Panicking over Criminal Organizations: We Don't Need Another Offence

High profile and dramatic crimes such as the shooting of Montreal journalist Michael Auger can produce panics that lead to quick and unnecessary legislation that threatens civil liberties. A few years ago, the murder of an Irish investigative journalist led to significant amendments to Irish criminal law that will be challenged under the European Convention on Human Rights. It looks like Parliament may be gearing up to do the same thing over the terrible shooting of Auger. There are, however, many reasons to doubt that adding new organized crime offences to the Criminal Code is necessary.

The original calls by Quebec Justice Minister Serge Menard to use s. 33 to declare membership in certain organizations to be illegal at least had the virtue of candour and of requiring Parliament to revisit the matter when the override expires in five years' time — by which time the panic will have subsided. The Code is already littered with offences that have long outlived their political purposes and social utility.

There is also a good case that s. 33 is necessary to make mere membership in an organization illegal. A return to such a draconian law (we made organizations such as the Communist Party illegal during the Red Scare) would completely deny and negate freedom of association for those who belong to the outlawed organization. This does not seem like a limit, let alone a reasonable limit, on the important right. Rather, it would seem to fall under that small line of cases where governments cannot justify the complete denial of a Charter right for reasons inconsistent with the right: see Quebec (Attorney General) v. Quebec Assn. of Protestant School Boards (1984), 104 D.L.R. (3d) 33; R. v. Big M Drug Mart Ltd. (1985), 18 C.C.C. (3d) 385 and Vriend v. Alberta (1997), 156 D.L.R. (4th) 385. This is an important yet often neglected restriction on the ability of governments to use s. 1.

How would an illegal organization be defined? The present definition requires that one of the primary activities be the commission of serious crimes and that any of the members have within the last five years engaged
in such crimes. Even this definition may cover organizations that engage in legitimate ventures as one of their primary activities.

In western Canada, the panic is about Aboriginal gangs (witness Winnipeg's unnecessary construction of a special courtroom for the trial of some Manitoba Warriors), but some of these organizations also engage in legitimate expressive and community activities. The line between criminal and legitimate organizations is already very thin. A ban on criminal organizations could be used (again) to criminalize legitimate dissent.

Allowing judges as opposed to Parliament to decide which particular organization is illegal does not solve the problem and offends the separation of powers. The enabling legislation would likely be vague and the judicial decision to prohibit a particular organization retroactive. As Chief Justice Lamer said about the public interest grounds for denying bail: "a standardless sweep does not become acceptable simply because it results from the whims of judges": *R. v. Morales* (1992), 77 C.C.C. (3d) 91.

In the oft-criticized line of cases holding that unions do not have a Charter right to strike or engage in collective bargaining, the Supreme Court has made clear that freedom of association only protects formation and membership in the organization, not the activities of the organization. We can and do criminalize conspiracies, attempts and conduct that arise from the organization, but not membership in the organization.

It is easy to forget just how expansive our regular criminal law is. So long as intent can be established, conduct can be criminalized long before harm occurs under the law of attempts. *R. v. Deutsch* (1986), 27 C.C.C. (3d) 385, suggests that courts are not likely to quibble over whether the police have caught a gang member in mere preparation to commit an offence or whether the member has committed the necessary act, which itself need not be illegal or harmful. The offence of counselling a crime that is not committed is also a useful tool, especially in cases where police have been able to infiltrate or win the confidence of criminal organizations. So too is the offence of conspiring to commit either an indictable or summary conviction offence. There are many alternatives short of outlawing membership in an organization and negating freedom of association.

The parties' provisions are only slightly less expansive. Those within the organization who counsel a crime or who attend at the crime with prior knowledge that it may be committed may be guilty of the offence. If they form an unlawful purpose, they will be guilty of subsequent offences (except murder and attempted murder) that they ought to know would be committed.

The penalties for being even a peripheral party can be severe. Under s. 467.1(1) (added in 1997 in response to an episode of gang violence in Quebec), those who knowingly participate in criminal organizations and are parties to indictable offences committed for or in association with the organization are subject to a separate offence punishable by up to 14 years, to be served consecutively with the sentence for the principal offence. The fact that the principal offence was committed for the criminal organization is itself an aggravating factor at sentencing under s. 718.2. Section
231(6.1) makes murders involving the use of explosives for a criminal organization a new form of first degree murder.

If organized crime is a rising problem in Canada, the answer lies in increased policing and prosecutorial resources, not new offences. This term the Supreme Court will hear a case concerning the tactics that police may use when investigating biker gangs. See Brown v. Durham Regional Police Force (1998), 131 C.C.C. (3d) 1 (Ont. C.A.). To the extent that most organized crime organizations are into drugs, the federal government can conduct their own prosecutions. There may be a need for some amendments relating to investigative powers and forfeiture, but we do not need another offence. We have plenty. A new offence will not get the job done and it may violate the Charter.

K.R.