

Counterfeit Canadian Bank Notes

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Introduction

This text is intended to assist prosecutors in making submissions on sentencing in counterfeiting cases concerned with fake Canadian bank notes.¹ Although not designed for this purpose, this text might also provide some assistance with respect to decisions concerning proper charges.

Before turning specifically to factors in sentencing, there is in Part I a review of different offences in the *Criminal Code* relating to counterfeiting money. In Part II there is discussion of the incidence and effect of counterfeiting offences upon their immediate victims and upon Canadian society generally. Part III addresses sentencing matters directly. The text is structured in this order to illustrate the nature and scope of counterfeiting as a current issue and thus to introduce a discussion of appropriate sentencing measures.

I. Nature of counterfeiting offences

In general terms counterfeiting refers to any unauthorised reproduction of a thing with the intention that it be accepted as genuine. It might be noted that there is nothing wrong in the idea of copying but, as with forgery or plagiarism or any other form of passing-off, something very wrong in the idea of unauthorised copying and misrepresentation. Counterfeiting can thus refer to any thing that is capable of reproduction, including things that are subjects of rights of private property, such as art, or things that are subject to protection as intellectual property. It also includes the reproduction of documents for identification, such as passports, or any paper that represents value (*e.g.*, stamps, travellers' cheques or negotiable instruments). To repeat, this text is concerned with counterfeit bank notes.

Paper money, in the form of a bank note issued by the Bank of Canada, is an instrument by which the Bank warrants the value that it represents.²

¹ Currency includes bank notes and coins. The former are the responsibility of the Bank of Canada under the *Bank of Canada Act*, R.S.C. 1985, c. B-2 and the latter are the responsibility of the Royal Canadian Mint under the *Royal Canadian Mint Act*, R.S.C. 1985, c. R-9. There are notes in the value of thirty-seven (37) billion dollars currently in circulation.

² A bank note is not a promissory note, according to section 25(6) of the *Bank of Canada Act*. Accordingly, the Bank does not guarantee reimbursement of the value of notes. Section 25(1) of the *Bank of Canada Act* provides as follows: "The Bank has the sole right to issue notes intended for circulation in Canada and those notes shall be a first charge on the assets of the Bank." Only notes issued by the Bank can be a charge upon its assets, and the Act thus plainly excludes a right of reimbursement from the Bank for losses incurred by acceptance of a counterfeit note.

Transactions are typically conducted with paper money on the understanding that each note tendered is genuine evidence of the value presented on its face. A merchant will typically accept a note of twenty dollars for its face value and a customer will typically accept change of that note in a bill of ten dollars as a genuine representation of ten dollars in value. Current value thus circulates in bills issued by the Bank of Canada. Those bills are, to use the language of the *Criminal Code*, “evidence of value” but in the ordinary course of daily transactions the evidence of value in the bill is accepted as true value. It is therefore self-evident that confidence in bank notes is of critical importance.

Historically, offences involving counterfeit money were regarded as serious offences against the state because they included a form of trespass upon the royal prerogative. Although offences of counterfeiting money have been punishable for centuries, statutory offences in Canada were first enacted in 1869³ and formed Part XXXV in the original Code of 1892.⁴ Not surprisingly, those enactments were chiefly concerned with offences concerning coinage. Amendments were made to include a definition of “counterfeit token of value” that referred expressly to “any spurious or counterfeit coin, paper money, [etc.]”.⁵ In current Canadian law offences of counterfeiting cash are found among the offences relating to currency in Part XII of the *Criminal Code*.⁶

For the purposes of Part XII “counterfeit money” is defined as follows in section 448 of the Code:

“counterfeit money” includes

- (a) a false coin or false paper money that resembles or is apparently intended or pass for a current coin or current paper money,
- (b) a forged bank note or forged blank bank note, whether complete or incomplete,
- (c) a genuine coin or genuine paper money that is prepared or altered to resemble or pass for a current coin or current paper money of a higher denomination,

³ S.C. 1869, c. 18.

⁴ S.C. 1892, c. 29.

⁵ R.S.C. 1927, c. 146, s. 546.

⁶ R.S.C. 1985, c. C-46.

- (d) a current coin from which the milling is removed by filing or cutting the edges and on which new milling is made to restore its appearance,
- (e) a new coin cased with gold, silver or nickel, as the case may be, that is intended to resemble or pass for a current gold, silver or nickel coin, and
- (f) a coin or a piece of metal or mixed metals that is washed or coloured by any means with a wash or material capable of producing the appearance of gold, silver or nickel and that is intended to resemble or pass for a current gold, silver or nickel coin.⁷

In section 2 of the Code “bank note” is defined:

“bank note” includes any negotiable instrument

- (a) issued by or on behalf of a person carrying on the business of banking in or out of Canada, and
- (b) issued under the authority of Parliament or under the lawful authority the government of a state other than Canada,

intended to be used as money or as the equivalent of money, immediately on issue or at some time subsequent thereto, and includes bank bills and bank post bills.

It will be noted that offences relating to counterfeiting cash are not restricted to false Canadian currency.⁸

Offences relating to counterfeit money are all generally concerned with the dishonest representation of the value of cash, although this should not be understood to imply that dishonesty is an element of the offences that requires express proof. Offences concerning counterfeit bank notes fall broadly into two categories, those relating to **distribution** and those relating to **production**. In the first group some offences are concerned with conduct that involves actual taking of the value of cash. These include offences of uttering or

⁷ See also a further definition in section 448: “counterfeit token of value” means a counterfeit excise stamp, postage stamp or other evidence of value, by whatever technical, trivial or deceptive designation it may be described, and includes genuine coin or **paper money** that has no value as money.

⁸ There have been many cases in which persons in Canada have counterfeited foreign bank notes, notably American notes. See, e.g., *Dunn* [1998] O.J. No. 807 (C.A.). This highlights the importance of international cooperation for the protection of currencies. Among central banks there are extensive programmes of cooperation relating to counterfeiting in particular and security more generally.

otherwise dealing in counterfeit money, and among these might also be placed offences of possession of counterfeit cash. Offences concerned with the production of false money include making counterfeit money or using any thing adaptable to the production of counterfeit money. The gravamen of several counterfeiting offences overlaps⁹ and several offences include elements of both distribution and production.¹⁰ It should also be noted that the counterfeiting offences have remained substantially unchanged for many years.¹¹

a) *Distribution*

In the following lists offences enumerated in italics are not concerned with bank notes.

450. Possession of counterfeit money

An essential element of this offence is knowledge, actual or constructive, and including wilful blindness, concerning the counterfeit nature of the notes.¹² It is this requirement for proof of knowledge that often leads the police and prosecutors to abandon a prosecution.¹³ Where a person is found in possession of a small quantity of notes, proof of knowledge is difficult.

451. *Possession of clippings*

452. Uttering counterfeit money

The word “utter” is defined in section 448 to include “sell, pay, tender and put off” and it follows that this section captures wholesale operations in which counterfeit bills are purchased by a buyer who is aware that they are fake.¹⁴ Both parties to such a transaction are liable.

⁹ There is, for example, a general offence of making counterfeit money in section 449 and a more specific (and less serious) offence of reproducing the likeness of a bank note in section 457. Both involve reproduction of a likeness but the second is aimed chiefly at the misuse of a likeness in advertising.

¹⁰ See, e.g., sections 454 and 457.

¹¹ This raises a question of general importance, which is whether the offences now in the Code are adequate in their scope and content to address modern problems concerning counterfeit bank notes. The language of section 457 was modernised in a minor amendment in 1999.

¹² See *Santeramo* (1976) 32 C.C.C. (2d) 35 (Ont. C.A.); *Freng* (1993) 86 C.C.C. (3d) 91 (B.C.C.A.); *Goodie* 2001 NSSC 82.

¹³ This comment applies to cases involving single notes or small amounts in which a person found in possession claims that he came into innocent possession of the note.

¹⁴ See *Kelly & Lauzon* (1979) 48 C.C.C. (2d) 560 (Ont. C.A.).

453. *Uttering coin*

454. *Slugs and tokens*

455. *Uttering clipped coin*

456. *Defacing current coins*

457. *Likeness of bank notes*

It will be noted that this offence is punishable on summary conviction, thus indicating a lower level of seriousness as perceived by Parliament when enacting it. The primary objective of this provision, apparently, is to police the misrepresentation of bank notes in promotional materials, games or retail goods.

460. *Advertising and trafficking in counterfeit money*

This offence overlaps in some measure with the offence of uttering in section 457, at least to the extent that it would capture some of the activities of participants in a wholesale operation, but it also reaches somewhat further.

b) Production

449. *Making counterfeit money*

This is the general offence relating to the manufacture of counterfeit bank notes. Liability is imposed not only for the completion of a counterfeit but for an act that is proved to be the commencement of a counterfeit. Although the section is silent on the point, it is apparent that the prosecutor must prove an intention to make, or begin to make, a counterfeit.

454. *Slugs and tokens*

455. *Clipping and uttering clipped coin*

456. *Defacing current coins*

457. Likeness of bank notes

This section is noted above among distribution offences. The manner in which the offence can be committed, however, includes several acts that correspond to production: *i.e.*, “make, publish, print”.

458. Making, having or dealing in instruments for counterfeiting

The scope of this offence is broad and is limited only by the requirement for proof of knowledge that the thing has been used or is intended to be used in counterfeiting activities.

459. *Conveying instruments for coining out of mint***c) Proof**

Section 461 contains exceptional provisions concerning proof of counterfeiting. One declares that there is counterfeit money whether the bank note in question has been completed or perfected. To some degree this duplicates that part of section 449 that defines as the prohibited conduct anything that includes the beginning of a counterfeit. The second element in section 461 allows for proof of counterfeit money by means of a specialist’s certificate.

d) Alternative charges

Of course, counterfeiting offences under Part XII of the Code may be charged against individual persons who have apparently acted alone in the commission of an offence. This does not exhaust the range of possible offences, as there might be elements of conspiracy to consider as well as attempts. Any of these charges might also be preferred against multiple accused. However, apart from ordinary charging practice, attention must be given where appropriate to two other approaches: proceeds of crime under Part XII.2 of the Code and participation in organised crime under section 467.1.

i) Proceeds of crime

Counterfeiting can be related in several ways to investigations and prosecutions for proceeds of crime. Generally, anything obtained by uttering counterfeit money is the product of a criminal offence. An item purchased successfully by passing a fake note is an obvious example. But counterfeiting is also undertaken as a means of raising capital. If a fake note of one hundred

dollars is successfully passed for goods of one dollar, the purchaser will receive ninety-nine dollars of good money in change. That good money might be invested in other goods, services or activities. In such a case any of the good money of ninety-nine dollars and any thing in which it is invested are proceeds of crime. It follows that in most cases of counterfeiting, and in every case of passing a fake note, there will be some aspect of it that is related to proceeds of crime. Part XII.2 of the Code deals with the proceeds of crime. The definition section indicates that this part of the Code applies to “designated offences.” Designated offences are defined to mean: (a) any indictable offence under any Act of Parliament (unless prescribed by regulation), and (b) a conspiracy, attempt, accessory after the fact, or counselling in relation to such an offence. Therefore, a “designated offence” for the purposes of applying Part XII.2, includes offences of making (section 449), possessing (section 450) and uttering counterfeit money (section 452). The definition also includes the indictable criminal organisation offences (sections 467.11, 467.12, and 467.13).

The definition of proceeds in section 462.3 of the Code is this:

“proceeds of crime” means any property, benefit or advantage, within or outside Canada, obtained or derived directly or indirectly as a result of

- (a) the commission in Canada of a designated offence, or
- (b) an act or omission anywhere that, if it had occurred in Canada, would have constituted a designated offence.¹⁵

To begin, then, proceeds do not include fake notes themselves. But proceeds, of course, can and often do include cash. Any producer or distributor of counterfeit notes who sells those notes on a wholesale basis for good money is in possession of proceeds with regard to the money paid for the fake notes. It is commonplace in counterfeiting for producers to sell fake notes to distributors for a fraction of their purported value, and such wholesale transactions are often repeated as one buyer of fake notes sells them on to another at a higher cost. (Typically, the cost of buying fake notes increases with each successive transaction away from the producer.) In each of these transactions the vendor who receives good money (or other valuable consideration) is in possession of proceeds. It is also the case, as noted, that proceeds are found when a person - the producer or a distributor - passes a

¹⁵ See also the definition of “offence-related property” in section 2 of the Code. These definitions are important for seizure and forfeiture.

fake note and receives good money in exchange. Similarly, there are proceeds when a person invests good money received from passing or distributing fake notes in other items of real or personal property.

ii) Organised crime

Participation in offences involving the production or distribution of counterfeit bank notes is usually an organised activity that involves more than one person. This does not mean that there are no instances of offences committed by persons who act alone and it does not mean that all “organised” offences of counterfeiting are committed by persons who are associated with a “criminal organisation”.

Even where there are several persons involved in a counterfeiting offence, there is a range between offences committed by small groups of entrepreneurs and offences committed by participants in a “criminal organisation”. This term is defined in section 467.1(1) of the *Criminal Code*:

“criminal organisation” means a group, however organised, that

- (a) is composed of three or more persons in or outside of Canada; and
- (b) has as one of its main purposes or main activities the facilitation or commission of one or more serious offences that, if committed, would likely result in the direct or indirect receipt of a material benefit, including a financial benefit, by the group or by any of the persons who constitute the group.

It does not include a group of persons that forms randomly for the immediate commission of a single offence.¹⁶

Participation in a criminal organisation was made an offence by amendment of the Code in 1997 and in 2001 this was replaced by the creation of three distinct offences in sections 467.11, 467.12 and 467.13 (participation, commission and counselling respectively). It follows that participation in counterfeiting offences might give rise to prosecution under the provisions concerning organised crime.

Indeed, this point bears consideration by prosecutors when they decide upon charges to prefer in counterfeiting cases. Police investigators have often discovered that counterfeiting forms only one element in the portfolio of organised criminal activity, which might include other activities such as forging

¹⁶ See also the definition of “criminal organisation offence” in section 2.

and fraudulent use of credit cards or debit cards, counterfeiting passports or other documents, trafficking in drugs or weapons, illegal smuggling of aliens, and many more.

A final point concerning participation in counterfeiting offences relates to terrorist activities that were the subject of amendments enacted late in 2001 by Bill C-36.¹⁷ Although there have been few instances of this kind, it is plausible that activities of this kind could be financed in part by participation in counterfeiting offences.¹⁸

II. Incidence and effects of offences involving counterfeit money

Offences involving counterfeit money are increasing in Canada and the effects upon their immediate victims and Canadian society are severe. If a merchant accepts a false bill of twenty dollars for goods or services of that value, the net effect is that the merchant has given the goods or services for nothing. And, of course, the potential for loss is repeated with each occasion on which the fake bill is passed on and accepted without detection.¹⁹ Merchants must cover the loss and the immediate effect is for consumers to absorb the value of that loss in higher prices. At a broader level, of course, this activity results in value lost to the Canadian economy as a whole. It also results in a loss of confidence in the stability of Canadian notes at home and abroad. Further discussion of the effects of counterfeiting in bank notes appears below, following a review of the incidence of offences.

a) Incidence

The incidence of counterfeiting offences refers generally to the frequency with which they are committed. Thus the most conspicuous information concerns the volume and the value of such activity at any given time. There are other aspects of this activity, however, that must be considered when assessing the seriousness of this type of crime. The technical ease or difficulty of counterfeiting is an important factor. So too is the identity of the persons who participate in these offences. There is a critical difference between industrial production and distribution of counterfeit notes by organised crime and small operations conducted by individuals for more

¹⁷ S.C. 2001, c. 21.

¹⁸ There has apparently been at least one investigation in which it was suspected that the Tamil Tigers in Sri Lanka were financed in part by counterfeiting activity in Canada.

¹⁹ As a matter of strict calculation, the actual loss to the immediate victim who innocently receives a fake note cannot exceed the purported value of the note. Similarly, the obtaining of a benefit, be it culpable or innocent, cannot exceed the value of the note passed. This, however, represents only the value in the passing of a fake note. The costs of counterfeiting are much greater, as is discussed below under the heading "Effects".

personal or private gain.²⁰ This difference is even more important where the industrial activity of organised crime is only one part of their criminal activity because it is the whole of their activity that must be taken into account. As will be demonstrated in the remainder of this text, it would be a mistake to suppose that the relatively low rate of prosecutions for production or distribution of counterfeit bank notes in any way suggests that this form of criminal activity is relatively minor.

Precise figures for counterfeiting activity cannot be given because, as with any type of crime, the available figures only account for offences that are reliably confirmed rather than offences actually committed or attempted. Similarly, although there are reliable figures for the number of notes passed or seized, there can be no reliable figure for the number of counterfeit notes that exist.²¹ Nevertheless the Bank of Canada has reported that the number of counterfeit bank notes passed in the years between 1990 and 2001 has increased. In some years, such as 2001, the high volume of counterfeit notes can be attributed to a small number of offenders but the general trend still shows an increase over ten years.²² Although the number and denominations of notes passed varies from year to year, there is no doubt that the incidence of counterfeiting demands attention. Even if there were a decline in the number of offences over a period of years, and indeed there has been some decline in recent years,²³ the cause for concern is in no way diminished because the trend over ten years substantiates a significant volume of counterfeiting activity.²⁴

According to the Central Bureau for Counterfeits in the Royal Canadian Mounted Police, currency counterfeiting in 2001 was concentrated in Ontario

²⁰ As between industrial operations and small undertakings, the R.C.M.P. and other police forces are confident that most counterfeiting is done by small operators. This might be changing with increased involvement of organised groups in counterfeiting but, even assuming that most of the activity is small in scale, small-scale operations have a pernicious effect in the aggregate – not least because such offences are often not investigated or, if investigated, not prosecuted.

²¹ There is a difference between a note that is passed *and* seized and a note that is only seized. A “seized note” refers to a note that has been partially or wholly completed but seized before it was passed. There is a further point concerning the recovery of counterfeit notes, which is that for every note that is seized there can be no certainty that there is not another. Even when investigators make significant seizures, a frequent question among them is “Where are the rest?”

²² In 2001 a large number of fake notes of one hundred dollars, known as the Windsor Note, accounted for a sharp increase in that year. This note is described below.

²³ With the exception of the Windsor Note, there was between 1998 and 2001 a decline in the value of counterfeits passed from approximately five million dollars to approximately two million dollars. Between 1999 and 2001, however, there was an increase in the volume of counterfeit ten-dollar notes.

²⁴ In 1990 the value of fake notes passed in Canada was \$256,000 and more than \$3,700,000 in 2000. With the addition of the Windsor Note in 2001, the value rose to over six (6) million.

(55% of confirmed activity) and Quebec (28%).²⁵ Moreover, in that year there was a sharp increase in both the volume and the value of such activity. The magnitude of the increase in one year can be explained in part by the detection of a production and distribution operation in Windsor, Ontario that involved \$3,800,000 in counterfeit notes.²⁶ Although this increase is thus somewhat anomalous, the broad outline over the past decade shows a steady increase in counterfeiting activity.

The investigation of counterfeiting offences is the responsibility of the Royal Canadian Mounted Police, provincial police forces and municipal police forces. At this time there is no bank of information that can provide a reliable profile of the number of investigations conducted by each force into cases involving bank notes and of course there is also no reliable data concerning the manner in which investigations were cleared. Figures collected by the R.C.M.P. are that for 2000 fifty-six (56) cases were cleared by charge and eight (8) were cleared by diversion or a caution.²⁷ In 2001 twenty-two (22) cases were cleared by charge while thirteen (13) were cleared otherwise. These figures relate only to cases reported to the R.C.M.P. and exclude not only the cases reported to other forces.

b) Investigation

Counterfeiting schemes take many forms and it cannot be said that they have recognisable patterns. Some can involve seemingly minor matters in which a few misguided people use a scanner and a photocopier to make money for drinks at the weekend. At the opposite extreme are industrial operations that wilfully set about the production of highly successful fake notes in large quantities. In these operations the producer (or producers) will often sell lots of their fake notes to buyers at discounted prices, and those buyers will then attempt to pass the bills in ordinary transactions for goods or services. The producer will often pass the notes himself.²⁸

²⁵ Generally about 80% of counterfeiting in Canada takes place in Ontario and Quebec with about 40% in each province.

²⁶ This case is discussed in greater detail below.

²⁷ These figures are significant. In 2000, thirty-five (35) of the cases reported to the R.C.M.P. were cleared but this is against a total of 5,459 cases reported to the Force. The sixty-four (64) cases cleared in 2001 were cleared from a total of 7,961. This means, of course, that a large number of cases are not investigated, or cannot be investigated, because there is no lead to pursue. In turn this means that the damage done by such activity to merchants and to the economy as a whole is not addressed. In effect, therefore, there is substantial damage attributable directly to small-scale counterfeiters. The figures of 5,459 and 7,961 in this note should not be misinterpreted. They refer to the numbers of fake notes reported to the R.C.M.P. Counterfeiting Laboratory and not to distinct criminal investigations.

²⁸ All of these factors were present in the case involving the Windsor Note. See below for further discussion.

Police investigations of counterfeiting cases typically begin in one of two different ways. In one there are reports of fake notes being passed. Suspect notes are sent for analysis to the laboratory of the Royal Canadian Mounted Police in Ottawa. This analysis can produce a report of the composition of the note and it can also determine whether notes come from the same source. This last piece of information is of critical importance because it is location and pattern of passed notes that allows investigators to begin careful inquiries concerning the source of the notes' distribution and production. From this point, assuming that there is evidence of a pattern in the presentation of bills, police begin the careful and long work of trying to match the distribution and production of fake notes with identifiable suspects. In short, this method of detection in effect works backward from the discovery of false notes.

The other way in which offences involving counterfeit notes are detected is that information is acquired in the investigation of some other matter, often by way of undercover officers or informants. Where this occurs, the investigation of counterfeit bank notes becomes part of a wider set of inquiries. There is growing evidence that counterfeiting is among the activities of groups in organised crime such as gangs and other criminal organisations.²⁹ As yet there is no comprehensive picture of this activity but there are broad outlines that seem now to be relatively clear. Organised groups are heavily involved in economic crime of different varieties, including telemarketing fraud and other types of fraud.³⁰ It is estimated that credit-card and debit-card crimes account for many millions of dollars annually. Among those crimes are credit-card and debit-card counterfeiting. These offences also account for millions of dollars in losses each year.³¹ The evidence is mounting that groups involved in these forms of counterfeiting are also increasingly involved in counterfeiting a wide array of things, including passports or other forms of identification, but also including bank notes. All of these activities are, predictably, linked to other

²⁹ Counterfeiting operations seldom involve persons acting wholly on their own but the degree and extent of organised activity can vary considerably. Police officers sometimes distinguish loosely between organised crime and Organised Crime, the latter comprising widespread organisations such as the mafia, biker gangs, and ethnically-based gangs.

³⁰ There are significant similarities between organised operations that involve counterfeiting and other commercial crimes and operations involved in drug trafficking. Sometimes the same groups are involved in both. Police officers report, on an anecdotal basis, that organised crime appears to be increasingly interested in commercial crime. All of these concerns and activities are within the purview of the Economic Crime Branch of the R.C.M.P. and their counterparts in other forces. For a recent overview of current approaches, see K.P.M.G., *Strategic Study of R.C.M.P. Economic Crime Programme* (1998). Among many police officers there is a growing perception and fear that organised crime is choosing to engage more actively in counterfeiting, both in payment cards and bank notes. They believe that this choice represents a calculated decision based variously on the high rate of return, a low rate of detection and prosecution, and apparently low sentences.

³¹ The R.C.M.P. estimates losses at almost \$200,000,000 *per annum*.

forms of crime that are associated with organised groups, most notably money-laundering.

c) Technology

Some time ago the production of counterfeit notes required a high degree of technical skill. The printing press for such activity was an offset press on which copies were made from engraved plates. The equipment and the engraver's professional skill were highly specialised. Today the technology that can be used is more readily available and does not require the same skill for production of fake notes. Scanners and computers are routinely used and notes are printed on computer printers or advanced photocopying machines. Sophisticated counterfeiters have succeeded in making passable, if not good, replications of security devices used by the Bank of Canada in the production of bank notes. The relative ease of production does not diminish the seriousness of counterfeiting because the skill in mimicking the security devices only emphasises the determination of the counterfeiters to succeed.

The starting-point therefore is that the production of successful counterfeits is now not only technically possible but technically easier than it was. The immediate consequence of this is there is a wider temptation to participate in counterfeiting. In turn this makes the Bank of Canada more vulnerable to those who would attempt to counterfeit its notes. In turn again the Bank must always be vigilant with respect to the security features in its notes. In response the counterfeiters will attempt to improve their skill and their product.³² This spiral of response and counter-response leads in effect to a point where the counterfeiters appear to be gaining ground on the Bank of Canada while the Bank is constantly seeking to protect the integrity of its notes.³³

d) Sample cases

Windsor Note

In August 2000 the R.C.M.P. were informed by the Central Bureau of Counterfeits in Ottawa that fake notes of one hundred dollars were being passed in Windsor and elsewhere in southern Ontario. Following a joint operation of the R.C.M.P. and other police forces, a search was conducted in July 2001 at a residential address and an operating counterfeiting plant was

³² In one extensive operation in Ontario police observed that one producer continued to improve his product through successive generations of counterfeit notes.

³³ Police and others concerned with counterfeiting predict that digital printing presses will pose a major problem in the future. This technology will allow for large quantities of high-quality notes to be made in a short time, and it does not require exceptional skill to operate these machines.

seized. Counterfeit notes were being printed on inkjet printers that had been obtained by the counterfeiters from ordinary retail outlets. In the plant 1,743 notes were seized, each with a face value of one hundred dollars, and there was paper to print approximately \$6,600,000 in notes. Also seized in the residence were a variety of devices and equipment that could be used to mimic the security features of genuine bank notes. The Central Bureau of Counterfeits received over \$3,800,000 of the fake notes that had been produced in the Windsor operation.³⁴ Those notes, which were identified by police collectively as the Inkjet OSD004, had been passed in Alberta, British Columbia, Ontario, Quebec, Michigan and a person was found in possession of such notes in London, England.

Five persons were arrested in connection with this operation. One of them, Wesley Weber, was apparently the craftsman responsible for production. In addition to production of the notes Weber passed many of them himself in daily transactions. He also sold notes at wholesale prices to distributors who passed them elsewhere, notably in southern Ontario. Weber used the proceeds of his counterfeiting activities to support himself but also to invest in the equipment necessary to maintain a marijuana cultivation scheme. In October 2001 Weber pleaded guilty to a variety of charges involving counterfeiting and other offences. He was sentenced to five years and is expected to be released in August 2002.³⁵

Guns and money

From 1996 to 1998 the R.C.M.P. in Montreal were investigating illegal activities of a particular group that was suspected of concentrated involvement in commercial crime. This investigation eventually led to the dismantling of two criminal organisations and to convictions relating both to counterfeiting offences and to trafficking in illegal firearms. Ten people were arrested and seizures that were conducted in parts of Quebec and New York included \$150,000 in counterfeit American bank notes, forty-eight (48) sub-machine guns with silencers and a variety of other weapons. This investigation involved the cooperation of several American law-enforcement agencies, including the U.S. Secret Service.³⁶

³⁴ The Bank of Canada estimates that approximately \$4,000,000 of the Windsor note have been seen to date.

³⁵ He received a concurrent sentence of six months on a drugs charge.

³⁶ The Secret Service is the agency responsible for counterfeiting matters in the United States.

Counterfeits in Vancouver

In December 1998 five people were arrested in Vancouver and charged with a variety of offences, including possession of counterfeit money, uttering and conspiracy to utter counterfeit money.³⁷ At the same time several other persons were arrested in and around Toronto. The arrests were made following an investigation of seven months that involved several police forces across Canada and the United States Secret Service.

In this case investigators were able to trace both the producers and distributors of large quantities of counterfeit money. During the course of the investigation the police were able to obtain or seize fake notes with a face value of more than \$250,000 but they estimated that notes with a face value of more than \$8,200,000 had been passed. The notes were imitations of the one-hundred dollar note of 1988. They were very deceptive and had been made on an inkjet colour copier, including replicas of several security devices in genuine notes. Also discovered in this investigation were counterfeit notes of twenty dollars, produced on a high-quality laser colour copier and counterfeit American notes made on an offset press.

Investigators in this case were especially concerned by the deceptive note of one hundred dollars. From a production plant in Ontario couriers took the notes by plane to Vancouver and they were subsequently distributed in Vancouver and various other places in British Columbia. Indeed, this note was distributed and passed by various people in all provinces. This was, obviously, a highly organised operation. As with all seizures of fake notes, police at the time of the arrests were concerned that there remained many of the fake notes in circulation.

The distributors charged in Vancouver pleaded guilty. One received a sentence of three years and the other two received conditional sentences of two years less a day.

e) Effects

To understand the damaging effects of counterfeit notes it is best to begin with an elementary proposition: a false note is worthless in the hands of its possessor. (As previously noted, the costs of this nature were calculated in 2001 on the basis of passed notes that were confirmed and the figure was in the

³⁷ They were also charged with participation in a criminal organisation but no conviction was entered on this count.

order of \$6,000,000.³⁸) Thus the counterfeiter or distributor seeks to obtain value in the false representation of a bill to some other person who will take possession of it. The merchant who provides goods or services in consideration for a false note surrenders value for nothing. The innocent person who receives a false note as change in a transaction has lost value in the amount of the change in the false note.

These are some of the immediate effects of counterfeiting on those who are caught in a transaction involving fake notes. The effects, however, are much wider and deeper. It is self-evident that as a bank note is only a symbol of value the underlying premise for the use of paper money must be confidence in the value of the symbol. Counterfeiting erodes confidence in the use of bank notes. Thus, when fake notes are found, the reaction of many merchants is to refuse acceptance of notes of specified denominations (notably notes of \$100 and \$50). This is not only the decision of local entrepreneurs; it is often a decision taken by large corporations. A consequence of such decisions is to spread a lack of confidence about bank notes. For example, in 2001 there were 46,652 counterfeit bills of \$100 detected while there were 169,000,000 genuine bills of this denomination in circulation. This means that for every 10,000 good notes three fake notes were detected but in some areas of the country (especially in Ontario and Quebec) over 15% of enterprises in large areas posted notices refusing notes of one hundred dollars.³⁹

Thus individual consumers lose confidence in notes not only when they have the unhappy experience of receiving one. They also lose confidence, as do merchants, when there is a general refusal to accept bills of a given denomination. There is an inconvenience, and some cost, as those people find other ways of giving and receiving payment for goods and services. A loss of confidence in particular denominations contributes to a loss of confidence in bank notes generally, although the degree of lost confidence might be different between them. There is certainly a cost to the Bank of Canada when confidence ebbs in higher denominations because it must produce more notes of lower denominations to compensate for diminished use of the others.⁴⁰

³⁸ The figure of \$6,200,000 represents the value of losses attributable to passed notes. The R.C.M.P. estimates that the value lost in robberies (not theft) for the same year was \$3,600,000.

³⁹ Merchants refusing notes of \$100.00 include large chains, which means in many instances that a directive has been sent from the head office of the corporation. In such instances the effect of eroding confidence spreads quickly because a concern might well be raised in a location where there has been no counterfeiting activity.

⁴⁰ For example, suppose a sharp loss of confidence in the use of notes of one hundred dollars. Suppose further that the cost of maintaining five (5) twenty-dollar bills in circulation (issuing, processing, destroying and replacing) would add twenty-three (23) cents for every displaced note of one hundred dollars. On this basis a reduction of fifty million dollars in the circulation of notes of \$100.00, matched by an increase of two hundred

And, of course, the Bank must also continue to take steps to ensure the security and integrity of all denominations.

In addition there are costs relating to prevention, detection and law-enforcement and that includes all of the costs that have to be incurred that would not be incurred if there were no counterfeiting. Costs of prevention include not only the security devices that the Bank of Canada must develop and adopt for bank notes but the costs associated with such proactive undertakings as educational programmes for merchants and cooperation with manufacturers of machinery to block or detect counterfeiting. Costs of detection include programmes of education conducted by the Bank of Canada or police forces for merchants and others so that they can better detect fake notes.⁴¹ Further, there are costs of police investigation, prosecution and corrections attributable to counterfeiting. Although the precise share of those costs that are attributable to these activities cannot be fixed exactly, they are significant.

Apart from costs, there are important reasons to be concerned about the degree of confidence in the system of currency. While there is no doubt that credit cards and debit cards have been used increasingly in ordinary transactions, the public continues to rely upon paper notes for payment and exchange. For some transactions bank notes are the most convenient form of payment. Some merchants set minimum amounts as a limit upon the use of cards. Moreover, the use of credit cards and debit cards presupposes that the users of these services have some financial sophistication and a bank account. There is also a measure of privacy in the use of cash that arises from its anonymity. In short, it is clear that the Canadian public continues to rely upon bank notes as a primary means of payment and exchange.

f) Responses to counterfeiting

i) Education

Police forces and the Bank of Canada provide educational programmes to inform the public, and specifically merchants, about the nature of counterfeiting and measures that may be taken to guard against fake notes.

At the Bank of Canada there is a Currency Education Team, created in 1997, that has undertaken a variety of measures to make the public aware of

million in the circulation of twenty-dollar notes, would be \$11,500,000 to the Bank of Canada and the taxpayer. This calculation is approximate but it is sufficient to give a clear indication of the costs involved.

⁴¹ These programmes are costly. One offered by the Royal Canadian Mounted Police takes about 2.5 hours each time, and thus it is very intensive. A complicating factor is also that often the targets for passing notes are retail operations in which employees might be disinclined to inspect notes carefully, thus encouraging their employers to assert a policy of refusal.

counterfeiting. Efforts have been made generally, through television interviews, to bring the issue to the attention of the general public. Efforts have also been made to publicise the issues through the publication of articles in trade magazines for retailers. Surveys have been commissioned to ascertain the attitude of the public to the problem of counterfeiting and, not surprisingly, the results show that the public is annoyed by the inconvenience when large denominations are refused by retailers. In view of the widespread incidence of such refusal, as seen in signs posted in retail establishments, increased efforts have been made to inform such merchants of the problems associated with problems of counterfeiting. As part of these efforts, the police and the Bank of Canada have provided extensive assistance to merchants and merchants' organisations through training programmes that are designed to assist in recognising fake notes.⁴²

The effectiveness of educational programmes undertaken by the police and the Bank of Canada cannot be measured but there can be little doubt that these undertakings are essential and cannot be relaxed. At a time when counterfeiting is technologically more accessible to larger numbers of people, these programmes are an integral element in the maintenance of awareness among merchants.

ii) Security

The Bank of Canada is constantly reviewing the security features in its notes. Counterfeiters have become more successful in imitating or mimicking those features and thus the Bank must remain alert to the possibility that the security features in its notes might be vulnerable and, accordingly, that new security features might be developed for future notes.⁴³ Concerns about security features are thus twofold, requiring the Bank to monitor the level of security in existing notes but also to develop new features for new series of notes.

⁴² This kind of educational programme is probably indispensable but there are severe difficulties concerning their effectiveness. They will be most effective where employers are able to train their employees and where trained employees remain in their post for some time. In many large retailing operations, including those that post signs refusing certain notes, the training of employees is not sufficiently rigorous or its effect is short-lived when employees move from their positions.

⁴³ Concerns about the security of notes require the Bank of Canada annually to spend large sums of money in research and development. In the late 1980's and early 1990's the Bank spent \$80,000,000 developing the optical security device (OSD), which is the small luminescent square in the upper left corner of the higher-denomination notes. There are, of course, many other security costs.

iii) Cooperation

Another important element in the Bank of Canada's response to counterfeiting is to maintain close links with institutions responsible for producing bank notes in foreign jurisdictions. These links allow the banks to exchange information concerning new developments in counterfeiting techniques as well as new developments to make counterfeiting more difficult. Another dimension to these activities is that the exchange of information allows banks to learn of attempts abroad to counterfeit notes that they issue.

In addition to links with other banks the Bank of Canada has established and is developing links with the private sector, and in particular with companies that deal in equipment of various kinds that can be used in the production of counterfeit notes. These include manufacturers of photocopiers, personal computers, scanners, inkjet printers, papers and the like. These links with the private sector involve not only bilateral arrangements between the Bank of Canada and commercial vendors; they also include cooperative work with other producers of bank notes in foreign jurisdictions that are similarly engaged with commercial vendors.

The Governors of the central banks of the G-10 have given impetus to these initiatives through the Central Bank Counterfeit Deterrence Group (CBCDG). This group has undertaken what is known as the Counterfeit Deterrence System (CDS), and its principal objective is to encourage the development of technical security devices that could interfere with the use of technology for counterfeiting purposes. These devices would include mechanisms to detect when a photocopier, scanner, computer or printer was being used for counterfeiting. These devices could not eradicate counterfeiting but they might inhibit some forms of this activity.

III. Sentencing

Offences relating to counterfeit money prescribe no minimum sentence and thus a fit sentence in each case must reflect the gravity of the offence committed and the gravity of the offender's participation in its commission.⁴⁴ Except for offences that may be punished by a maximum of fourteen years, the full range of sentencing options – from discharge (section 730) to actual imprisonment – is available.

⁴⁴ A discharge is not an option where a person has been found guilty of an offence punishable by a maximum of fourteen years: section 730, *Criminal Code*.

While the incidence of prosecutions for counterfeiting has not been high or consistent over time, the increasing frequency of these offences and the increasing sophistication in their commission warrant careful attention for purposes of sentencing. This attention is also warranted because the damage done by counterfeiting offences is serious and perhaps not fully appreciated by prosecutors and sentencing judges.⁴⁵

Offences involving counterfeit cash are not only offences of dishonesty. They are offences that will often victimise individual persons or enterprises, as when a merchant accepts as genuine a counterfeit banknote, but they are also offences that *in each and every case* strike at the state's interest in the integrity of its system of currency and exchange.⁴⁶ For this reason it is not surprising that most of the offences relating to counterfeit cash are indictable and punishable by maximum terms of five or fourteen years. For this same reason it is not surprising that the courts – at least in the past – have typically viewed counterfeiting cash as a class of offences that should attract a term of imprisonment.⁴⁷ More specifically, the courts have viewed offences relating to the production of fake cash more severely than offences relating to possession and distribution.⁴⁸ The reason for this is that although there is immediate harm done in passing or distributing fake cash there is a greater harm in production, which is by definition *mass* production because counterfeiting invariably involves making multiple specimens. With regard to both distribution and production offences, but especially the latter, the courts have frequently adverted to the need for general deterrence.⁴⁹

A review of sentencing decisions in counterfeiting cases reveals, first, that they are comparatively few. Again, although the frequency of prosecution is comparatively low for distribution offences and even lower for production offences, it should not be thought that these are minor crimes. The effects of

⁴⁵ For example, a common anecdote about counterfeiting cases is that victims and others, including judges, assume that a counterfeit note can be redeemed for a good note at any bank or at the Bank of Canada. At the core of this assumption is an unstated assumption that the problem of counterfeiting is perhaps not so severe or serious, but it is mistaken.

⁴⁶ See *Lacoste* (1965) 46 C.R. 188 (Que. C.A.); *Sonsalla* (1971) 15 C.R.N.S. 99 (Que. C.A.); *Dickson* [1999] N.B.J. No. 643, para. 24 (Q.B.); *Vouniseas* (unreported), 25 September 1986 (Ont. District Ct.). See also the decisions of the English Court of Appeal in *Howard* (1981) 82 Cr. App. R. 262 and *Crick* [1982] Crim. L.R. 129, (1981) 3 Cr. App. R. 275.

⁴⁷ See *Langlois* (1981) 6 W.C.B. 276 (Ont. Cty. Ct.). With the sentencing reform of 1996 this proposition might be open to doubt, at least as regards low-level distribution offences or even production offences in which the offender was a minor participant.

⁴⁸ See, e.g., *Jones* (1974) 17 C.C.C. (2d) 31, 34 (P.E.I.C.A.); *Gross* (1972) 9 C.C.C. (2d) 122 (Ont. C.A.).

⁴⁹ E.g., *Martins* (2 June 1989), Doc. Niagara North 751/88 (Ont. Dist. Ct.); *Le* (1993) 78 C.C.C. (3d) 436 (B.C.C.A.).

these offences are felt by the persons who are left in possession of a passed note, by local economies and by the Canadian economy as a whole. Unlike most forms of theft and fraud, counterfeiting offences strike at the stability of the system of currency and exchange. While production offences are typically more serious than distribution offences, both are serious for the reasons identified earlier. Moreover, the seriousness of these offences also reflects the volume and value of the counterfeit notes. Another important element is the degree of the offender's participation in the offence or offences for which he is found guilty. In view of the important effects of counterfeiting offences judges have often emphasised the importance of general deterrence.

As there is no minimum sentence for counterfeiting offences, every sentence must be imposed by taking into account the principles recited in Part XXIII of the Code. It is entirely predictable therefore that for a class of offences in which there are few prosecutions there will be also no clear pattern of sentencing. At the high end, and this is comparatively rare, there have been sentences of over five years.⁵⁰ In the main distribution offences appear to be at or below a bench mark of two years and production offences vary from a low end around two years to a high end of four.⁵¹ There have been terms of probation imposed and, since the reform of Part XXIII in 1996, there have also been conditional sentences.⁵² It should be noted that there have been too few sentences imposed since the sentencing reform of 1996 to ascertain whether there is a pattern or practice.

It would appear that there has never been a settled practice concerning sentencing in counterfeiting cases. That there should be, generally, less severe sentences for distribution offences than for production is not surprising. Similarly, there is little surprise in the call for general deterrence in production

⁵⁰ E.g., *Robertson* [1969] O.J. No 668 (C.A.): conspiracy to utter reduced on appeal from twelve (12) to eight (8) years. *Pisani* [1971] O.J. No. 230 (C.A.): six (6) years for possession of counterfeit currency.

⁵¹ E.g., *Blanchette* 5 June 1998 (Que. C.A.), No. 200-10-000677, three (3) years concurrent on counts of making and possession of counterfeit bills. The accused and co-accused carefully planned an operation based on skill in use of photocopiers. The plan was to make \$1,000,000 in twenty (20) dollar denominations; incomplete notes of \$980,000 were seized. *Dunn, supra*, note 8: accused with no record received three (3) years concurrent on charges of making, possessing and conspiracy; on appeal this was reduced to twenty-one (21) months and made conditional. *Dickson* [1999] N.B.J. No. 643 (Q.B.): accused with gambling problem but no record, charged with two counts each of making and possession, received concurrent *conditional* terms of six (6) months. *Mankoo* (2000) 132 O.A.C. 270, multiple counts including possession of counterfeit money, sentenced to 23.5 imprisonment. *Bruno* [1991] O.J. No. 2680 (Gen. Div.): first offender in fifties pleaded guilty to possession of over US\$1,000,000 in counterfeit notes, and sentenced to thirty (30) months. In *Bibeau* (1995) 69 B.C.A.C. 117 a sentence of two years less a day was upheld for possession. In *Leung* [1985] B.C.J. No. 2165 a sentence of eight years concurrent on various counts, including possession of counterfeit money, was reduced to two years.

⁵² See *Dunn, supra*, note 8.

cases. And to say that a fit sentence must reflect the gravity of the offence and the gravity of the offender's participation is only to state general principles.

As for the gravity of the offence, the volume and value of the activity in question is a sound objective indicator.⁵³ This will be true of both distribution and production offences, although as already noted production offences in themselves present a heightened element of gravity. In very broad terms there is some analogy to be drawn between the gravity of various counterfeiting offences and the gravity of offences involving drugs. There are, obviously, differences in the gravity of offences of wholesale manufacture or importation, wholesale trafficking, retail trafficking in lesser amounts and petty possession. It is therefore important for prosecutors to be especially diligent in the manner in which the objective gravity of the offence is characterised.

Of particular importance in this regard is not only the value and volume of the activity but the effect that the activity has on its immediate victims and more generally upon the Canadian economy. Prosecutors should be reluctant to regard counterfeiting offences as offences against property because the commodity at the centre of the issue is currency circulated under the authority of the Bank of Canada. In no way can the commodity be construed as private property and for the same reason it cannot be said that the sole victim of counterfeiting offences is the person who innocently accepts counterfeit bank notes. In greater or lesser degrees counterfeiting offences necessarily prejudice the interests of the state in the stability of its currency. It is this feature of counterfeiting offences that requires them to be distinguished from fraud.⁵⁴

The offender's participation also varies in degrees.⁵⁵ In assessing this aspect prosecutors and judges must not only examine the role and the record of the individual offender in the offences but, it is submitted, they should also examine whether the offender's role was part of a broader organisation. It is

⁵³ In *Rachid* [1994] O.J. No. 4228 (Prov. Ct.) the Crown adduced evidence of the prevalence of counterfeiting in Niagara Falls; on one count of possession and one count of uttering five (5) months concurrent and probation of one year. In *Irvine* [2000] O.J. No. 3226 (Sup. Ct.) accused sentenced to twelve (12) months for uttering.

⁵⁴ Although the number of counterfeiting cases is relatively small by contrast to cases of fraud, it would appear that serious fraud cases are treated more severely than serious counterfeiting cases. This generalisation might be unsound precisely because the number of cases is too small but counterfeiting sentences seem comparatively less severe. In *Weber's* case, for example, a sentence of five years concurrent should probably not be taken as a model. It was not his first conviction for counterfeiting; he passed many bills himself and sold other at wholesale prices for distribution in other parts of Canada. This was a case in which the gravity of the offence and the gravity of the offender's participation might well have attracted a longer term of imprisonment. It might be noted that *Weber* also has previous convictions for counterfeiting notes of twenty dollars, shopping-mall gift certificates and welfare cheques.

⁵⁵ See *Zezipa* (1974) 13 C.L.Q. 153 (Que. C.A.).

elementary, of course, that a sentence cannot punish an offender for an offence that was not charged or proved but the circumstances of counterfeiting offences will often allow for a clearer determination of a just sentence if elements such as organisation can be established. To the extent that it is proved that counterfeiting offences are part of a broader criminal undertaking this might legitimately be identified as an aggravating factor for purposes of sentencing.⁵⁶

IV. Future monitoring

An appropriate sentencing policy on counterfeiting cases cannot be advanced in a sophisticated manner without further and ongoing information. What is needed most urgently is a protocol by which police forces, prosecutors and the Bank of Canada can be apprised of the incidence of counterfeiting activity. To this end it would be desirable if the Central Bureau of Counterfeits were given regular and complete briefs by the police concerning reported cases, investigations and the manner of disposition. Information of this kind would assist greatly in providing a profile of the counterfeiting problem, to the extent that is known, but separated from cases of prosecution. More specifically, this information would disclose at least a partial assessment of the scope of counterfeiting and the volume of reported cases that cannot be pursued to possible charges. This is important because it would illustrate the damage done by counterfeiting that is beyond prosecution, thus underscoring the gravity of the offence in a broader context.

Similarly, there is at the moment no collection of data concerning prosecution and disposition of counterfeiting cases in Canadian courts. It would be helpful in the medium and long term if prosecutorial services in each jurisdiction were to report to the Attorney General of the jurisdiction all charges laid in relation to counterfeiting and their disposition. Only with the compilation of such information can prosecutors rely upon case-law over time in making submissions on sentence to the court with the hope of developing some consistency in outcomes.

Conclusion

Counterfeiting Canadian bank notes is a serious concern both as regards the losses inflicted by the commission of offences and the threat to the stability of Canadian currency as a means of exchange. Its victims thus include not only

⁵⁶ Increased emphasis on the objective gravity of counterfeiting offences might militate in favour of stronger sentences but it should also be noted that subjective factors appear often to account for seemingly lenient sentences. Gambling addiction, chronic debt and other elements have been cited as reasons for diminishing a sentence.

the person who is left holding a bad note but all persons who absorb costs to make up the loss – or who face the costs of a less effective payments system - and, of course, the Bank of Canada itself.

It is arguable, at least with respect to objective factors, that the seriousness of counterfeiting offences has not been sufficiently established in sentencing submissions. In most cases these factors are the volume and value involved and the degree of the offender's participation. More attention must be given to the scale and impact of this kind of offence in general.