whom the consideration would have been given had it not been given to the (Government Agency).

Eligible judgments

6. A judgment against a person is eligible if it is for compensation arising from a violent crime of which the person was convicted.

When consideration distributed

7. (1) The (Government Agency) shall distribute consideration it retains to satisfy eligible judgments against a person,

(a)upon the expiry of the three year period following the first receipt of such consideration if there are no ongoing actions, of which the (Government Agency) has notice, in which a judgement would be an eligible judgement;

(b)following the expiry of the three year period at any time there are no ongoing actions, of which the (Government Agency) has notice, in which a judgement would be an eligible judgement.

(2) For the purposes of this section "ongoing action" means an action that has been commenced but has not been finally disposed of but does not include an action if, in the opinion of the (Government Agency), the action has been unreasonably delayed and the plaintiff has failed to take reasonable steps to ensure that it was not so delayed.

How consideration distributed

8. The (Government Agency) shall distribute consideration it retains to satisfy eligible judgments against a person as follows:

1.The (Government Agency) shall distribute the consideration in satisfaction of the eligible judgments of which the (Government Agency) has notice.

2.If the consideration is insufficient to satisfy all the eligible judgements of which the (Government Agency) has notice, the (Government Agency) shall distribute the consideration in proportion to the unpaid amounts of those judgments.

3.The (Government Agency) shall distribute any consideration that

remains after satisfying the eligible judgements to the persons to whom the original consideration would have been given had it not been given to the (Government Agency). If different amounts of the consideration would have been given to different persons, then the (Government Agency) shall distribute the consideration in proportion to the consideration the persons would have received had the consideration not been given to the (Government Agency).

Interim distributions

9. (1) The (Government Agency) may make interim distributions of the consideration it retains before the time distribution is required under section 7.

(2) Interim distributions may be made to satisfy all or part of any eligible judgement or they may be made to the persons to whom the original consideration would have been paid had it not been given to the (Government Agency).

(3) An interim distribution may be made only if, in the opinion of the (Government Agency), the interim distribution will not prejudice any person to whom consideration would otherwise be distributed at the time required under section 7.

(4) If interim distributions have been made the final distribution shall be made, at the time required under section 7, so that the total amount distributed on an interim or final basis to each person is what they would have received had the interim distributions not been made.

Extension of limitation periods in actions

10. (1) This section applies only with respect to an action in which a judgment would be an eligible judgement.

(2) Despite the expiry of a limitation of time for the bringing of an action fixed by or under any Act, if consideration is received by the (Government Agency) or an official or agency in another jurisdiction that is prescribed in the regulations as the (Government Agency)'s counterpart in that jurisdiction and the consideration would be available to satisfy any judgment obtained, the action may be brought within three years after the day on which any such consideration is first received. [60]

(3) Despite the expiry of a limitation of time for the bringing of an action fixed by or under any Act, the action may be brought if,

(a)no consideration has been received by the (Government Agency) or an official or agency in another jurisdiction that is prescribed in the regulations as the (Government Agency)'s counterpart in that jurisdiction that is or was available to satisfy a judgment obtained in the action;

(b)a contract exists that provides, either absolutely or upon conditions being satisfied, for consideration to be given where the giving or acceptance of the consideration is prohibited by this Act or under comparable legislation in another jurisdiction or would be prohibited but for the fact that the contract provides for the consideration to be paid to the (Government Agency) or an official or agency in another jurisdiction that is prescribed in the regulations as the (Government Agency)'s counterpart in that jurisdiction;

(c)the time the consideration referred to in clause (b), or any part of it, is to be given is within one year after the bringing of the action; and

(d)the consideration referred to in clause (b) would be available to satisfy a judgment obtained in the action.

(4) The court may allow an action to be brought after the expiry of the three year period under subsection (2), on such terms as it considers proper, if it is satisfied that,

(a)consideration is being retained by the (Government Agency) or an official or agency in another jurisdiction that is prescribed in the regulations as the (Government Agency)'s counterpart in that jurisdiction and the consideration would be available to satisfy a judgment obtained in the action or the conditions in clauses (3) (b), (c) and (d) are satisfied;

(b)there was a significant risk, before the three year period expired, that it would not be

possible to collect any significant amount on any judgement obtained;

(c)there is a reasonable chance that an eligible judgment will be obtained; and

(d)given the circumstances, the plaintiff has commenced the action without unreasonable delay.

Offences

11. (1) A person who contravenes subsection 2(1) or 2(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 2 (1) or failed to give as required under subsection 2 (2).

(2) 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 accepted in contravention of subsection 3 (1) or with respect to which the person failed to make a direction as required under subsection 3 (2).

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

(4) A person who fails to give the (Government Agency) information as required under a regulation made under clause 12 (c) is guilty of an offence and on conviction is liable to a fine not exceeding $5,000.

Regulations

12. The Lieutenant Governor in Council may make regulations,

(a)for the purposes of subsections 2 (4) and 3 (4), prescribing circumstances in which consideration is not necessary to ensure that all eligible judgments are satisfied;

(b)prescribing an official or agency in another jurisdiction as the (Government Agency)'s counterpart in that jurisdiction;

(c)requiring the following persons to give the (Government 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 2 (2) to give consideration to the (Government Agency),

(ii)persons who are required under subsection 3 (2) to give a direction that consideration be given to the (Government Agency);

(d)defining a substantial interest in or connection to a corporation for the purposes of paragraph 2 of subsection 4 (1);

(e)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 9 (4);

(f)requiring interest to be credited by the (Government Agency) to consideration retained by the (Government Agency) and governing the determination of such interest;

(g)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;

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

APPENDIX F
DRAFT LEGISLATION. ADMINISTRATIVE RE-DISTRIBUTION

Criminals' Exploitation of Violent Crime Act [61]

Table of Contents

Definitions

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; [62]

"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;

"violent crime" means,[63]

(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).

Paying for a criminal's recollection

2. (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 (Government Agency) *See footnote 64* 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 (Government Agency)'s counterpart in that jurisdiction.

Selling a criminal's recollection

3. (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 (Government 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 (Government Agency)'s counterpart in that jurisdiction.

Persons deemed to be agents

4. (1) For the purposes of sections 2 and 3, the following persons shall be deemed to be agents of the person convicted of the crime:

1.An assignee of 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 2 and 3, 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.

Use of consideration by (Government Agency)

5. (1) The (Government Agency) shall retain one half of the consideration it receives in respect of the recollection of a violent crime for which a person was convicted for distribution to victims of that crime and other crimes for which the person was convicted.

(2) The (Government Agency) shall distribute one half of the consideration it receives to the persons to whom the consideration would have been given had it not been given to the (Government Agency).

Amounts distributed to victims

6. (1) The (Government Agency) shall distribute consideration it retains for victims of crimes to the victims of whom the (Government Agency) has notice in proportion to the harm they have suffered as a result of the crimes.

(2) The proportion of harm suffered by the victims shall be determined by the

(Government Agency) in accordance with the regulations.

When consideration distributed to victims

7. (1) The (Government Agency) shall distribute consideration it retains for victims upon the expiry of the three year period following the first receipt of such consideration.

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

Interim distributions

8. (1) The (Government Agency) may make interim distributions of the consideration it retains for victims 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 (Government 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.

Distribution if no victims

9. If the (Government Agency), at the time it would otherwise distribute consideration it retains to victims, does not have notice of any such victims, the (Government Agency) shall pay the consideration into the consolidated revenue fund.

Offences

10. (1) A person who contravenes subsection 2(1) or 2(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 2 (1) or failed to give as required under subsection 2 (2).

(2) 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 accepted in contravention of subsection 3 (1) or with respect to which the person failed to make a direction as required under subsection 3 (2).

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

(4) A person who fails to give the (Government Agency) information as required under a regulation made under clause 11 (b) is guilty of an offence and on conviction is liable to a fine not exceeding $5,000.

Regulations

11. The Lieutenant Governor in Council may make regulations,

(a)prescribing an official or agency in another jurisdiction as the (Government Agency)'s counterpart in that jurisdiction;

(b)requiring the following persons to give the (Government 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 2 (2) to give consideration to the (Government Agency),

(ii)persons who are required under subsection 3 (2) to give a direction that consideration be given to the (Government Agency);

(c)defining a substantial interest in or connection to a corporation for the purposes of paragraph 2 of subsection 4 (1);

(d)defining, for the purposes of this Act, who is a victim of a crime;

(e)governing the determination of the proportion of harm suffered by the victims under subsection 6 (2);

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

(g)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);

(h)requiring interest to be credited by the (Government Agency) to consideration retained by the (Government Agency) and governing the determination of such interest;

(i)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;

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

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FOOTNOTES

Footnote: 1 This point is discussed further, at infra part III(1).

Footnote: 2 In addition to the ability to sue at common law for torts or delicts, provinces also provide legislation that allows victims to obtain money from a public fund. In this regard see: Criminal Injuries Compensation Act, R.S.B.C. 1979, c. 83; Criminal Injuries Compensation Act, R.S.A. 1980, c. C-33; Criminal Injuries Compensation Act, R.S.S. 1978, c. C-47; The Criminal Injuries Compensation Act, Re-enacted S.M. 1987, c. 305; Compensation for Victims of Crime Act, R.S.O. 1990, c. C.24; Crime Victims Compensation Act, R.S.Q. 1977, c. I-6; Compensation for Victims of Crime Act, R.S.N.B. 1973, c. C-14; Compensation for Victims of Crime Act, R.S.N.S. 1989, c. 83; Criminal Injuries Compensation Act, R.S.Nfld. 1970, c. 68.

Footnote: 3 The various states in the United States enacted legislation as a result of the outrage that occurred when David Berkowitz., the "Son of Sam" received $75,000 for his assistance in writing a book about his life: S. S. Okuda, 'Criminal Antiprofit Laws: Some Thoughts in Favor of Their Constitutionality' (1988), 76 Cal. L.Rev. 1353 and J. T. Loss, 'Criminals Selling their Stories: The First Amendment Requires Legislative Reexamination' [1987] 72 Corn. L.R. 1331. In Canada, the same outrage occurred after Clifford Olson received $100,000 from the police in exchange for

information about the death of eleven children: see Rosenfeldt v. Olson (1984) 16 D.L.R. (4th) 103 (B.C.S.C.), overturned on appeal at (1986), 1 B.C.L.R. (2d) 108 (C.A.). For a discussion of the trial decision, see J. D. McCamus, 'Recovery of the Indirect Profits of Wrongful Killing: the New Constructive Trust and the Olson Case' (1985), 20 E.T.R. 165. The same outrage has occurred in the wake of the Bernardo and Homolka trials, as noted in the following footnote, even though they have not financially benefited from their crimes.

Footnote: 4 On October 21, 1993 Debbie Mahaffy was present in the Ontario Legislature when she was reported to have said that "To profit from crime, the murder/violation of

another human being, is quite a repulsive reality in Canada." That same day a portion of a letter that Doug and Donna French had sent to the Members of the House was read. In that letter the parents of murdered teenager Kristen French were reported to have written the following: "The fact that people want to profit from someone else's tragedy is disgusting. But the fact that the criminals themselves can profit from crime is an outrage. It exploits victims and their families and in fact promotes crime". Both of these comments were mentioned by Mr. Cam Jackson, the sponsor of the private members bill that led to the creation of the Victims' Right to Proceeds of Crime Act, 1994, S.O. 1994, c. 39: Debates of the Legislative Assembly of Ontario (3rd Sess., 35th Parliament) No. 73 (October 21, 1993), p. 3653. The same sentiments were voiced by Mr. James Bradley, speaking in support of the Bill on behalf of the Liberal Party, where he said: "Society is repulsed by the fact that someone who has committed a crime can make a profit from that crime.": Ibid., p. 3656.

Footnote: 5 Committee on the Financial Exploitation of Crime, 'Committee Report on the Financial Exploitation of Crime' (Uniform Law Conference of Canada, Calgary: 1984), p. 7.

Footnote: 6 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.

Footnote: 7 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.

Footnote: 8 Joint Session of Uniform Law Section and Criminal Law Section, 'Financial Exploitation of Crime' (Uniform Law Conference of Canada, Quebec: 1995).

Footnote: 9 Reference re Validity of Section 5(a) of the Dairy Industry Act (Margarine Reference), [1949] S.C.R. 1, 50, affirmed by the Judicial Committee of the Privy Council

at [1951] A.C. 179.

Footnote: 10 Ibid., 49-50: "A crime is an act which the law, with appropriate penal sanctions, forbids; but as prohibitions are not enacted in a vacuum, we can properly look for some evil or injurious or undesirable effect upon the public against which the law is directed." Also see R. v. Swain, [1991] 1 S.C.R. 933, 998-9.

Footnote: 11 Toronto Railway. Co. v. Toronto City, [1920] A.C. 446

Footnote: 12 Scowby v. Glendinning, [1986] 2 S.C.R. 226, 240 and R. v. Zelensky, [1978] 2 S.C.R. 940.

Footnote: 13 If the act of recalling a crime by a criminal were indeed a crime, then the provincial legislatures could not create any legislation prohibiting it. However, so long as this matter is one that comes within provincial jurisdiction, such provincial legislation may operate even though it may be characterized as providing a punishment to the commission of a criminal offence other than the one prescribed in the Criminal Code, R.S.C. 1985, c. C-46 and thus contrary to s. 6(1)(b) of that Act: R. v. Langlais (1965), 49 C.R. 159 (Que. S.C.).

Footnote: 14 Nova Scotia Board of Censors v. McNeil, [1978] 2 S.C.R. 662, 691 and Rio Hotel Ltd. v. New Brunswick (Liquor Licensing Board), [1987] 2 S.C.R. 59 illustrate that merely because legislation is prompted for moral reasons, it will not necessarily be characterized as criminal in nature.

Footnote: 15 Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927, 973.

Footnote: 16 R. v. Oakes, [1986] 1 S.C.R. 103.

Footnote: 17 It should also be noted that there are a number of good policy reasons why all of a criminal's money should not be taken. For example, if criminals can earn some money through writing, it may mean that their energy is channelled into that activity rather than through crime. Moreover, it should assist the reintegration of criminals into society if,

upon their release, they have at least some of the proceeds of their exploitation to rely upon. In addition, in arriving at their determinations about whether the criminal's rights have been minimally impaired, courts may be affected by article 15(1)(c) of the International Covenant on Economic, Social and Cultural Rights (adopted and opened for signature, ratification and accession by General Assembly resolution 2200 A (XXI), 16 December 1966 and ratified by Canada 19 August 1976) which recognizes the rights of everyone, presumably including criminals, to the material interest resulting from any "literary or artistic production of which he is author".

Footnote: 18 Joint Session of Uniform Law Section and Criminal Law Section, supra note , pp. 9-10.

Footnote: 19 In arriving at this conclusion, the paper, ibid, relied upon the reformulation of the third criterion by the Supreme Court of Canada in Dagenais v. Canadian Broadcasting Corporation, [1994] 3 S.C.R. 835, 889 and in the conclusion of the Supreme Court of the United States in Simon & Schuster, Inc. v. New York Crime Victims Board, 112 S.Ct. 501 (1991).

Footnote: 20 This is already part of the common law. See, for example, Hollington v. F. Hewthorn & Co. Ltd., [1943] 2 All. E.R. 35; Hunter v. Chief Constable of West Midlands, [1981] 3 All. E.R. 727 (H.L.); Demeter v. British Pacific Life Insurance Co. and two other actions (1983), 43 O.R. (2d) 33; and, Royal Bank of Canada v. McArthur (1985), 51 O.R. (2d) 86. It is also part of many provincial Evidence Acts. For example, see Evidence Act, R.S.O. 1990, c. E.23, ss. 22 and 38 and Evidence Act, R.S.B.C. 1979, c. 116, s. 29.

Footnote: 21 Some provinces already have provisions like this in case of fatal accidents. See, for example, the Fatal Accidents Act, R.S.A. 1980, c. F-5, s. 8 and the recommendation of the Alberta Law Reform Institute that the level of compensation set out in that Act be raised and that it be reviewed every three years by the Lieutenant Governor in Council and subject to increase by Order in Council: Non-Pecuniary Damages in Wrongful Death Actions:_A Review of Section 8 of the Fatal Accidents Act (Alberta Law Reform Institute, Edmonton: 1992).

Footnote: 22 Criminal Code, R.S.C. 1985, c. C-46, s. 672.34: "Where the jury, or the judge or provincial court judge where there is no jury, finds that an accused committed the act or made the omission that formed the basis of the offence charged, but was at the

time suffereing from mental disorder so as to be exempt from criminal responsibility by virtue of subsection 16(1), the jury or the judge shall render a verdict that the accused committed the act or made the omission but is not criminally responsible on account of mental disorder." (emphasis added)

Footnote: 23 This latter possibility is not merely fanciful. A few years ago, years after the crime had been committed, three of the people who were involved in freeing George Blake, a convicted spy, wrote books about the subject. See: Pat Pottle and M. Randle, The Blake Escape: How We Freed George Blake and Why (Harrap Books Ltd: 1989) and Sean Bourke, The Springing of George Blake, (Macmillan: New York, 1987). In fact, at least one of these books was written to earn money to be able to pay for a defence in the event that they were charged.

Footnote: 24 Supra note .

Footnote: 25 Supra note .

Footnote: 26 Supra note .

Footnote: 27 Supra note .

Footnote: 28 Supra part III(4).

Footnote: 29 It should be noted that An Act to amend the Criminal Code and Copyright Act (profit from authorship respecting a Crime), Bill C-307, introduced into the House of Commons by Tom Wappel, MP for Scarborough West on February 22, 1995, (Appendix B) uses the phrase "and the work is principally based on the indictable offence or the circumstances of its commission".

Footnote: 30 Supra note .

Footnote: 31 For example, see Fong Estate v. Gin Brothers Enterprises Ltd. (1990 B.C.C.A.)) (cited from Goldsmith, Damages for Personal Injury and Death, vol. 2, p. T65-

17); Gill Estate v. Greyhound Lines of Canada Ltd. (1987), 21 B.C.L.R. (2d) 324 (B.C.S.C.) Larney Estate v. Friesen (1986), 41 Man .R. (2d) 169 (Man. C.A.) Reidy v. McLeod (1986), 54 O.R. (2d) 661 (Ont. C.A.); Gervais v. Richard (1984) 48 O.R. 191 (Ont. H.C.); Kinnon v. Traynor (1982), 46 A.R. 75 (Alta. Q.B.).

Footnote: 32 This situation may change in the near future as the Attorney General has announced that he is in favour of them and because work is now being undertaken within the Government to determine what the impact of contingency fees are likely to be.

Footnote: 33 R.S.O. 1990, c. C-24, s. 26(2).

Footnote: 34 It has been reported in the media that the French and Mahaffy families received close to their full compensation under the Act.$25,000.

Footnote: 35 Reference Re Residential Tenancies, [1981] 1 S.C.R. 714.

Footnote: 36 There are a number of decisions to the effect that the essential feature of a judicial function is to resolve the lis between the parties: Labour Relations Board (Saskatchewan) v. John East Iron Works Ltd., [1949] A.C 134 , 149-50. If there is in fact no lis, then it is arguable that the officer is not exercising a judicial function.

Footnote: 37 For example, see Tomko v. Labour Relations Board (Nova Scotia), [1977] 1 S.C.R. 112.

Footnote: 38 For example, see Jones v. Edmonton Catholic S. Dist. Trustees Bd., [1977] 2 S.C.R. 872.

Footnote: 39 For example, see Attorney General for Quebec v. Farrah, [1978] 2 S.C.R. 628.

Footnote: 40 H. Laddie, P. Prescott and M. Vitoria, The Modern Law of Copyright and Designs (Butterworths, London: 1995), p. 1: "A thing cannot be described as property unless one has a legal right to stop others from using it, either absolutely or (at any rate)

on condition that a suitable payment is made. Intellectual property is thus a purely negative right, and this concept is quite important. Thus, if someone owns the copyright in a film he can stop others from showing it in public but it does not in the least follow that he has the positive right to show it himself."

Footnote: 41 Infra part IV(4)(b)(ii).

Footnote: 42 To some extent, this position can be supported by the decision Bishop v. Télé-Métropole Inc. (1985), 4 C.P.R. (3d) 349, 367-8 (Fed. T.D.). However, that decision may be explained on much narrower grounds, that being that the legislation in that case went to the core of what is copyright.the ability to prevent the non-copyright holder from making copies.

Footnote: 43 Supra note . Also see Evidence Act, R.S.O. 1990, c. E.23, s. 22.1, as amended by An Act respecting Victims of Crime, S.O. 1995, c. 6.

Footnote: 44 R.S.A. 1980, c. F-5, s. 8.

Footnote: 45 These were, in part, the recommendations of the Alberta Law Reform Institute, Non-Pecuniary Damages in Wrongful Death Action:_A Review of Section 8 of the Fatal Accidents Act, supra note .

Footnote: 46 He has also copyrighted a video entitled Motivational Sexual Homicide Patterns of Serial Child Killer Clifford Robert Olson.

Footnote: 47 S.C. 1992, c. 20.

Footnote: 48 Supra part (IV)(2)

Footnote: 49 So long as Ms. Holmolka is still governed by her sentence (that is, she is either imprisoned or on parol), the fact of a non-compliance with her plea bargain can be used by the Parole Board as an indication of Ms. Holmolka's suitability for early release. Once she is free of the criminal justice system, it is hard to see what the Crown can do to

ensure that she complies with her agreement. If it sued for breach of contract, it is unlikely that the Crown can prove any damages.and the victims themselves were not party to the plea bargain so they could not sue. The only possible option that the Crown would have, to re-charge Ms. Homolka for those crimes for which she was not tried, but even this option is not necessarily possible since part of the consideration that Ms. Homolka gave for this benefit was a guilty plea.and that she cannot get back. Even if this option is possible, however, it would not exist in most cases.

Footnote: 50 Supra part IV(4)(ii)(b).

Footnote: 51 An Act to amend the Criminal Code and Copyright Act (profit from authorship respecting a Crime), supra note . As I understand, this Bill has only received first reading and has not yet received support from the government. However, Mr. Wappel's executive assistant advised me that this bill has support of the Bloc Québecois and the Reform Party and of many people within the Liberal Party. Consequently, they have great hopes that this Bill will become law.

Footnote: 52 Supra note .

Footnote: 53 See: Limitation Act, R.S.B.C. 1979, c. 236, s. 3(1); Limitation of Actions Act, R.S.A. 1980, c. L-15, s. 51; Limitation of Actions Act, R.S.S. 1978, c. L-15, s. 3(1)(d); Limitation of Actions Act, Re-enacted S.M. 1987, c. L150, s. 2(1)(e); Limitation of Actions Act, R.S.N.B. 1973, c. L-8, s. 4; Statute of Limitations Act, R.S.P.E.I. 1988, c. S-7, s. 2(1)(d). In Quebec, the prescription time is three years (Code Civil du Québec, art. 2925) and in Ontario the limitation period is four years (Limitations Act, R.S.O. 1990, c. L.15, s. 45(1)(j)). In Nova Scotia, the limitation period is one year: The Limitation of Actions Act, R.S.N.S. 1989, c. 258, s. 2(1)(b).

Footnote: 54 Supra part IV(1).

Footnote: 55 This Act came into force May 1, 1995.

Footnote: 56 This draft does not attempt to deal with issues relating to protection of privacy legislation which may differ from jurisdiction to jurisdiction.

Footnote: 57 See Criminal Code, section 672.34 (S.C. 1991, c. 43, s. 4).

Footnote: 58 Much of this definition was taken from section 752 of the Criminal Code.

Footnote: 59 Throughout this draft the term "Government 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 "Government Agency" in that jurisdiction.

Footnote: 60 Very loosely based on section 5 of the Judicial Review Procedure Act.

Footnote: 61 This draft does not attempt to deal with issues relating to protection of privacy legislation which may differ from jurisdiction to jurisdiction.

Footnote: 62 See Criminal Code, section 672.34 (S.C. 1991, c. 43, s. 4).

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