

Background on Bill C-10

By the Anti-Colonial Committee of the Law Union of Ontario

The Federal Government introduced Bill C-10 in Parliament through Justice Minister Peter MacKay on November 5, 2013, and it was discussed at the Parliamentary Committee on Justice and Human Rights on Dec. 3, 5, 10, and 12, 2013. The Bill will amend the Criminal Code to include a section on the possession and trafficking of contraband tobacco.

Contraband tobacco is defined as any tobacco product that does not comply with the relevant federal and provincial statutes. Importing, stamping, marking, manufacturing, distributing and paying duties and taxes on such products are all regulated by statute.

The RCMP considers the definition of contraband tobacco to include product to be sold on First Nations' reserves that has been diverted to the wider market. The RCMP believes that certain businesses on reserve are major distributors of contraband tobacco and that considerable amounts of contraband cigarettes are manufactured on reserve in unlicensed factories.

Committee testimony from anti-smoking advocates stated that "based on reports from the RCMP and others, on Kahnawake near Montreal, there are about ten [cigarette factories]; there's one on Tyendinaga, near Belleville; and there are maybe a dozen or so on Six Nations near Brantford. Those are in Canada. On the U.S. side of Akwesasne, there were 10 a couple of years ago, but it may be slightly less than that now. These are the primary sources. Well over 90% of the contraband in Canada originates from these unlicensed [cigarette] factories."

Committee testimony from the OPP also

noted that "in addition to the Cornwall area within our east region, the area of Ontario where OPP highway enforcement



teams have laid the most charges relating to contraband tobacco has been the southwestern part of the province. The contraband cigarettes confiscated in many of these stops were worth tens of thousands of dollars. In several cases, the contraband cigarettes were manufactured within the Six Nations of the Grand River community south of Hamilton, the vehicles being registered to businesses located in this first nations community. Southwestern Ontario has also seen the phenomenon of smoke shacks progressively develop in recent years, mostly on the Highway 6 corridor, which borders the Six Nations community."

While anyone can smuggle or sell contraband cigarettes, the activity in Ontario is often tied to residents of various first nations communities. This can complicate enforcement, as the issues can be compounded with claims related to treaty rights and traditional native practices.

The police and government allege that a significant amount of the trade in contraband tobacco occurs in and around certain First Nations reserves, for a number of reasons:

- First Nations such

as the Mohawk of Akwesasne and Saint Regis have territories that straddle the border with the United States, which

can facilitate smuggling.

- Certain First Nations believe that the use and trade in tobacco, including between different First Nations across the country, is an inherent right that should be constitutionally recognized under section 35 of the Constitution Act, 1982.

- As such, some First Nations individuals and communities do not recognize certain federal or provincial laws limiting their rights in relation to tobacco

- In addition, prices of tobacco products are usually lower on reserve because provincial taxes and sales taxes (both federal and provincial) are not included in the prices of these products when purchased by customers who are Status Indians

- Though anyone other than a Status Indian is supposed to pay all taxes if they purchase tobacco products on reserve, this does not always occur and certain businesses on reserve are major distributors of contraband tobacco.

THE CURRENT LEGAL FRAMEWORK

Currently, prosecutions for contraband tobacco-related offences can be conducted either under the Excise Act,

2001, or under a number of general provisions in the Criminal Code. Under the Excise Act, 2001, certain contraventions are

already subject to fines and imprisonment for up to five years.

Currently, no specific offence relating to "contraband tobacco" is found in the Criminal Code. Prosecutors have an array of offences at their disposal to assist in the prosecution of some tobacco smugglers, including fraud, conspiracy, money laundering, etc. Currently, police and prosecutors complain of unpaid Excise Act fines being ignored by offenders.

IMPACT OF C-10

Criminal enforcement under the Excise Act, 2001 may be carried out by "any police force in Canada" that is designated according to certain conditions. It appears that the RCMP is the force designated to fulfill this role. In comparison, all police forces may enforce Criminal Code provisions.

By creating specific provisions on contraband tobacco in the Criminal Code, similar to the ones found in the Excise Act, 2001, the amendments proposed in Bill C-10 ensure that all police forces - including provincial forces like the OPP and SQ - are mandated to pursue these new specific tobacco offences.

According to the

news release that accompanied the introduction of Bill S-16, the precursor to Bill C-10, a new 50-officer RCMP Anti-Contraband Tobacco Force will be created to "target organized crime groups engaged in the production and distribution of contraband tobacco, to reduce the contraband tobacco market, and combat organized crime networks." At this point, it is not known where the new force will focus its attention.

According to OPP Chief Superintendent Gary Couture:

"This proposed act will give us more tools. It will allow our officers to act differently. Now that it will be considered a criminal offence, they will be able to investigate further than they can at the moment any time they pull someone over. At the moment, provincial law does not allow us to become involved unless we have probable cause. With the bill, they will have more power along those lines. Now that it will be considered a criminal offence, there may be arrests."

According to the Department of Justice, the bill proposes amendments to the Criminal Code in order to provide for a new offence of trafficking in contraband tobacco. The particular activities that are prohibited include the offer for sale, possession for the purpose of selling, as well as distributing and transporting of such tobacco.

Upon indictment the maximum penalty is up to five years' imprisonment, and on summary conviction it is up to six months. The bill provides for mandatory minimum terms of imprisonment for individuals who have been convicted of this particular offence for the second or subsequent times. For a second conviction it's up to a minimum of 90 days. For a third conviction it's up to 180 days of minimum imprisonment, and then for

a fourth or subsequent conviction it's up to two years less a day.

In order to have these penalties imposed requires the presence of or the involvement of 10,000 cigarettes or more of contraband tobacco, or 10 kilograms of raw leaf tobacco, or 10 kilograms of any other tobacco product.

Under the 2001 Excise Tax Act, only the federal government may prosecute this offence, whereas under Bill C-10, the federal government and the provinces may do so.

So practically speaking, it's likely that the RCMP will lay charges and the federal prosecution service will prosecute in many cases, and in other cases, either form of law enforcement will lay a charge and then the provincial prosecutors will prosecute.

LEGAL ISSUES ARISING FROM THE CHANGE

A broad new series of Criminal Code contraband tobacco offences will be created with mandatory minimum jail sentences for repeat offenders. The bill will allow the Crown to proceed by indictment (leading to mandatory minimum sentences being triggered) where it decides to.

The OPP and Surete du Quebec will become much more actively involved in investigating and prosecuting contraband tobacco offences. Criminal matters proceeding by indictment are much more likely to qualify for the issuance of a warrant to search a premises under the search warrant sections of the Criminal Code.

Expanded search powers of vehicles or other locations will be permitted in cases where the police have reasonable grounds to suspect the possession of contraband tobacco for the purpose of trafficking, for example, in the case of the stop