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Vol. 138, No. 45 — November 6, 2004

Regulations Amending the Controlled Drugs and Substances Act (Police Enforcement) Regulations

Statutory authority

Controlled Drugs and Substances Act

Sponsoring department

Department of Public Safety and Emergency Preparedness

REGULATORY IMPACT ANALYSIS STATEMENT

(This statement is not part of the Regulations.)

Description

Effective enforcement of drug control laws has necessitated the development of specialized investigative techniques, such as controlled deliveries and other types of "sting" operations. As with many consensual crimes, experience has shown that ordinary methods of investigation are often ineffective. The *United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988* (Vienna Convention) called for various coordinated activities, including the use of proven investigative techniques.



In April 1999, the Supreme Court of Canada's judgment in *R. v. Campbell and Shirose* declared that, under common law, the police were not immune from criminal liability for criminal acts they committed during the course of an investigation. The court also stated that, "If some form of public interest immunity is to be extended to the police . . . it should be left to Parliament to delineate the nature and scope of the immunity and the circumstances in which it is available."

The *Controlled Drugs and Substances Act (Police Enforcement) Regulations*, as they are now written, provide a justification for law enforcement officers (and persons acting under their direction and control) for violations of some provisions of the *Controlled Drugs and Substances Act* (CDSA), when investigating violations directly related to that Act. However, no limited immunity exists for violations of the CDSA committed by law enforcement officers (and those acting under their direction and control) as part of an investigation unrelated to the Act.

This gap poses a problem for law enforcement officers when they are investigating, by means of an undercover operation, violations of other statutes. Undercover law enforcement officers may have to violate provisions of the CDSA in order to maintain their undercover identity, even though they are participating in investigations that are unrelated to that Act.

Sections 25.1 to 25.4 of the *Criminal Code* are known as the law enforcement justification provisions. Bill C-24, *An Act to amend the Criminal Code (organized crime and law enforcement)*, came into force on February 1, 2002. These provisions respond to the judgment in *R. v. Campbell and Shirose* by providing a limited justification for otherwise illegal acts and omissions committed by law enforcement officials (and persons acting under their direction and control) while investigating an offence under federal law, enforcing a federal law, or investigating criminal activity.

Accordingly, section 55 of Bill C-24 amends section 55 of the CDSA by adding subsection 55(2.1), which makes it possible to make regulations prescribing limited immunity for violations of the CDSA committed during law enforcement activities conducted under any other Act of Parliament.

The amendment harmonizes the CDSA (Police Enforcement) Regulations with the new subsection 55(2.1) of that Act,

enacted by Bill C-24. In other words, the CDSA (Police Enforcement) Regulations will extend the exemption scheme currently provided for CDSA-related investigations to investigations under any other Act of Parliament. As well, the other primary purpose for amending the Regulations is to incorporate changes made in response to comments received from the Standing Joint Committee for the Scrutiny of Regulations.

Alternatives

As stated above, the enactment of Bill C-24 created a consequential amendment to the CDSA with respect to the (Police Enforcement) Regulations. Current legislation does not permit law enforcement officers to use illegal substances to further a criminal investigation unless it is specifically a CDSA investigation. Bill C-24 provides for an amendment to the CDSA that extends the exemption identified under the Regulations to investigations under any other Act of Parliament. Given that, without an amendment to the Regulations, the discrepancy created by the enactment of Bill C-24 will not be sufficiently addressed, there is no other alternative. An example of this discrepancy is that, under the current CDSA (Police Enforcement) Regulations, law enforcement officials are not exempt from carrying "street drugs" during the course of a homicide investigation.

Benefits and costs

The level of sophistication by drug traffickers and organized criminals continues to grow and has precipitated the need for specialized enforcement techniques. By adopting these amendments, the police community's ability to target high-level organized crime groups successfully will be enhanced, which is inherently beneficial to all Canadian society.

The financial costs of amending these Regulations are relatively insignificant in comparison to the cost of investigating and prosecuting law enforcement officials for drug offences.

Consultation

On September 22, 2003, the Department of the Solicitor General of Canada wrote to federal, provincial and territorial counterparts, as well as to the law enforcement community, seeking their views and comments on the proposed

amendments to the CDSA (Police Enforcement) Regulations.

As of November 28, 2003, the Department had received some comments in response to the consultation letter, mostly supporting the proposed Regulations. Alberta, New Brunswick, the Northwest Territories and the Yukon indicated support with no substantive comments. The provinces of Quebec and Nova Scotia responded with substantive comments.

Nova Scotia proposed the introduction of a reasonability test into the Regulations. It was suggested that, as the CDSA provisions would be extended to other federal statutes, it might be desirable to introduce a balancing provision for the authority to commit criminal acts. Consultations were held with the Public Safety and Emergency Preparedness Canada (PSEPC) Departmental Legal Services, the RCMP Legal Services, and the Department of Justice Federal Prosecution Service, the Criminal Law Policy Section and the Regulations Section of the Legislative Services Branch, and it was agreed that a reasonability test is not necessary in these proposed amendments to the Regulations. It was argued that the absence of a reasonability test in the Regulations does not relieve police from the obligation of ensuring that their conduct is reasonable.

Quebec questioned whether the Committee for the Scrutiny of Regulations was correct in its assertion that the term "assisting" law enforcement should be repealed. The Committee suggested that the enabling provisions of the Act [paragraph 55(2)(b)] makes no mention of people "assisting" or providing an exemption where a person has "reasonable grounds to believe" and thus considered sections 4, 7, 9, 12, 14, 16, 18.2 and 20 to be *ultra vires*. Based on consultations between the Departmental Legal Services and the Department of Justice, a consensus was reached that the Committee for the Scrutiny of Regulations did not appreciate that the "assisting" requirement in the above sections was in essence an additional condition of control, as evidenced by the word "and" rather than an alternative basis for claiming the exemption. For this reason, it would not be *ultra vires* and it is a desired element of control that should remain in the Regulations. It was acknowledged, however, that the basis for the comments of the Standing Joint Committee in regard to persons having "reasonable grounds to believe" that the police officer under whose direction and control they are acting meets the exemption conditions. The scope of subsections 55(2) and 55(2.1) appears only to extend

to persons acting under the direction of an officer who does in fact meet the exemption conditions. It was proposed that the words "the person has reasonable grounds to believe" should be deleted where they occur in paragraph (a) of the respective provisions.

Clause 3 amends section 5 to allow after-the-fact notification of importation or exportation of a substance in circumstances where prior notification is impossible. The Province of Quebec decided that a test of "impossibility" was too stringent and that section 5 of the Regulations should not be amended or, failing this, that it should be amended to include an impracticability test. It was determined that the effect of this recommendation would be to return the section to the same state that led to the concern expressed by counsel for the Committee on the Scrutiny of Regulations. Therefore, the Department decided not to implement that recommendation and instead incorporated the comments received from the Standing Joint Committee on the Scrutiny of Regulations. Quebec also stated that amending sections 15 and 16 of the French version of the Regulations to ensure congruency with the English version was unnecessary. After further analysis and consultation, it was determined that the proposed amendments to the French version were in fact necessary, thus no further changes to the proposed amendments were required.

The Department of the Solicitor General of Canada, in consultation with the PSEPC Departmental Legal Services, the RCMP Legal Services, and the Department of Justice Federal Prosecution Service, the Criminal Law Policy Section, and the Regulations Section of the Legislative Services Branch, worked together to ensure that all comments and concerns with regard to the Regulations were addressed.

Compliance and enforcement

The primary amendment is the correction of a legislative discrepancy created by the coming into force of Bill C-24 of the *Criminal Code* in 2002. The enforcement burden will not increase as a result of the implementation of these amendments.

Contact

Ms. Danielle Lacasse, Director, National Strategies Division,
Policing, Law Enforcement and Interoperability Branch,

Department of Public Safety and Emergency Preparedness,
340 Laurier Avenue W, 10th Floor, Ottawa, Ontario K1A 0P8,
(613) 991-4078 (telephone), (613) 993-5252 (facsimile),
Danielle.Lacasse@psepc-sppcc.gc.ca (electronic mail).

PROPOSED REGULATORY TEXT

Notice is hereby given that the Governor in Council, pursuant to subsections 55(2) and (2.1) ([see footnote a](#)) of the *Controlled Drugs and Substances Act* ([see footnote b](#)), proposes to make the annexed *Regulations Amending the Controlled Drugs and Substances Act (Police Enforcement) Regulations*.

Interested persons may make representations with respect to the proposed Regulations within 30 days after the date of publication of this notice. All such representations must cite the *Canada Gazette*, Part I, and the date of publication of this notice, and be addressed to Danielle Lacasse, Director, National Strategies Division, Policing, Law Enforcement and Interoperability Branch, Public Safety and Emergency Preparedness Canada, 340 Laurier Avenue West, Ottawa, Ontario K1A 0P8.

Ottawa, October 25, 2004

EILEEN BOYD
Assistant Clerk of the Privy Council

	REGULATIONS AMENDING THE CONTROLLED DRUGS AND SUBSTANCES ACT (POLICE ENFORCEMENT) REGULATIONS
	AMENDMENTS
	1. The definition "particular investigation" in section 1 of the <i>Controlled Drugs and Substances Act (Police Enforcement) Regulations</i> (see footnote 1) is replaced by the following: "particular investigation" means a primary investigation conducted under the Act or any other Act of Parliament and includes any investigation that arises from the primary investigation. (<i>enquête particulière</i>)
	2. Paragraph 4(a) of the Regulations is

	<p>replaced by the following: (a) acts under the direction and control of a member of a police force who meets the conditions set out in paragraphs 3(a) and (b); and</p>
	<p>3. Section 5 of the Regulations is replaced by the following:</p>
RCMP notification	<p>5. A member who is exempt, under section 3 of these Regulations, from the application of section 6 of the Act shall notify, in written or electronic format, the Assistant Commissioner of the RCMP in charge of drug enforcement of the importation or exportation of a substance by the member in accordance with section 3 of these Regulations, or by a person under the member's direction or control pursuant to section 4 of these Regulations, before the substance is imported or exported or, if it is not practicable to do so before the substance is imported or exported, as soon as practicable after that time.</p>
	<p><i>Section 5 of the Act — Holding Out</i></p>
Holding out	<p>5.1 A member of a police force who engages or attempts to engage in conduct referred to in section 5 of the Act by representing or holding out a substance to be a substance included in Schedule I, II, III or IV of the Act is exempt from the application of that section if the member</p> <p>(a) is an active member of the police force; and</p> <p>(b) is acting in the course of the member's responsibilities for the purposes of a particular investigation.</p>
Direction and control	<p>5.2 A person who engages or attempts to engage in conduct referred to in section 5 of the Act by representing or holding out a substance to be a substance included in Schedule I, II, III or IV of the Act is exempt from the application of that section if the person</p> <p>(a) acts under the direction and control of a member of a police force who meets the conditions set out in paragraphs 5.1(a) and</p>

	(b); and (b) acts to assist the member referred to in paragraph (a) in the course of the particular investigation.
	4. Paragraph 7(a) of the Regulations is replaced by the following: (a) acts under the direction and control of a member of a police force who meets the conditions set out in paragraphs 6(a) and (b); and
	5. The Regulations are amended by adding the following after section 7:
	<i>Provisions of the Precursor Control Regulations</i>
Member of police force	7.1 A member of a police force is exempt from the application of subsections 6(1) and (2) and 9(1), section 10, subsections 47(1) and 57(1) and section 88 of the <i>Precursor Control Regulations</i> if the member engages or attempts to engage in conduct referred to in any of those provisions and (a) is an active member of the police force; and (b) is acting in the course of the member's responsibilities for the purposes of a particular investigation.
Direction and control	7.2 A person is exempt from the application of subsections 6(1) and (2) and 9(1), section 10, subsections 47(1) and 57(1) and section 88 of the <i>Precursor Control Regulations</i> if the person engages or attempts to engage in conduct referred to in any of those provisions and the person acts under the direction and control of a member of a police force who meets the conditions set out in paragraphs 7.1(a) and (b).
	6. Paragraph 9(a) of the Regulations is replaced by the following: (a) acts under the direction and control of a member of a police force who meets the conditions set out in paragraphs 8(2)(a) and (b); and
	7. Section 10 of the Regulations is replaced by the following:

Controlled deliveries	10. For the purposes of subsection 11(1) and section 12, a substance requested of and obtained directly from a foreign state does not include a substance that has, for the purpose of identifying any person involved in the commission of an offence under the Act or any other Act of Parliament or a conspiracy to commit such an offence, been allowed to pass out of or through a foreign state, with the knowledge and under the supervision of that state's competent authorities.
	8. Paragraph 12(a) of the Regulations is replaced by the following: (a) acts under the direction and control of a member of a police force who meets the conditions set out in paragraphs 11(2)(a) and (b); and
	9. The portion of section 15 of the French version of the Regulations before paragraph (a) is replaced by the following:
Offre de se livrer à des activités	15. Est soustrait à l'application des articles 5 ou 7 de la Loi, quant à l'offre, le membre d'un corps policier qui se livre à des activités qui y sont visées du fait qu'il offre de le faire, si les conditions suivantes sont réunies :
	10. (1) The portion of section 16 of the French version of the Regulations before paragraph (a) is replaced by the following:
Personne supervisée	16. Est soustrait à l'application des articles 5 ou 7 de la Loi, quant à l'offre, quiconque se livre à des activités qui y sont visées du fait qu'il offre de le faire, s'il agit :
	(2) Paragraph 16(a) of the Regulations is replaced by the following: (a) acts under the direction and control of a member of a police force who meets the conditions set out in paragraphs 15(a) and (b); and
	11. Sections 18.1 and 18.2 of the Regulations are repealed.
	12. (1) The portion of section 19 of the Regulations before paragraph (a) is replaced by the following:

Conspiracy	<p>19. A member of a police force is exempt from the application of the provisions that create the offence of conspiracy to commit, being an accessory after the fact in relation to, or any counselling in relation to, an offence under subsection 4(2) or section 5, 6 or 7 of the Act if the member</p>
	<p>(2) Paragraph 19(c) of the Regulations is replaced by the following: (c) engages in conduct that, but for the application of this section, would constitute a conspiracy to commit, being an accessory after the fact in relation to, or any counselling in relation to, an offence under subsection 4(2) or section 5, 6 or 7 of the Act.</p>
	<p>13. (1) The portion of section 20 of the Regulations before subparagraph (a)(i) is replaced by the following:</p>
Direction and control	<p>20. A person is exempt from the application of the provisions that create the offence of conspiracy to commit, being an accessory after the fact in relation to, or any counselling in relation to, an offence under subsection 4(2) or section 5, 6 or 7 of the Act if the person (a) acts under the direction and control of a member of a police force who</p>
	<p>(2) Paragraph 20(c) of the Regulations is replaced by the following: (c) engages in conduct that, but for the application of this section, would constitute a conspiracy to commit, being an accessory after the fact in relation to, or any counselling in relation to, an offence under subsection 4(2) or section 5, 6 or 7 of the Act.</p>
	<p>14. (1) Subsections 21(1) to (3) of the Regulations are replaced by the following:</p>
Forfeited substances	<p>21. (1) The chief or appropriate officer shall, as soon as practicable but not later than 60 days after a forfeited controlled substance or precursor is no longer required for the proceeding in respect of which it was seized, where the controlled substance or precursor is required</p>

	for the purposes of conducting investigations under the Act or any other Act of Parliament, inform the Minister in writing of that requirement.
Secure location	(2) Every controlled substance or precursor referred to in subsection (1) shall be kept in a secure location while not being used for the purposes of conducting investigations under the Act or any other Act of Parliament.
Transfer	(3) The chief or appropriate police officer of a police force is exempt from the application of section 5 of the Act if that person transfers any controlled substance or precursor referred to in subsection (1) to the chief or appropriate police officer of another police force and if the chief or appropriate police officer of that other police force requests the transfer for the purposes of a particular investigation.
	(2) Subsection 21(5) of the Regulations is replaced by the following:
Directions	(5) If a controlled substance or precursor referred to in subsection (1) is no longer required for the purposes of conducting investigations under the Act or any other Act of Parliament, the chief or appropriate police officer shall seek the directions of the Minister and dispose of or otherwise deal with the controlled substance or precursor in accordance with the Minister's directions.
Substances not required	(6) If a forfeited controlled substance or precursor is no longer required for the proceeding in respect of which it was seized and is not required for the purposes of conducting investigations under the Act or any other Act of Parliament, the chief or appropriate police officer shall, as soon as practicable, (a) in writing seek directions from the Minister respecting the disposal of or otherwise dealing with the controlled substance or precursor, unless the Minister has previously given such directions; and

	(b) dispose of or otherwise deal with the controlled substance or precursor in accordance with the Minister's directions.
	15. Subsection 23(1) of the Regulations is replaced by the following:
Report of substances no longer in possession	23. (1) The chief or appropriate police officer shall submit a report in written or electronic format to the Solicitor General of Canada and the Minister containing the information required by subsection (3), respecting every controlled substance or precursor referred to in subsection 21(1) that is lost, stolen or otherwise no longer in the possession of the police force, as soon as practicable after the substance is lost, stolen or no longer in the possession of the police force.
	16. The French version of the Regulations is amended by replacing the expression "commissaire-adjoint" with the expression "commissaire adjoint" wherever it occurs in the following provisions: (a) paragraph (a) of the definition "agent de police compétent" in section 1; and (b) the portion of subsection 11(2) before paragraph (a).
	17. The French version of the Regulations is amended by replacing the expression "aux fins de" with the expression "pour les besoins de" wherever it occurs in the following provisions, with such modifications as the circumstances require: (a) paragraph 3(b); (b) paragraph 6(b); (c) paragraph 8(2)(b); (d) paragraph 11(2)(b); (e) paragraph 13(2)(b); (f) paragraph 15(b); (g) paragraph 18(1)(c); (h) paragraph 19(b); and (i) subparagraph 20(a)(ii).
	COMING INTO FORCE
	18. These Regulations come into force on the day on which they are registered.

[Footnote a](#)

S.C. 2001, c. 32, s. 55

[Footnote b](#)

S.C. 1996, c. 19

[Footnote 1](#)

SOR/97-234

NOTICE:

The format of the electronic version of this issue of the Canada Gazette was modified in order to be compatible with hypertext language (HTML). Its content is very similar except for the footnotes, the symbols and the tables.



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Important Notices
