

CANADA'S ANTI-MONEY LAUNDERING REGIME

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I. INTRODUCTION

Canada enacted criminal law which, *inter alia*, criminalized money laundering in 1989. Part XII.2 of the *Criminal Code of Canada*¹ contains a money laundering offence². This Part also establishes all the essential provisions required to seize, restrain and ultimately forfeit “proceeds of crime”³. That Part is the procedural foundation for most money laundering investigations in Canada. The provisions in the Part go on to limit the crimes for which special search, restraint and forfeitures orders are available to a number

of predicate offences, which Canadian law describes as “enterprise crime offences”⁴.

There is some thought of a revision to the existing provisions so that proceeds of all crimes would be covered by the Part XII.2 scheme.⁵ The problem with a law that attempts to list crimes, which may result in forfeitures, is that individuals frequently migrate to non-listed crimes for profit. They can avoid the loss of their criminal profits and, ultimately, they become more successful criminals.⁶

In the last decade there has been a concerted effort to estimate the magnitude of the money laundering problem. In UNAFEI's 117th International Senior Seminar Rationale and Objectives document the magnitude of the laundering phenomenon is described in the seminar rationale. I was impressed with that document's references to US\$300 to \$500 billion in money laundering from the drug trade alone. I was as impressed with the reference to the Bank of Credit and Commerce International (BCCI) affair and the seizure of US\$12 Billion in assets.

In spite of those figures, I always asked myself why we should be concerned with the magnitude question. The magnitude of a problem is important if you are considering the issue *ab initio*. You may also need to understand the magnitude of the problem if you have to determine the

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¹ Revised Statutes of Canada, 1985, Part XII.2, as amended. This can be accessed, over the internet, at <http://canada.justice.gc.ca/en/laws/C-46/36036.html#rid-36081>

² Section 462.31. An identical money laundering offence was included in the relevant drug law. Subsequently, money laundering offences were included in the new *Controlled Drugs and Substances Act*, the *Customs Act*, and the new *Corruption of Foreign Public Officials Act*. As appropriate, money laundering offences are included in other federal laws.

³ The *Code* creates an expansive definition of proceeds. It includes proceeds from Canadian and foreign offences. The definition reads as follows :

“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 an enterprise crime offence or a designated substance offence, or

(b) an act or omission anywhere that, if it had occurred in Canada, would have constituted an enterprise crime offence or a designated substance offence.

⁴ Section 462.3 sets out the list of relevant offences.

Currently, the predicate offences include 48 broad classes where the common element is that the offence could generate profits (i.e. “proceeds of crime”).

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amount of investigative and prosecution resources you propose to put against the issue. It should not become an overarching issue since such figures are impossible to prove and as difficult to justify. The simple fact is that criminals launder their profits of crime to defeat a state's attempt to seize those profits. I suggest that the magnitude issue is less relevant to a better appreciation of the approaches States can take to the money laundering problem. Naturally, this assumes that countries agree that money laundering is a criminal justice issue.

There have been numerous studies on the harm to national economies and the global financial system as a result of money laundering.⁷ I do not intend to discuss the magnitude of money laundering issue. I take the phenomenon as a truism and the magnitude issue is less important than the ability to investigate and prosecute (civilly or criminally). In Canada's case we have elected to investigate and prosecute money laundering under our criminal law.⁸ Criminals will move their criminal profits, abuse the financial system and ignore national laws because they are criminals. Anyone who sells deadly drugs, illegally,

⁵ The initial impetus for criminal forfeitures, at the international level, can be found in the 1988 *Vienna Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*. Pressure to expand beyond a drug based attack against criminal profits developed in the 1985 *Milan Plan of Action* (i.e. a Plan adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders) and the 1994 *Naples Political Declaration and Global Action Plan*. The Naples meeting was the precursor to the very recent *United Nations Convention against Transnational Organized Crime*.

The Financial Action Task Force [(see: <http://www.oecd.org/fatf/index.htm>), an international body that emerged from an initiative of the 1989 G7 Summit, as well as the growth of regional FATF type bodies (such as the Asia/Pacific Group on Money Laundering (APG) (see: http://www.oecd.org/fatf/Ctry-orgpages/org-apg_en.htm) and the Caribbean Financial Action Task Force (CFATF) (see: http://www.oecd.org/fatf/Ctry-orgpages/org-cfatf_en.htm)] advocated a broadly based money laundering provision. This is the clear intent of the FATF's *Recommendation 4*. It reads as follows:

Each country should take such measures as may be necessary, including legislative ones, to enable it to criminalise money laundering as set forth in the Vienna Convention. Each country should extend the offence of drug money laundering to one based on serious offences. Each country

would determine which serious crimes would be designated as money laundering predicate offences.

⁶ In 1892 Canada abolished the common law's historic ability to forfeit upon conviction for a felony. The 1892 Code prohibited "any attaindre or corruption of blood, or any forfeiture or escheat" but it retained the ability to forfeit as part of a sentence. Until 1989 forfeitures were reserved to specified things (e.g. guns, explosives) and offences. The new provisions implemented the 1988 Vienna Conventions requirements, expanded the concept to the listed enterprise crimes and created a criminal offence of money laundering.

⁷ The Basel Committee on Banking Supervision (see <http://www.bis.org/>) developed the "*Core Principles for Effective Banking Supervision*" (see: <http://www.bis.org/publ/bcbs30a.pdf>). In addition, the Basel Committee's study on "*Prevention of Criminal Use of the Banking System for the purpose of Money-Laundering*" (see: http://www.oecd.org/fatf/pdf/basle1988_en.pdf) illustrates the financial community's concern with money laundering. Similar concerns can be seen in the securities and investment sector (see the International Organisation of Securities Commissions' *Core Principles*, at <http://risk.ifci.ch/144440.htm>), and the insurance sector, where various principles and standards of the International Association of Insurance Supervisors (IAIS) and the Offshore Group of Insurance Supervisors consider money laundering issues

for profit does not care that they may have to bribe a banker or corrupt a government official. That type of activity is a cost of doing business. I expect that other experts at the Seminar will be better able to fully discuss the magnitude of the money laundering phenomenon.⁹ I leave that issue to those experts.

The more interesting issue is how a country approaches money laundering problems. What are the lessons, if any, it has learned? What are its roadblocks to effective money laundering investigations and prosecutions? How can nations combine their sovereignties to react to criminals who use territorial sovereignty to shelter their profits or hinder investigations? These are all valid questions. In this paper I will try and answer some questions that develop from Canada's anti-money laundering regime. In a second discussion I will examine the emerging development of privacy laws, electronic cash and similar issues in the anti-money laundering context.

II. INVESTIGATIVE AND FORFEITURE'S ROLE IN CANADA'S PROCEEDS OF CRIME REGIME

The 1989 revision to Canada's Criminal Code built upon earlier work. In 1973 the offence of possession of property obtained by crime was added to the Canadian

criminal law.¹⁰ The possession offence was not generally used. In the early 1980 the RCMP established an anti-drug profiteering unit to attack the property obtained by drug traffickers. They targeted a bank account but the courts ultimately overturned their search warrant. That warrant purported to seize the money held on deposit in the bank and the court held that a warrant could only seize tangibles while the money on deposit was an intangible.¹¹

The inability of the police to freeze the assets in the Montreal bank account created added impetus for the subsequent major proceeds of crime amendments. The Part XII.2 scheme created an ability to trace and freeze proceeds of crime at the investigative stage, long before charges were laid.¹² Once property is seized or retrained further provisions apply to the property. The court has jurisdiction to accept applications to challenge the seizure or restraint orders. A person effected by the seizure, (i.e. the person in possession or a person having a valid interest in the thing) can seek to overturn the order or,

⁸ On December 5, 2000 the Province of Ontario tabled the *Remedies for Organized Crime and Other Unlawful Activities Bill*, a new civil forfeiture of proceeds of crime law. (See Bill 155, at <http://gateway.ontla.on.ca/library/bills/155371.htm>). It is an interesting option but investigative and litigation results will be the final arbiter of the success of that approach.

⁹ If this assumption is incorrect the FATF publishes reports from its annual money laundering trends and typologies meetings. (see http://www.oecd.org/fatf/FATDocs_en.htm#Trends)

¹⁰ S.C., 1972, C.13, s.27. The provision is now found in subsection 354(1). It creates an offence punishable by two years, whenever anyone possesses property obtained from the commissions of an indictable offence. The subsections states:

354. (1) Every one commits an offence who has in his possession any property or thing or any proceeds of any property or thing knowing that all or part of the property or thing or of the proceeds was obtained by or derived directly or indirectly from

(a) the commission in Canada of an offence punishable by indictment; or

(b) an act or omission anywhere that, if it had occurred in Canada, would have constituted an offence punishable by indictment.

¹¹ *Royal Bank v. Bourque* (Sub nom. *Quebec A.G. v. Royal Bank*) (1985) 18 C.C.C. 98

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alternatively, seek payments from the targeted assets to cover reasonable living business and legal expenses.¹³

Any proceeds investigation can proceed simultaneously with the investigation of a predicate offence. It can follow the predicate offence or it can be a stand-alone investigation. This is because the possession offence is itself a predicate charge. The Canadian system is flexible. A criminal could be charged and convicted of the single predicate offence and all of her proceeds of crime could be forfeited. This forfeiture must occur at the time of sentence for the offence. The onus on the prosecutor is to establish that the property is proceeds from the offence charged, on a balance of probabilities standard of proof.¹⁴

Alternatively, the offender could have served their time on the principal charge and subsequently face a possession of proceeds of crime charge that allows for forfeiture. They could also be charged with a money laundering offence. In those scenarios the forfeiture options continue. Independent money launders, not involved in the underlying offences that gave rise to the proceeds of crime, could also be investigated and charged with that offence. Forfeiture is available. In addition, Canadian law, for any drug or organized crime offence, provided that "offence related property", sometimes referred to as an instrumentality, can be seized, restrained and subsequently forfeited upon

conviction.

**III. MONEY LAUNDERING,
TRANSACTION REPORTING AND A
FINANCIAL INTELLIGENCE UNIT,
CANADA'S REGIME**

In 1991 Canada enacted a *Proceeds of Crime (money laundering) Act*.¹⁵ This Act's declared object, as provided in section 2, specified that:

The two referenced sections are Canada's money laundering offences at the time the Act was drafted. This object was accomplished by a regulatory package¹⁶. The regulations established financial sector account creation; customer identification; record keeping; and related record requirements. The regulations came into force on March 26, 1993 and the result partially satisfied international expectations. It created a paper trail for money laundering investigations and prosecutions. It did not oblige effected businesses to actually report suspicious transactions.

There was no specific bank secrecy law in Canada when the Act became law. Financial institutions and other effected business could "voluntarily report" suspicious transactions.¹⁷ Subsequent developments resulted in the new *Proceeds*

¹² Sections 462.32 and 33 of the *Criminal Code* allow applications to the court with evidence that supports a reasonable belief that the targeted property may be forfeited. Subsection 462.35 provides that the seizure or restraint is in force for six months. It is renewed once charges are laid but it can be extended if the investigation is continuing.

¹³ Section 462.34

¹⁴ Section 462.37(1)

¹⁵ Statutes of Canada 1991,c.26, in R.S.C 1985, C. P-24.5 as amended. (see <http://canada2.justice.gc.ca/en/laws/P-24.5/79312.html>)

"(T)he object of this Act is to establish record-keeping requirements in the financial field in order to facilitate the investigation and prosecution of offences under subsection 462.31(1) of the *Criminal Code* and subsection 9(1) of the *Controlled Drugs and Substances Act*.

¹⁶ *Proceeds of Crime (Money Laundering) Regulations*, as amended, SOR/93-75 (see <http://canada2.justice.gc.ca/en/laws/P-24.5/75/145024.html>)

of *Crime (Money Laundering) Act*¹⁸. This new law is now being implemented over a suitable transition period. Prior to examining these new provisions it is important to consider other legal developments.

IV. INCREASED PRIVACY EXPECTATIONS

Privacy expectations of Canadians have significantly evolved since 1993 when the first *Proceeds of Crime (money laundering) Act* came into force. The precursor to increased privacy expectation is seen in constitutional protections in Canada's 1984 *Charter of Rights and Freedoms*.

Subsequently, the courts have adopted an expansive interpretation of an individual's reasonable expectation of privacy.¹⁹ This development evolved as courts interpreted the scope of s. 8 of the *Charter* in various cases.

Concomitantly, privacy expectations became the banner for significant changes as a result of the explosive growth of the Internet and the need to protect electronic commerce. This led to a new law that has a direct impact on every business in Canada. The *Personal Information Protection and Electronic Documents Act*²⁰. It came into force on January 1, 2001. It specifically covers banks; other federally regulated financial institutions; and other federal business organizations. Transitional provisions provide that all

¹⁷The common law established an expectation of confidentiality between a financial institution and its client. A reporting concept was a voluntary obligation in light of the confidentiality relationship between a financial institution and its client. Section 462.47 of the *Criminal Code* (see <http://canada.justice.gc.ca/en/laws/C-46/36036.html#rid-36081>) developed the voluntary reporting theory by providing as follows :

"For greater certainty but subject to section 241 of the *Income Tax Act*, a person is justified in disclosing to a peace officer or the Attorney General any facts on the basis of which that person reasonably suspects that any property is proceeds of crime or that any person has committed or is about to commit an enterprise crime offence or a designated substance offence."

¹⁸The most important development was the significant revision to the FATF's Recommendation 15. Its predecessor called upon States to consider a requirement to report suspicious transactions to competent authorities. Canada's voluntary reporting regime could be said to comply with the earlier recommendation. It did not comply with the revised recommendation which states, as follows:

15. If financial institutions suspect that funds stem from a criminal activity, they should be required to report promptly their suspicions to the competent authorities.

¹⁹For many years the leading case on bank secrecy was the *Tournier v. National Provincial Bank of England*, [1924] 1 K.B. 461 (C.A.). See also *Canadian Imperial Bank of Commerce v. Sayani* [1994] 2 W.W.R. 260 (B.C.C.A.). In a 1993 case, *R. v. Plant* (<http://www.canlii.org/ca/cas/scc/1993/1993scc96.html>), the Supreme Court of Canada held that s. 8 of the *Charter* protected a biographical core of personal information maintained by a commercial enterprise in certain scenarios. In *Plant* the police obtained hydro consumption records from a city utility company without a search warrant. Justice Sopinka, for the majority, opined on the issue of access to commercial information as follows :

"The United States Supreme Court has limited application of the Fourth Amendment (the right against unreasonable search and seizure) protection afforded by the United States Constitution to situations in which the information sought by state authorities is personal and confidential in nature: *United States v. Miller*, 425 U.S. 435 (1976). That case determined that the accused's cheques, subpoenaed for evidence from a commercial bank, were not subject to Fourth Amendment protection. While I do not wish to be taken

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other Canadian businesses will become subject to that law within three years. This law controls the business collection of personal information and the subsequent use and disclosure of such information. I will address the investigative impact of this initiative in another paper but, for the present, it is sufficient to indicate that a customer's personal information held by any business in Canada now has greater protection than ever.

**V. THE NEW PROCEEDS OF CRIME
(MONEY LAUNDERING) ACT**

The development of an increased privacy concern for personal information held by commercial businesses is crucial to any appreciation of the evolution of Canada's new *Proceeds of Crime (Money Laundering) Act*. This law received assent on June 29, 2000 Canada's but it is, as yet, not fully in force. Part III was quickly proclaimed in

force on July 5, 2000. That Part was implemented to provide sufficient opportunity to establish and equip Canada's new Financial Transactions and Reports Analysis Centre. The remainder of the Act will come into force with a complete regulatory package, after the Centre is ready for business.

All businesses covered under the predecessor Act will remain covered in the new law. The new Act allows additional sectors to be added by regulation. The Act and Regulations will also create a cross border currency regime. Individuals and businesses that conduct cross-border transfers of large amounts of money will be required to report these transfers to Canada Customs. Again, regulations will be developed to allow effective customs reporting and forfeiture provisions. The Act further provides that unreported cash at the border can be forfeited and available, in appropriate cases, for sharing²¹.

as adopting the position that commercial records such as cancelled cheques are not subject to s. 8 protection, I do agree with that aspect of the *Miller* decision which would suggest that in order for constitutional protection to be extended, the information seized must be of a "personal and confidential" nature. In fostering the underlying values of dignity, integrity and autonomy, it is fitting that s. 8 of the *Charter* should seek to protect a biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state. This would include information which tends to reveal intimate details of the lifestyle and personal choices of the individual. The computer records investigated in the case at bar while revealing the pattern of electricity consumption in the residence cannot reasonably be said to reveal intimate details of the appellant's life since electricity consumption reveals very little about the personal lifestyle or private decisions of the occupant of the residence."

²⁰ S.C., 2000, C.5

The new, independent, financial intelligence unit, known as the Financial Transactions and Reports Analysis Centre of Canada (the Centre), was established to operate as the competent authority for the purposes of the FATF's Recommendation 15. This Centre will receive and administer the information transmitted to it in accordance with the Act. It will analyse the information in all filed reports and disclose designated information to an appropriate police force, when specified conditions are met.

The establishment of a suspicious transaction-reporting centre in Canada is a novel development in Canada's law. The concept has been widely accepted throughout the world²². International pressure to establish a financial intelligence unit must be considered in

²¹ S.C. 2000, C. 17, s. 22

light of Canada's constitutional framework and its *Charter*. Our *Charter* normally requires a prior judicial authorization before an agent of the state, such as the new Centre, obtains information.²³ This had a significant impact upon the drafters as the new law developed. The RCMP, as a law enforcement agency, could not host the Centre without creating a Charter risk. Essentially, if a law enforcement agency, directly or through a subsidiary part of the enforcement agency, obtained personal information without a warrant. It operates under a significant section 8 *Charter* risk. The solution was to establish a new independent agency.

This new Centre was deliberately established without investigative powers. The law also placed significant restrictions on the amount of data that the Centre could divulge to investigators.²⁴ Otherwise, the Centre's information collection activity activities would be challenged. Its

authority to collect suspicious or proscribed transaction reports may have been seen as a backdoor device for law enforcement. The Charter required law enforcement to use search warrants and similar prior authorizations. The new Centre was a deliberate choice in the Proceeds of Crime (Money Laundering) Act as a suitable compromise to undertake a regulatory and analysis function, rather than a law enforcement function.

When fully implemented, the Act repeals its predecessor. Structurally, the Act consists of five parts. Part I contains specific objects²⁵ which define the purposes for the legislation. This Part obliges a designated business to make and maintain records; report either questionable (i.e. suspicious) or proscribed financial transactions²⁶ to the new Centre. The record keeping and maintenance provisions will continue to facilitate an investigative paper trail. Law enforcement will have to

²² This is best seen in the work of the Egmont Group.)

²³ The seminal Supreme Court of Canada's decision on point is *R. v. Hunter and Southam* [1984] 2 S.C.R. 145

²⁴ Section 55 first states that the Centre may not disclose the information it collects, other than under the provisions set out in subsection 55(3), (4) and (5). Those subsections provide, as follows :

(3) If the Centre, on the basis of its analysis and assessment under paragraph 54(c), has reasonable grounds to suspect that designated information would be relevant to investigating or prosecuting a money laundering offence, the Centre shall disclose the information to

- (a) the appropriate police force;
- (b) the Canada Customs and Revenue Agency, if the Centre also determines that the information is relevant to an offence of evading or attempting to evade paying taxes or duties imposed under an Act of Parliament administered by the Minister of National Revenue;

(c) the Canadian Security Intelligence Service, if the Centre also determines that the information is relevant to threats to the security of Canada within the meaning of section 2 of the *Canadian Security Intelligence Service Act*; and

(d) the Department of Citizenship and Immigration, if the Centre also determines that the information would promote the objective set out in paragraph 3(j) of the *Immigration Act* and is relevant to determining whether a person is a person described in subsection 19(1) or (2) or section 27 of that Act or to an offence under section 94.1, 94.2, 94.4, 94.5 or 94.6 of that Act.

(4) The Centre may disclose designated information to an institution or agency of a foreign state or of an international organization established by the governments of foreign states that has powers and duties similar to those of the Centre if

(a) the Centre has reasonable grounds to

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use search warrants or voluntary disclosures to access that trail. On the other hand, the Centre will have significant financial information for its purposes

Part II creates cross border currency and monetary instrument reporting obligations. Persons must report to

suspect that the information would be relevant to the investigation or prosecution of a money laundering offence or a substantially similar offence; and

(b) the Minister has, in accordance with subsection 56(1), entered into an agreement or arrangement with that foreign state or international organization regarding the exchange of such information.

(5) The Centre may disclose designated information to an institution or agency of a foreign state that has powers and duties similar to those of the Centre if

(a) the Centre has reasonable grounds to suspect that the information would be relevant to the investigation or prosecution of a money laundering offence or a substantially similar offence; and

(b) the Centre has, in accordance with subsection 56(2), entered into an agreement or arrangement with that institution or agency regarding the exchange of such information.

²⁵ The objects are found in s. 3 and state :

The object of this Act is

(a) to implement specific measures to detect and deter money laundering and to facilitate the investigation and prosecution of money laundering offences, including

(i) establishing record keeping and client identification requirements for financial services providers and other persons that engage in businesses, professions or activities that are susceptible to being used for money laundering,

(ii) requiring the reporting of suspicious financial transactions and of cross-border movements of currency and monetary

Canada's Customs and Revenue Agency²⁷. Persons will be obliged to report the importation or exportation of proscribed currency or monetary instruments. Part III establishes the Centre to collect, analyse, assess and disclose designated information in order to assist in the detection, prevention and deterrence of

instruments, and

(iii) establishing an agency that is responsible for dealing with reported and other information;

(b) to respond to the threat posed by organized crime by providing law enforcement officials with the information they need to deprive criminals of the proceeds of their criminal activities, while ensuring that appropriate safeguards are put in place to protect the privacy of persons with respect to personal information about themselves; and

(c) to assist in fulfilling Canada's international commitments to participate in the fight against transnational crime, particularly money laundering.

²⁶ Two sections are relevant. The first, section 7, deals with suspicious transaction reporting; the second, section 9, deals with proscribed transaction reporting. Section 7 provides, as follows:

7. In addition to the requirements referred to in subsection 9(1), every person or entity shall report to the Centre, in the prescribed form and manner, every financial transaction that occurs in the course of their activities and in respect of which there are reasonable grounds to suspect that the transaction is related to the commission of a money laundering offence.:

Section 9 provides for proscribed transaction reporting, as follows:

9. (1) Every person or entity shall report to the Centre, in the prescribed form and manner, every prescribed financial transaction that occurs in the course of their activities.

The Act specifies that something is proscribed by regulations. Therefore, the subsequent regulatory package will establish when specific transactions,

laundering the proceeds of crime. The Centre is also responsible for ensuring compliance with Part I of the Act. Part IV authorises the Governor in Council to make regulations. Part V creates offences, including the failure to report suspicious financial transactions and the prohibited use of information under the control of the Centre.²⁸

VI. CURRENT MONEY LAUNDERING INVESTIGATIVE SITUATION IN CANADA

The Royal Canadian Mounted Police (RCMP), within its federal policing portfolio, operate the national proceeds of crime programme.²⁹ They have developed thirteen Integrated Proceeds of Crime (IPOC) Units tasked with investigative responsibility for proceeds of crime. These units include peace officers (RCMP members and seconded officers from local

as opposed to suspicious transactions, will have to be reported to the Centre.

²⁷ This will comply with the FATF's Recommendations 22. The Act establishes a cross border reporting regime as follows:

12. (1) Every person or entity referred to in subsection (3) shall report to an officer, in accordance with the regulations, the importation or exportation of currency or monetary instruments of a value greater than the prescribed amount.

(2) A person or entity is not required to make a report under subsection (1) in respect of an activity if the prescribed conditions are met in respect of the person, entity or activity, and if the person or entity satisfies an officer that those conditions have been met.

(3) Currency or monetary instruments shall be reported under subsection (1)

(a) in the case of currency or monetary instruments in the actual possession of a person arriving in or departing from Canada, or that form part of their baggage if they and their baggage are being carried on board the same conveyance, by that person;

(b) in the case of currency or monetary instruments imported into Canada by courier or as mail, by the exporter of the currency or monetary instruments or, on receiving notice under subsection 14(2), by the importer;

(c) in the case of currency or monetary instruments exported from Canada by courier or as mail, by the exporter of the currency or

monetary instruments;

(d) in the case of currency or monetary instruments, other than those referred to in paragraph (a) or imported or exported as mail, that are on board a conveyance arriving in or departing from Canada, by the person in charge of the conveyance; and

(e) in any other case, by the person on whose behalf the currency or monetary instruments are imported or exported.

(4) If a report is made in respect of currency or monetary instruments, the person arriving in or departing from Canada with the currency or monetary instruments shall

(a) answer truthfully any questions that the officer asks with respect to the information required to be contained in the report; and

(b) on request of an officer, present the currency or monetary instruments that they are carrying or transporting, unload any conveyance or part of a conveyance or baggage and open or unpack any package or container that the officer wishes to examine.

(5) Officers shall send the reports they receive under subsection (1) to the Centre.

Once again, the regulations will flesh out the reporting requirements.

²⁸ Sections 74 to 80 of the Act create a number of offences where persons or entities (e.g. corporations) criminally fail to comply with the Act. The penalties vary with the relevant offences but they include incarceration for up to five years and fines up to \$2 million dollars.

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police departments), tax and customs officers, forensic accountants, and legal counsel (i.e. prosecutors and advisors). In addition the Federal Prosecution Service, the prosecution arm of the Canadian Department of Justice, has thirteen regional offices and branch offices or agents, throughout Canada, who routinely prosecute proceeds of crime cases investigated by the RCMP and the major police forces in Canada.

It should also be appreciated that there is only one source for criminal law in Canada. The federal government has the sole authority to enact criminal law and laws of criminal procedure. This is why Part XII.2 of the *Criminal Code* applies to any proceeds of crime criminal investigation and prosecution.

Various prosecutors can undertake criminal prosecutions. Federal prosecutions routinely involve non-*Criminal Code* money laundering prosecutions, unless a provincial Attorney General agrees that a federal prosecution can include a *Code* "enterprise crime offence".³⁰ On the other hand, provincial Attorneys General and local law enforcement can investigate and enforce the criminal law in Canada. The dual ability of federal and provincial Attorneys General to prosecute is a novel feature of the Canadian criminal justice system.

²⁹ The RCMP acts as a contract police force for all but two provinces (Ontario and Quebec). It also is a significant player in many municipal police contracts. It is the major proceeds of crime investigative authority in Canada. You can access further information on this particular aspect of their work on the Internet, at <http://www.rcmp-grc.gc.ca/frames/rcmp-grc1.htm> . The RCMP currently maintains thirteen Integrated Proceeds of Crime (IPOC) units across Canada in the major cities and regions.

VII. CANADA'S APPROACH TO CRIMINAL ORGANIZATIONS

Recently, the money laundering debate has been intermixed with the issue of transnational organized criminal groups. Canada has joined in that debate. There was a very recent significant modification to the Canadian criminal law. In 1996 the public's perception of a problem with criminal organisations resulted in a significant expansion of the criminal law and investigative powers in Canada.³¹ The RCMP re-focused investigative priorities to deal with the organized crime issue. Their earlier approach to proceeds of crime investigations has now become an integrated approach where proceeds and criminal organizations are dealt with in tandem³².

The two issues are easily related. Any effective attack against organized crime must consider the profits from that crime. Canada and the various Provincial governments have collectively undertaken an expanded organized crime programme as a national initiative. It is primarily directed against organizations that are involved in a violent turf war (e.g. outlaw motorcycle gangs) and others involved in transnational organized crime. Obviously,

³⁰ Section 2 of the *Criminal Code* defines and controls the case prosecutor in Canada. Broadly speaking anyone can institute most criminal charges and prosecute a case. The *Code* allows the Attorney General, as defined in s. 2, to intervene and take over a private prosecution. In addition, only counsel for the Attorney General can make various proceeds of crime applications, such as applications for special search warrants and restraint orders against proceeds of crime and all forfeiture applications. It is therefore important to ascertain which Attorney General is conducting a prosecution. Equally, any forfeiture goes to the Attorney General who made the forfeiture application. (See s. 462.37 of the *Code*)

this initiative targets groups of individuals. After all, an organization, by definition, must include five or more persons. This creates increased investigative costs and systemic issues for the criminal justice system³³.

There are proceeds of crime and money laundering ramifications in any criminal organization investigation. Collectively, the organization should realise more criminal activity. A criminal organization targets profitable crimes. This justifies more intensive investigative resources. Does this mean that states should only concentrate on organizations? I believe that such a decision would be a mistake.

³¹ Section 467.1 created a new participation in a criminal organization offence with a maximum punishment of fourteen years. Section 2 of the Code defined a criminal organization in the following manner :

“criminal organization” means any group, association or other body consisting of five or more persons, whether formally or informally organized,

(a) having as one of its primary activities the commission of an indictable offence under this or any other Act of Parliament for which the maximum punishment is imprisonment for five years or more, and

(b) any or all of the members of which engage in or have, within the preceding five years, engaged in the commission of a series of such offences;

The *Code’s* wiretap provisions were also modified (e.g. A one year wiretap authorization could be obtained) and other related amendments were made.

³² In February 2000 the RCMP announced a major new organized crime initiative. See <http://www.rcmp-grc.gc.ca/frames/rcmp-grc1.htm>.

³³ The system must adapt to larger trials. The evidence is much more complex. Year long wiretap investigations, multiple defendants and increased legal aid costs are some of the problems in this initiative.

Any organized criminal or criminal organization, and I intentionally distinguish between the two concepts, launders to protect their profits. The activity of either requires that criminal profits be laundered. Any money laundering has a serious negative effect upon financial systems. It involves the same issues and creates demands for the same limited investigative resources. The individual “organized” criminal and criminal organizations, in general equally harm societal interests. The scale of the criminal activities and profits is the only significant difference.

The fact is criminal profits can be used to buy financial and other advice. The international financial system is available for a rich individual criminal or a criminal organization. Either type of criminal must use the same techniques to launder their criminal profits. Indeed, with the evolution of the global financial system, any criminal’s laundering difficulties are easier. Apart from exceptional investigative authority³⁴ available in a criminal organization offence, the investigative effort is the same.

The problem is that criminal organizations are merging to take advantage of expertise available in another organization. Why compete when a merged organization is more efficient? The merged groups work off each other’s strengths. They do not compete for the media’s attention. They do not have to worry what they next year’s budget allocation will be and how their manpower needs will be resolved. The reality is that organized crime groups are sometimes more efficient

³⁴ Section 186.1 of the Criminal Code permits a one year wiretap authorization when the underlying investigation is committed for the benefit of, at the direction of or in association with a criminal organization.

than law enforcement. National self-interest and laws are irrelevant to a criminal organization!

In order that nations respond to this reality their law enforcement agencies must do their investigations more effectively. States and law enforcement must co-operate or recognise that criminal organizations will continue on the basis that laws and the police are minor inconveniences. This means that new forms of international co-operation must be developed. Time and space restraints limit a discussion of this issue.

I can raise at least one investigative technique to illustrate this fact. Money laundering creates a need to develop proactive investigative techniques. The police can not wait at their station for a remorseful criminal to walk in and confess³⁵. One effective technique can be seen in a law enforcement storefront operation. Does a storefront money laundering operation offer the police a problem free effective alternative investigative technique?

³⁵ R. v. Bond, 135 A.R. 329 (Alberta C.A.) at page 333 opined

Illegal conduct by the police during an investigation, while wholly relevant to the issue of abuse of the court's processes, is not *per se* fatal to prosecutions which may follow: *Mack, supra*, at 558. Frequently it will be, but situational police illegality happens. Police involve themselves in high speed chases, travelling beyond posted speed limits. Police pose as prostitutes and communicate for that purpose in order to gather evidence. Police buy, possess, and transport illegal drugs on a daily basis during undercover operations. In a perfect world this would not be necessary but, patently, illegal drug commerce is neither successfully investigated, nor resisted, by uniformed police peering through hotel-room transoms and keyholes or waiting patiently at police headquarters to receive the confessions of penitent drug-traffickers :

VIII. MONEY LAUNDERING INVESTIGATIVE TECHNIQUES AND THE RULE OF LAW

Law enforcement can undertake a storefront money laundering operation where the police and co-operating agents hold themselves out as service providers for criminals. This type of investigative technique has advantages and problems. The police must conceal and convert criminal assets in this type of operation. That is the essence of a money laundering operation. The police view the operation from a different perspective. They move money or other assets to record the criminal's instructions and gather evidence for subsequent prosecutions. If someone reviews the law enforcement activity from a justice policy viewpoint the investigators may have a good motive but they are committing crimes. Are they any better than the criminals? Some consider this issue through the eyes of law enforcement others argue that the rule of law should apply to the police and the criminals alike.

A. Police Illegality

The Supreme Court of Canada considered the police illegality issue in a police reverses sting drug investigation. In *R. v. Campbell and Shirose*³⁶, the court held that the police were not immune from criminal liability for criminal activities committed in the course of a *bona fide* criminal investigation. However, while observing that "everybody is subject to the ordinary law of the land", the Supreme Court explicitly recognised 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

³⁶ This and other Supreme Court decisions can be found at : http://www.scc-csc.gc.ca/Judgments_Jugements/menu_e.htm . *R. v. Campbell and Shirose* can be accessed at <http://www.canlii.org/ca/cas/scc/1999/1999scc18.html>.

scope of the immunity and the circumstances in which it is available". The Court noted further that "in this country it is accepted that it is for Parliament to determine when in the context of law enforcement the end justifies the means that would otherwise be unlawful". This means that the law must keep up with criminal activity and address the needs of proactive law enforcement. That is a difficult requirement in any democracy.

B. Benefits in a Storefront Operation

The use of storefront money laundering techniques has been proven to be very effective. The technique has several advantages. Criminals come to the undercover police operation rather than the police attempting to infiltrate a criminal's organization. Criminals, once satisfied that the storefront money laundering operation can deliver, frequently divulge information. Often that is information that law enforcement would never discover in their ordinary investigations. Essentially, criminals brag about their criminal prowess. Their admissions provide invaluable criminal intelligence. As a money laundering service, the storefront allows law enforcement to better track the assets moved by the undercover operatives. The storefront client can tell the undercover operative where they want the asset to go, or better yet, the undercover operative can suggest alternative routes and investments. In either scenario the long-term goal is to track, trace, freeze and ultimately, forfeit the assets.

C. Associated Problems in a Storefront Operation

Storefront money laundering operations also create problems. Frequently the laundered assets must be moved offshore. Obviously, foreign law enforcement must co-operate in these investigations. Otherwise a domestic investigation that

moves outside Canada runs the risk of infringing another State's law. These operations must be long term. The up-front development costs would be easily frustrated if the police immediately arrested the first criminal that brought in a suitcase of cash to be laundered. There is a continuous risk that the storefront's laundered cash could be used to purchase more drugs or foster other criminal activity. This is a difficult reality to deal with as some point in every storefront investigation.

D. A Police Officer Exception to the Money Laundering Offence

In Canada we have a concern with illegal police conduct. The undercover police officer must inevitably commit a money laundering offence. The police are subject to the rule of law. Laundering is a broadly defined concept in Canada's criminal law.³⁷ The offence provisions are broad enough to include the controlled delivery of assets that the police know or believe are proceeds of crime. Essentially, the scope of the section could be seen to resemble controlled deliveries of drugs.³⁸ The important point to remember is that the "rule of law"

³⁷ Section 462.31 (1) provides as follows :

Every one commits an offence who uses, transfers the possession of, sends or delivers to any person or place, transports, transmits, alters, disposes of or otherwise deals with, in any manner and by any means, any property or any proceeds of any property with intent to conceal or convert that property or those proceeds, knowing or believing that all or a part of that property or of those proceeds was obtained or derived directly or indirectly as a result of

(a) the commission in Canada of an enterprise crime offence or a designated substance offence; or

(b) an act or omission anywhere that, if it had occurred in Canada, would have constituted an enterprise crime offence or a designated substance offence.

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applies. If the police commit an unlawful act in their investigation the defence will argue that their illegal activity taints the investigation and justifies a judicial “stay of proceedings”.

Parliament, to use the words of the Supreme Court, in *R. v. Campbell and Shirose*, delineated “the nature and scope of the immunity and the circumstances in which it is available”. This occurred as a result of a statutory money laundering exception for law enforcement.³⁹

³⁸ The 1988 Vienna Convention specifically calls upon countries to co-operate in controlled deliveries of drugs. In 1996 Canada's new *Controlled Drugs and Substances Act's (CDSA) new Controlled Drugs and Substances Act (Police Enforcement) Regulations*, SOR/97-234 (see <http://canada2.justice.gc.ca/en/laws/C-38.8/234/67999.html>) established a very rigorous administrative regime for state supplied drugs and exceptions for law enforcement when they undertake investigations that could infringe the CDSA offences.

³⁹ Subsection 462.31(3) of the *Criminal Code*, as well as identical amendments in other money laundering offences, provides as follows :

- (3) A peace officer or a person acting under the direction of a peace officer is not guilty of an offence under subsection (1) if the peace officer or person does any of the things mentioned in that subsection for the purposes of an investigation or otherwise in the execution of the peace officer's duties

This is not a wide-open exception for any peace officer. For example foreign law enforcement official would not be considered to be a peace officer in Canada. That foreign law enforcement officer or any civilian agent assisting a peace officer must act under the direction and control of a peace officer. In addition the peace officer must be undertaking the money laundering investigation as part of his/her duties.

It should be noted that the mere existence of a law enforcement exception does not mean that the storefront money laundering operation's client has no defences. The exception operates as a shield for law enforcement and persons acting under the direction and control of the peace officer but it does not obviate any defence for the accused individual. Entrapment continues to be a recognised legal defence in Canada⁴⁰.

⁴⁰ In 1985, in *R. v. Jewitt* [1985] 2 S.C.R. 128, 136-137, the Supreme Court of Canada found that courts had a discretion, although it could only be exercised in “the clearest of cases”. Subsequent decisions from the court have expanded upon the concept. Madam Justice L'Heureux-Dub_ has been quite instrumental in developing the law in this area. In *R. v. Conway*, [1989] 1 S.C.R. 1659, 1667 she said that:

“ ... where the affront to fair play and decency is disproportionate to the societal interest in the effective prosecution of criminal cases, then the administration of justice is best served by staying the proceedings.”

In *Power* [1994] 1 S.C.R. 601, she defined “the clearest of cases” to mean “conduct which shocks the conscience of the community.” She said the cases of this nature will be extremely rare. In *O'Connor* [1995] 4 S.C.R. 411, 465, she said a stay will only be appropriate when two criteria are fulfilled:

1. Where the prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome (in other words, this is not a remedy for past misconduct per se; there has to be some continuing abuse); and
2. Where no other remedy is reasonably capable of removing that prejudice.

Finally, *R. v. Mack*, [1988] 2 S.C.R 903 is the seminal decision on point. It fully canvassed all aspects of the issue and raised the problem caused by police illegality.

E. Storefront Operation Implementation Issues

In the last decade the RCMP has undertaken a number of storefront money laundering operations. They have also assisted foreign law enforcement in money pick ups and ancillary activity. The existence of the law enforcement exception has assisted the police as they determine if a proposed storefront or other proactive investigative technique is appropriate. In spite of this exception, every storefront money laundering proposal creates other significant issues.

Some issues are obvious. These operations became security problems. Generally, the undercover team deals with significant amounts of cash. Proper personal and exhibit security is required. Cover teams; safe locales; and record keeping systems are essential. Storefront enforcement cases also have other unexpected surveillance costs.

F. One-party Interceptions

Every case commences with the expectation that the best admissible evidence is sought. Frequently, this requires the interceptions of the participant's conversations and video surveillance of their conduct. This is required for the personal security of the operatives. Equally, interception evidence is important for the intrinsic value of the evidence obtained by means of the interception. The problem is that Canadian interception law creates pre-conditions that all investigative participants in a storefront operation should understand.

Electronic surveillance evidence is admissible against an accused person, in Canada, provided that the evidence was lawfully obtained. Canadian law⁴¹ provides that a judicially authorised one-party consent interception order can and should

be obtained in all cases. This is important consideration in any Canadian storefront laundering case. A Canadian peace officer must work on the case so that the officer and others are sheltered within the exception created by ss. 463.31. Any undercover operation will use a Canadian peace officer. Every foreign peace officer, posing as an agent, or civilian agent, must operate under the Canadian peace officer's direction and control to shelter under the exception. They are agents of the state for interception purposes. This has an impact on any possible interception.

These operations frequently include an international dimension has an effect on interception options. Canada's *Criminal Code*, and, in particular, Part VI does not apply outside Canada. This means that interceptions of private communications outside Canada must comply with the law in the territory upon which the interception occurred. *Charter* considerations may continue to apply⁴² in some cases. The best advise is to obtain judicial authorisations whenever possible.

⁴¹ Part VI of the *Criminal Code* governs. (See <http://canada.justice.gc.ca/en/laws/C-46/35184.html>). The interception of private communications by an «agent of the state» with the consent of one of the participants but without prior judicial authorization violates s. 8 of Canada's *Charter of Rights and Freedoms*. The Supreme Court of Canada, in *R. v. Duarte*, refused to apply American jurisprudence and opined that while a s. 184 criminal offence did not occur in a one party consent interception scenario that in all cases where state agents consented a prior judicial authorization was a constitutional prerequisite. (see : <http://www.canlii.org/ca/cas/scc/1990/1990scc2.html>). As a result subsections 184.1 to 184.4 were added to Part VI of the Code.

⁴² Section 8 of the *Charter* gives persons "the right to be secure against unreasonable search and seizure". Case law indicates that the Charter may apply outside Canada in certain cases.

G. Other Investigative Conduct

Undercover investigations are a routine feature in Canadian law enforcement. Apart from the one-party intercept scenario undercover operatives have few legal roadblocks to control their activity. Recently, the defence bar has seized upon the *R. v. Campbell and Shirose* and its predecessors to successfully argue that any police illegality taints an investigation and inures to the benefit of the criminal defendant.

The tainted police conduct shocks the community's standards of fairness. The argument is that this conduct requires the court to enter a stay of proceedings. This has been argued in several cases. Most occurred before the recent amendment to 462.31 creating a law enforcement exception.⁴³ The money laundering exception does not create exceptions for other unlawful conduct. The defence frequently looks for unlawful activity to advance a defence. Therefore investigators must be aware of this concern.

H. Profits or Evidence

Finally, what happens to the profits from a Canadian storefront money laundering investigation? Canada's financial administration provisions and the criminal law⁴⁴ have another unexpected impact upon storefront money laundering operations. The storefront operator charges the criminal for their investment or cash conversion activity. If they did not the criminal would be suspicious. Law

enforcement would like to re-invest these charges into the operation to help fund the storefront's costs. This is a problem.

The realities are that the operation's costs, recovered from the criminal, are retained as a case exhibit. The heavy investigative costs for these operations must be included in the investigative budget. There can not be a direct transfer of the criminals laundering costs to the storefront's operations budget. The mere fact that money is obtained does not convert an exhibit into property which the police can use for their own purposes. These exhibits are ultimately disposed of, generally by forfeiture orders.⁴⁵ There is no direct payment or financial benefit to law enforcement.

IX. CONCLUSION

Canada has adopted a moderate and balanced approach to the problems created by money laundering. It has constantly reviewed its laws and attempted to reflect the best practices of other jurisdictions around the world. I always end these types of discussions with the observation that criminals are more organized than States. Criminals use national borders as a shield whenever it suits their purposes. Criminals are free to organise for their own self-interest. They merge as needed and compete as required.

⁴³ In *R. v. Mathiesson* ((1995), 172 A.R. 196 (Q.B.)), a case where the police laundered money. In *R. v. Cresswell* (<http://www.courts.gov.bc.ca/jdb-txt/ca/00/05/c00-0583.htm>) the British Columbia Court of Appeal returned the matter for reconsideration.

⁴⁴ At the federal level, the *Financial Administration Act*, RSC 1985, C. F-11 and the *Criminal Code* have an impact on the money realized in a storefront money laundering operation.

⁴⁵ The subsequent disposition of the forfeited property, in any case prosecuted by the Attorney General of Canada, is controlled by the *Seized Property Management Act* (<http://canada2.justice.gc.ca/en/laws/S-8.3/83666.html>). This law specifies that everything is deposited into a special purpose account. It also permits domestic sharing with Provincial governments and international sharing with foreign governments.

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States seem prone to an approach that suggests co-operation while investigators compete for budgets and media attention. The Attorney General of Trinidad and Tobago advised the International Association of Prosecutors, in a speech at Ottawa, in September 1998, that nations had to pool their sovereignties to protect their sovereignties. Free trade and the easy movement of capital and information merely accelerates the need to actually adopt the Attorney General's observation.