

# CANADA'S LAWS ON MONEY LAUNDERING & PROCEEDS OF CRIME: THE INTERNATIONAL CONTEXT

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*"The investigation, prosecution and suppression of crime for the protection of the citizens and the maintenance of peace and public order is an important goal of all organized societies. The pursuit of that goal cannot realistically be confined within national boundaries. This has long been the case, but it is increasingly evident today. Modern communications have shrunk the world and made McLuhan's global village a reality. The only respect paid by the international criminal community to national boundaries is when these serve as a means to frustrate the efforts of law enforcement and judicial authorities."<sup>1</sup>*

## INTRODUCTION

**I**N THIS PAPER, it will be assumed that the reader knows about Canada's money laundering and proceeds of crime provisions.<sup>2</sup> It will

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\*\* The views expressed in this paper are the author's views. They do not reflect policy or positions of the Department of Justice or the Government of Canada.

<sup>1</sup> *United States of America v. Cotroni*, (1988), 48 C.C.C. (3d) 193 at 215 (S.C.C.). This dicta from Justice LaForest succinctly highlights the problem transnational crime creates for victims and states.

<sup>2</sup> In case that assumption is erroneous you must appreciate that s. 354(1) (possession of property obtained by the commission of an indictable offence) and s. 462.31 (money laundering) are criminal offences in Canada. (*Criminal Code*, R.S.C. 1985, Chap. C-46, as amended, which is accessible online: <<http://laws.justice.gc.ca/en/C-46/index.html>>.) You should also know that Part XII.2 and Part II.1 of the *Criminal Code* provide for the seizure, restraint and forfeiture of property, which depending on the facts could be property relevant to terrorist offences (ss. 83.13 & 83.14) or proceeds of crime (ss. 462.3, 462.32, 462.33, 442.37, & 462.38) so long as the property is derived, directly or indirectly from the commission of a "designated offence." The concept of a "designated offence" and proceeds of crime are important to appreciate. Each are defined in s. 462.3 as follows:

"designated offence" means

also be assumed that the reader understands that in 1991, Canada enacted the *Proceeds of Crime (Money Laundering) Act*.<sup>3</sup> In 2000, Canada enacted and quickly amended the new *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, (hereinafter referred to as the *PC (ML)TF Act*),<sup>4</sup> as a result of concerns flowing from events after September 11, 2001.

The *PC(ML)TF Act* maintains pre-existing requirements for customer identification, record keeping, and retention obligations, but adds new suspicious or prescribed transaction and cross border currency and monetary instrument reporting obligations. These reports are sent to the newly-created Financial Transactions and Reports Analysis Centre of Canada (FINTRAC). FINTRAC, the financial transaction analysis authority, or to borrow an international concept, Canada's Financial Intelligence Unit (FIU),<sup>5</sup> serves a compliance and financial intelligence function. The *PC(ML)TF Act* establishes specific offences and a robust compliance provision.

The object of the *PC(ML)TF Act* illustrates parliament's purpose for the expanded *PC(ML)TF Act* scheme. The *Act's* purpose is found in section 3, which states:

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(a) an indictable offence under this or any other Act of Parliament, other than an indictable offence prescribed by regulation, or

(b) a conspiracy or an attempt to commit, being an accessory after the fact in relation to, or any counselling in relation to, an offence referred to in paragraph (a); 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.

Recently, the Supreme Court, in *Quebec (Attorney General) v. Laroche* 2002 SCC 72. File No.: 28417, reviewed the objective for the *Criminal Code's* scheme. Justice Lebel opined, "Parliament intended to neutralize criminal organizations by taking the proceeds of their illegal activities away from them. Part XII.2 intends to give effect to the old adage that crime does not pay."

<sup>3</sup> *Proceeds of Crime (Money Laundering) Act*, S.C. 1991, c. 26. That law did not create any proceeds of crime offence. Such offences were in the *Criminal Code*. It merely established customer identification, record keeping, and record maintenance obligations.

<sup>4</sup> *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2002, c. 17, as amended by S.C. 2001, c. 41, s. 48.

<sup>5</sup> The Egmont Group, (named for the location of a 1995 meeting at the Egmont-Arenberg Palace in Brussels) is an international association of Financial Intelligence Units. Currently there are 69 member states. Further information can be obtained online: Organization for Economic Co-operation and Development <[http://www1.oecd.org/fatf/Ctry-orgpages/org-egmont\\_en.htm](http://www1.oecd.org/fatf/Ctry-orgpages/org-egmont_en.htm)>.

3. The object of this Act is

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

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

(ii) requiring the reporting of suspicious financial transactions and of cross-border movements of currency and monetary 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, and the fight against terrorist activity.

It should not come as a great surprise that the development of this law did not arise out of thin air. In this paper, Canada's international commitments and related international developments will be examined to provide some context to section 3(c). We may find, as a result, a reason why such a scheme exists.

## **DEVELOPMENTS IN OTHER COUNTRIES**

The United States' Racketeer Influenced and Corrupt Organizations (RICO) Statute was enacted as part of the *Organized Crime Control Act of 1970*, creating significant provisions designed to attack organized crime.<sup>6</sup> While RICO provisions attacked organized crime's economic incentive, legislators also recognized that evidence had to be

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<sup>6</sup> *Organized Crime Control Act of 1970*, Pub. L. No. 91-452. (Codified in 18 U.S.C. §§ 1961-1968), also known as the *Organized Crime Control Act* and the *Comprehensive Drug Abuse Prevention and Control Act of 1970*. 21 U.S.C. §§ 801 et seq.

preserved or shared to assist enforcement's efforts against crime. In 1970, the United States Congress enacted provisions in the *Bank Records and Foreign Transaction Act*, more commonly known as the *Bank Secrecy Act*, to complement the provisions in their organized crime scheme.<sup>7</sup> The *Bank Secrecy Act* provisions established record maintenance and transaction reporting obligations. The reporting obligations were:

- (a) Currency Transaction Report obligations imposed by the *Bank Records and Foreign Transactions Act*;
- (b) Currency or Monetary Instruments Reports (CMIR), required under the same Act;
- (c) A Foreign Bank Accounts Report (FBAR), mandated a requirement for the report of foreign bank and financial accounts;
- (d) Finally, the United States' *Internal Revenue Code* required any person engaged in a trade or business that receives \$10,000 in cash to report the transaction.

The RICO scheme and concerns about criminal profits fuelled an international movement towards better cooperation in the attack against crime.

The first justification for better cooperation was seen in the expanding illicit drug area. In the 1980s, many countries, including Canada, were looking at the financial rewards that flowed from the illicit drug trade. In 1975, the *Criminal Code* was amended to add the offence of possession of anything derived from the commission of an indictable offence.<sup>8</sup> That provision did not provide any mechanism to forfeit such property, but it was a first tentative step in a longer legislative development, which ultimately led to the proceeds of crime provisions in Part XII.2 of the *Criminal Code*. In the United Kingdom, drug profits were targeted for confiscation under the *Misuse of Drugs Act, 1971*.

The House of Lords in *Cuthbertson* rejected an argument that a bank account could be forfeited.<sup>9</sup> Subsequently, in *Re Banque Royale du Canada and the Queen*, the Quebec Court of Appeal found that it was not possible to seize a bank account for the purposes of a possession of property obtained from crime investigation.<sup>10</sup> In the United Kingdom, the Hodgson Committee responded to the *Cuthbertson* decision with

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<sup>7</sup> *Bank Secrecy Act*, Pub. L. No. 91-508, 84 Stat. 1114 (1970) (Codified in 31 U.S.C. §§ 5311-5324).

<sup>8</sup> S.C. 1974-75-76, c. 93, s. 29, now s. 354(1) of the *Criminal Code*.

<sup>9</sup> *R. v. Cuthbertson*, [1980] 2 All E.R. 401.

<sup>10</sup> *Re Banque Royale du Canada and the Queen*, (1985) 18 C.C.C. (3d) 387, leave to appeal to the Supreme Court of Canada refused.

recommendations that increased forfeiture powers should be provided for in United Kingdom law. That committee Report was ultimately realized in the United Kingdom's *Drug Offences Act (1986)*, but the provision was limited to drug proceeds. In 1988, the United Kingdom partially corrected that limitation by the *Criminal Justice Act, 1988*, which extended forfeiture of proceeds to non-drug offences. Canada also responded with revisions to the *Criminal Code*, which created Part XII.2.<sup>11</sup> In addition, companion and unrelated legal assistance law was established with the passage of the *Mutual Legal Assistance in Criminal Matters Act*.<sup>12</sup> Throughout this period, work on a new International Drug Convention proceeded, which was premised on the concept of increased international cooperation.<sup>13</sup>

## INTERNATIONAL EFFORTS AND CONVENTIONS

**I**N 1980, THE COUNCIL of Europe Ministers issued Recommendation No. R(80)10, requiring that customer identification should be imposed on account or safe deposit box rentals.<sup>14</sup> In 1986, the European Ministers of Justice directed the European Committee on Crime Problems to develop a convention on freezing assets from drug crimes. In April 1986, the Organization of American States recommended that its members study and approve legislation to strengthen the ability of appropriate agencies to investigate and prosecute unlawful drug trafficking, including their ability to trace the origins of money.<sup>15</sup> Each of these developments presaged a new drug convention.

The major international convention on money laundering can be seen in the *1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*.<sup>16</sup> Article 2 of this Convention called upon the parties to promote cooperation. As Neil Boister indicates, parties agreed to a consensual mutual relaxation of state sovereignty.<sup>17</sup> This was the first Convention to include mutual legal assistance

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<sup>11</sup> S.C. 1988, c. 51.

<sup>12</sup> S.C. 1988, c. 37.

<sup>13</sup> Neil Boister, *Penal Aspects of the UN Drug Conventions* (The Hague: Kluwer Law International, 2001).

<sup>14</sup> W. Gilmore, ed., *International Efforts to Combat Money Laundering*, (Cambridge, 1992) at 169.

<sup>15</sup> *Inter-American Program of Action of Rio de Janeiro Against the Illicit use and Production of narcotic drugs and Psychotropic Substances and Traffic Therein*, April 1986, Chapter II, para. 2(i). See online: Inter-American Drug Abuse Control Commission <<http://www.cicad.oas.org/en/?CICAD%20-%20New.htm>>.

<sup>16</sup> CTS 1990/42, Canada ratified this Convention on November 11, 1990.

<sup>17</sup> Neil Boister, *supra* note 13 at 15.

provisions, and it specifically addressed the concerns that resulted from bank secrecy.<sup>18</sup> It is important to appreciate the impact of Article 5, paragraph 3, in this Convention. It provides:

In order to carry out the measures referred to in this article, each Party shall empower its courts or other competent authorities to order that bank, financial or commercial records be made available or be seized. A Party shall not decline to act under the provisions of this paragraph on the ground of bank secrecy.

The barrier created by bank secrecy provisions in many States was addressed specifically through this treaty obligation.

The work of the European Committee on Crime Problems preceded the new drug convention. It led to the 1990 Council of Europe *Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime*.<sup>19</sup> The bank secrecy concerns, set out in the 1988 Vienna Convention, were also included in the 1990 Council of Europe Convention.<sup>20</sup> The Convention also addressed the need for mutual legal assistance between parties.<sup>21</sup>

Looking beyond these two Conventions, further work at the Organization for Economic Co-operation and Development (OECD) and the United Nations resulted in other relevant Conventions. The first,<sup>22</sup> at least sequentially, was the OECD's *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*.<sup>23</sup> Thirty OECD member countries and five non-member countries adopted this Convention on November 21, 1997. Canada signed the Convention on December 17, 1997 and ratified it on December 17, 1998, with the result that the Convention came into force.<sup>24</sup> Articles 7 and 9 of the Convention

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<sup>18</sup> Article 4, para. 3 and Article 7.

<sup>19</sup> E.T.S. No. 141, online: Committee of Ministers-Council of Europe <<http://cm.coe.int/stat/E/Public/1980/80r10.htm>>.

<sup>20</sup> Article 4, paragraph 1.

<sup>21</sup> Chapter III, Articles 7 & 25.

<sup>22</sup> It is important to appreciate regional discussions, the work of organizations such as Transparency International, and similar developments, but space and time do not permit any detailed analysis of that effort.

<sup>23</sup> CTS 1999 no. 23. The Convention is accessible online: Organization for Economic Co-operation and Development <<http://www.oecd.org/oecd/pages/home/displaygeneral/0,3380,EN-document-31-nodirectorate-no-3-7198-31,00.html>>.

<sup>24</sup> Canada ratified the convention once *the Corruption of Foreign Public Officials Act*, S.C. 1998 c. 34 was enacted. The Canadian Department of Justice has published a Guide to this Act.

See online: <<http://canada.justice.gc.ca/en/dept/pub/cfpoa/guide5.html>>.

are relevant to this paper. Article 7 calls on parties to make bribery of foreign public officials a predicate offence for money laundering. Article 9 establishes a mutual legal assistance obligation. Essentially, this Convention carries on with the concept of mutual relaxation of state sovereignty. It is also relevant to note that Article 9, paragraph 3, requires parties not to refuse mutual legal assistance for criminal matters on the basis of bank secrecy.

Other international work to respond to crime was progressing simultaneously with the OECD Convention. Strategically, for the purpose of international cooperation against crime, the next plateau was reached with the *United Nations Convention against Transnational Organized Crime*, which some refer to as the *Palermo Convention* to reflect where it was finalized.<sup>25</sup> The most important feature of this Convention is that, for the first time, the United Nations approached the problem of all serious crimes, as opposed to the more restrictive consideration of only drug crimes.<sup>26</sup> In addition, the Convention included proceeds of crime, freezing, seizure, and confiscation concepts. It is interesting to note Article 7 and its treatment of measures to combat money laundering; in particular, subparagraph (1)(a) & (b) provide as follows:

1. Each State Party:

(a) Shall institute a comprehensive domestic regulatory and supervisory regime for banks and non-bank financial institutions and, where appropriate, other bodies particularly susceptible to money-laundering, within its competence, in order to deter and detect all forms of money-laundering, which regime shall emphasize requirements for customer identification, record-keeping and the reporting of suspicious transactions;

(b) Shall, without prejudice to articles 18 and 27 of this Convention, ensure that administrative, regulatory, law enforcement and other authorities dedicated to combating money-laundering (including, where appropriate under domestic law, judicial authorities) have the ability to cooperate and exchange information at the national and international levels within the conditions prescribed by its

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<sup>25</sup> There is no CTS number pending the coming into force of the actual Convention. The Convention is accessible online: <[http://www.undcp.org/pdf/crime/a\\_res\\_55/res5525e.pdf](http://www.undcp.org/pdf/crime/a_res_55/res5525e.pdf)>.

<sup>26</sup> Article 2, paragraph (b) defined this as follows: "serious crime" shall mean conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty.

domestic law and, to that end, shall consider the establishment of a financial intelligence unit to serve as a national centre for the collection, analysis and dissemination of information regarding potential money-laundering.

Subparagraph 2 of the same Article calls on parties to consider implementing feasible measures to detect and monitor the cross border movement of cash and monetary instruments. Finally, Article 18 sets out mutual legal assistance in criminal matter obligations on parties to the Convention. In particular, Article 18, paragraph 8, includes the now standard requirement that parties not refuse mutual legal assistance on the basis of bank secrecy. The Convention's approach to countering money laundering establishes the following criteria:

- Parties are to institute comprehensive domestic regulatory and supervisory regimes
  - For banks
  - For non-bank financial institutions, and where appropriate,
  - Other bodies particularly susceptible to money laundering
- The regime shall emphasize requirements
  - For customer identification
  - For record keeping
- The regime shall include suspicious transaction reporting, and
- Parties shall consider the establishment of a financial intelligence unit.

Recent events have focused international concern on the need to suppress the financing of terrorism. The *United Nations Convention for the Suppression of the Financing of Terrorism* is the foundation agreement on this particular issue.<sup>27</sup> Once again, this Convention carries on the recognition of the requirement to relax state sovereignty and create the offences set out in Article 2. Article 12, paragraph 2, sets out the now standard term that parties may not refuse mutual legal assistance on the grounds of bank secrecy. Article 18 of the Convention then sets out countermeasures that parties are obliged to institute. In particular,

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<sup>27</sup> CTS 2002 no.9. Canada signed the Convention on February 10, 2000 and ratified the Convention on February 19, 2002. The Convention may be accessed online: <<http://untreaty.un.org/English/Terrorism/Conv12.pdf>>.



Article 18, subparagraph 1(b) is relevant to this paper. That requirement provides as follows:

1. States Parties shall cooperate in the prevention of the offences set forth in article 2 by taking all practicable measures, *inter alia*, by adapting their domestic legislation, if necessary, to prevent and counter preparations in their respective territories for the commission of those offences within or outside their territories, including:

(a) (Not reproduced)

(b) Measures requiring financial institutions and other professions involved in financial transactions to utilize the most efficient measures available for the identification of their usual or occasional customers, as well as customers in whose interest accounts are opened, and to pay special attention to unusual or suspicious transactions and report transactions suspected of stemming from a criminal activity.

For this purpose, States Parties shall consider:

(i) Adopting regulations prohibiting the opening of accounts the holders or beneficiaries of which are unidentified or unidentifiable, and measures to ensure that such institutions verify the identity of the real owners of such transactions;

(ii) With respect to the identification of legal entities, requiring financial institutions, when necessary, to take measures to verify the legal existence and the structure of the customer by obtaining, either from a public register or from the customer or both, proof of incorporation, including information concerning the customer's name, legal form, address, directors and provisions regulating the power to bind the entity

(iii) Adopting regulations imposing on financial institutions the obligation to report promptly to the competent authorities all complex, unusual large transactions and unusual patterns of transactions, which have no apparent economic or obviously lawful purpose, without fear of assuming criminal or civil liability for breach of any restriction on disclosure of information if they report their suspicions in good faith;

(iv) Requiring financial institutions to maintain, for at least five years, all necessary records on transactions, both domestic and international

It is appropriate to note that the obligation to pay special attention to, and report suspicious transactions, should apply to financial institutions

and other professions. In addition, the Convention obliges state parties to create a regime that requires financial institutions to promptly report all complex, unusual, and large transactions and unusual patterns of transactions. Finally, Article 18, paragraphs 2 and 3, call on state parties to license and supervise all money transmission agencies, monitor the cross border movement of cash and negotiable instruments, and co-operate with other state parties in the exchange of accurate and verified information. The scope of the Convention is reflected in the fact that more than seventy state parties have already ratified or accepted the Convention. Obviously, the terrorist attacks in September 2001 have had a significant impact on this development, but the Convention does reflect that we live in a small world that is dependent upon the international movement of money.

It is also useful to consider the work that has developed surrounding a proposed *United Nations Convention against Corruption*.<sup>28</sup> This draft Convention contains Articles that reflect the call for states to address a common criminal problem through more relaxed state sovereignty approaches to large-scale political and financial corruption. The draft reflects the concern against bank secrecy in Article 53, paragraph 8. It proposes measures to combat money laundering of proceeds derived, directly or indirectly, from corruption offences. In particular, Article 14, paragraph I, including issues still being discussed as set out in square brackets, provides as follows:

1. Each State Party:

(a) Shall institute a comprehensive domestic regulatory and supervisory regime for banks and non-bank financial institutions [and for natural or legal persons engaged in professional or business activities, including non-profit organizations] [persons or legal entities that provide formal or informal services for the transmission of money or value] and, where appropriate, other bodies particularly susceptible to money-laundering, within its competence, in order to deter and detect [money-laundering mechanisms] all forms of money-laundering, which regime shall emphasize requirements for customer [or beneficial owner] identification, record-keeping and the reporting of suspicious [or unusual] transactions [and assessment of the legitimacy of sources]; (Footnotes excluded)

It is interesting to note that the paragraph builds upon a similar Article in the *Transnational Organized Crime Convention*, yet it

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<sup>28</sup> The most recent version of this (draft) Convention may be accessed online: <[http://www.odccp.org/pdf/crime/convention\\_corruption/session\\_5/3reve.pdf](http://www.odccp.org/pdf/crime/convention_corruption/session_5/3reve.pdf)>.

specifically suggests that the non-bank financial institutions may include natural or legal persons engaged in professional or business activities. Potentially, this would be a significant expansion to reflect the role professionals would play in suspicious transaction reporting. It appears that the final negotiating session for this draft Convention will conclude on March 20, 2003. It will be interesting to look at the final decision on Article 14, paragraph 1.<sup>29</sup>

Finally, prior to turning to international standards that have developed from various fora, two European Union Directives that affect the use of financial intermediaries in any anti-money laundering regime need to be considered. On June 10, 1991, the Council of the European Economic Community approved Directive 91/308/EEC "on the prevention of the use of the financial system for the purpose of money laundering."<sup>30</sup> The Directive refers to the Council's *Convention on Laundering, Tracing, Seizure and Confiscation of Proceeds of Crime*, recognizing the influence money laundering plays in the international financial community. Articles 5, 6, and 7 of the Directive are important since they required Council member states to enact laws to deal with customer identification, record keeping and retention, and transaction reporting. Subsequently, an expanded Directive 2001/97/EC was issued in 2001.<sup>31</sup> The updated Directive had an impact on legal counsel or notaries and others acting as financial intermediaries. Directive 2001/97/EC incorporated these professionals as follows:

**Article 2 a**

Member States shall ensure that the obligations laid down in this Directive are imposed on the following institutions:

1. credit institutions as defined in point A of Article 1;
2. financial institutions as defined in point B of Article 1; and on the following legal or natural persons acting in the exercise of their professional activities:
3. auditors, external accountants and tax advisors;

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<sup>29</sup> Article 14, paragraph 1 now states:

Each party shall: (a) Institute a comprehensive domestic regulatory and supervisory regime for banks and non-bank financial institutions, including natural or legal persons that provide formal or informal services for the transmission of money or value and, where appropriate, other bodies particularly susceptible to money-laundering, within its competence, in order to deter and detect all forms of money-laundering, which regime shall emphasize requirements for customer and, where appropriate, beneficial owner identification, record-keeping and the reporting of suspicious transactions;

<sup>30</sup> This Council Directive may be accessed online:

<[http://europa.eu.int/eurlex/en/consleg/pdf/1991/en\\_1991L0308\\_do\\_001.pdf](http://europa.eu.int/eurlex/en/consleg/pdf/1991/en_1991L0308_do_001.pdf)>

<sup>31</sup> The Directive may be accessed online: International Money Laundering Information Network <<http://www.imolin.org/EUdir01e.htm>>.

4. real estate agents;
5. notaries and other independent legal professionals, when they participate, whether:
  - i. by assisting in the planning or execution of transactions for their client concerning the
  - ii. buying and selling of real property or business entities;
  - iii. managing of client money, securities or other assets;
  - iv. opening or management of bank, savings or securities accounts;
  - v. organisation of contributions necessary for the creation, operation or management of companies;
  - vi. creation, operation or management of trusts, companies or similar structures;
- b) or by acting on behalf of and for their client in any financial or real estate transaction;
6. dealers in high-value goods, such as precious stones or metals, or works of art, auctioneers, whenever payment is made in cash, and in an amount of EUR 15000 or more;
7. casinos

The expansive scope of Directive 2001/97/EC illustrates that European member states must adopt laws that will be similar to the *PC(ML)TF Act*.

## **INTERNATIONAL STANDARDS:**

### **Banking**

The evolution of international standards, as opposed to conventions, takes on a chicken and egg analysis. Some could look at this issue from an anti-money laundering aspect, while others could consider the issue from a financial stability perspective. If we approach the issue based on chronology, we need to start with the concern created by bank secrecy and criminal investigations. It is appropriate to bear in mind the 1980 Council of Europe Ministers recommendation No. R.(80)10,<sup>32</sup> as touched upon earlier, and the 1970s United States' development of the *Bank Secrecy Act*. A world where bank secrecy and anonymous accounts coexist is not a world where money laundering investigations and the recognition that crime cannot pay can coexist.

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<sup>32</sup> *Supra* note 12.

In December 1988, the Bank of International Settlement's Basel Committee issued their Statement on *Prevention of criminal use of the Banking System*.<sup>33</sup> The Basel Committee, according to its descriptive document, was established at the Bank of International Settlements<sup>34</sup> by the central bank Governors of the Group of Ten countries at the end of 1974. This Committee meets regularly and formulates broad supervisory standards and guidelines. It recommends statements of best practice in the expectation that individual authorities will take steps to implement them through detailed arrangements - statutory or otherwise - which are best suited to their own national systems. The Basel Committee's first sojourn into the concern of criminals using the banking community is seen in their 1988 *Statement of Principles on Prevention of criminal use of the Banking System*. In this document, the Committee set out general obligations that should be imposed upon banks to know their customers and close accounts whenever improper use of the banking system was suspected.

This principle was specifically included in the *BCBS Compendium of Documents, Volume 1 Basic Supervisory Methods*. The Basel Committee established detailed "know your customer" methodologies, which it expects all banks to adopt. One of the central core principles, Principle 15, provides as follows:

**Principle 15:** Banking supervisors must determine that banks have adequate policies, practices and procedures in place, including strict "know-your-customer" rules, that promote high ethical and professional standards in the financial sector and prevent the bank being used, intentionally or unintentionally, by criminal elements.<sup>35</sup>

Essential criteria to enforce this Principle are also set out, including the following:

2. The supervisor determines that banks have documented and enforced policies for identification of customers and those acting on their behalf as part of their anti-money laundering program. There are clear rules on what records must be kept on customer identification and individual transactions and the retention period.

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<sup>33</sup> BIS publication No. 5, which may be accessed online: <<http://www.bis.org/publ/bcbssc137.pdf>>.

<sup>34</sup> See online: Bank for International Settlements <<http://www.bis.org/bcbs/aboutbcbs.htm>>.

<sup>35</sup> BCBS Compendium of Documents. This is available online: Bank for International Settlements <<http://www.bis.org/publ/bcbssc002.htm>>.

3. The supervisor determines that banks have formal procedures to recognize potentially suspicious transactions. These might include additional authorization for large cash (or similar) deposits or withdrawals and special procedures for unusual transactions.

The compendium of documents, and more specifically, Principle 15, refers to the work of the Financial Action Task Force's Recommendations. A more significant reference to the World Bank and the International Monetary Fund (IMF) is revealed in the executive summary to the Core Principles Methodology. Their support is described as follows:

17. Both the IMF and the World Bank will play an active role in the implementation process. In the context of its surveillance mandate, the IMF will encourage its member countries to comply with the Core Principles, and will work with them in assessing compliance on a case-by-case and priority basis. In the course of its regular operations, the World Bank will encourage its client countries to adopt the Core Principles and will also work with them to assess their supervisory framework against the Principles. Both the IMF and the World Bank will seek to have countries remedy identified weaknesses in their regulatory and supervisory regimes, and will provide technical assistance and training to address such weaknesses on a priority basis. To meet the increasing demands in the financial sector area, both institutions are increasing the number of staff with financial sector expertise.

The real impact of this collaboration is that the World Bank and the IMF have significant persuasive impact throughout the world. That impact raises the level of the international standard created by the Basel Committee to a significant degree.

The anti-money laundering concerns for the world's financial institutions did not end with the work of the Basel Committee and their Principles. Private banking has an equally important role to play in this effort. A group of the leading private bankers, in association with Transparency International, met in Wolfsberg Switzerland in October 2002, and issued a set of global anti-money laundering guidelines for international private banks. This is known as the *Wolfsberg AML Principles for Private Banking*.<sup>36</sup> There are nuances and slight differences

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<sup>36</sup> The *Wolfsberg Principles*, as revised, can be accessed online: The Wolfsberg Group

in the customer identification requirements in the *Wolfsberg Principles* and the Basel Committee's, yet they accomplish the same "know your customer" goal. If the "know your customer" principles, including their concept of due diligence, is fully implemented, private banking will have equally onerous anti-money laundering obligations. In addition, private banking will have a reporting obligation, as set out in *Wolfsberg Principle* 4.3, which provides as follows:

#### 4.3 Follow-up on unusual or suspicious activities

The private banker, management and/or the control function will carry out an analysis of the background of any unusual or suspicious activity. If there is no plausible explanation a decision will be made involving the control function:

To continue the business relationship with increased monitoring

To cancel the business relationship

To report the business relationship to the authorities.

The report to the authorities is made by the control function and senior management may need to be notified (e.g. Senior Compliance Officer, CEO, Chief Auditor, General Counsel). As required by local laws and regulations the assets may be blocked and transactions may be subject to approval by the control function.

## **The Financial Action Task Force (FATF)**

The FATF has become the recognised international forum on anti-money laundering issues. The genesis of the forum and the first year's efforts of the FATF are outlined in the organization's first Plenary Report. The United States, Japan, Germany, France, United Kingdom, Italy, Canada (the G7) and the Commission of the European Communities, together with Sweden, Netherlands, Belgium, Luxembourg, Switzerland, Austria, Spain, and Australia joined the FATF to accomplish the G7 heads of state instructions. In February 1990, the FATF issued its first Report on its activities.<sup>37</sup>

The Report identified the key stage for the detection of money laundering when "cash enters into a domestic financial system, either formally or informally, where it is sent abroad to be integrated into the financial systems of regulatory havens, and where it is repatriated in the

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<[http://www.wolfsberg-principles.com/wolfsberg\\_principles\\_1st\\_revision.html#Reporting](http://www.wolfsberg-principles.com/wolfsberg_principles_1st_revision.html#Reporting)>.

<sup>37</sup> FATF Plenary 1 Report, accessible online: Organisation for Economic Co-operation and Development <[http://www1.oecd.org/fatf/pdf/AR1990\\_en.pdf](http://www1.oecd.org/fatf/pdf/AR1990_en.pdf)>.

form of transfers of legitimate appearance.”<sup>38</sup> The Report concluded with *40 Recommendations*, which became the key international anti-money laundering focus over the next decade.<sup>39</sup>

The FATF is most notable for its continuation of their analysis of effective anti-money laundering requirements, as seen in the original *40 Recommendations*, and their mutual evaluation obligation imposed upon member states. In addition, the FATF conducts significant outreach efforts, most notably their *Non Cooperative Countries and Territories Initiative* (hereinafter referred to as the *NCCT Initiative*.)

In their 1991 Plenary report, the original membership (i.e. the United States, Japan, Germany, France, United Kingdom, Italy, Canada (the G7)) and the Commission of the European Communities, together with Sweden, Netherlands, Belgium, Luxembourg, Switzerland, Austria, Spain, and Australia was expanded to include Denmark, Finland, Greece, Ireland, New Zealand, Norway, Portugal, Turkey, Hong Kong and the Gulf Co-operation Council and, subsequently, Hong Kong, Singapore, Argentina, Brazil, and Mexico joined the FATF. The forum’s second Plenary Report identified non-traditional financial institutions or professions, including lawyers, for further study.<sup>40</sup> In the FATF Plenary III, this issue was further developed. For example, the FATF considered lawyers acting as intermediaries as follows:

If the customer is an attorney and there are doubts as to whether the attorney is acting on his own behalf, then the question could arise - given the attorney-client privilege - whether recommendation 13 applies. In order to answer this question, it should be acknowledged that persons being attorneys do not by definition always act as such, i.e. they do not necessarily provide typical attorney services. They can also act outside the scope of the traditional attorney-client relationship, e.g. when acting as intermediary for financial services. In fact, observance of new money laundering typology shows that in some cases attorneys have been used as an intermediary for financial services to obscure the identity and transactions of their clients. A bank or other financial institution should know the identity of its own customers, even if these are represented by

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<sup>38</sup> *Ibid.* at 9.

<sup>39</sup> The original 1990 *40 Recommendations* can be accessed online:

Organisation for Economic Co-operation and Development  
<[http://www1.oecd.org/fatf/pdf/40Rec-1990\\_en.pdf](http://www1.oecd.org/fatf/pdf/40Rec-1990_en.pdf)>.

<sup>40</sup> FATF Plenary 2 Report at 3, 9-10, accessible online:

Organisation for Economic Co-operation and Development  
<[http://www1.oecd.org/fatf/pdf/AR1991\\_en.pdf](http://www1.oecd.org/fatf/pdf/AR1991_en.pdf)>.



lawyers, in order to detect and prevent suspicious transactions as well as to enable it to comply swiftly to information or seizure requests by the competent authorities. Accordingly, recommendation 13 also applies to the situation where an attorney is acting as an intermediary for financial services.<sup>41</sup>

Another effective and persuasive aspect of the FATF and its *40 Recommendations* can be seen in its formal practice of peer reviews, conducted by experts nominated by other member states, of a member's adherence to and implementation of the *40 Recommendations*.<sup>42</sup> Finally, the FATF regularly reviews and updates its *40 Recommendations* to ensure that they address effective anti-money laundering requirements. That review had a direct impact upon Canada and its development of the *PC(ML)TF Act*.

The 1990 *40 Recommendations* were updated and replaced with the 1996 *40 Recommendations*. The revision of the *40 Recommendations* expanded the need for anti-money laundering diligence beyond banks. It imposed a mandatory suspicious transaction reporting requirement, while maintaining the FATF's counter measure procedures for non-compliant members and other states. The table sets out the 1990 and 1996 salient Recommendations on these issues.

<b>1990 Recommendations</b>	<b>1996 Recommendations</b>
<p><b>9.</b> Recommendations 12 to 29 of this paper should apply not only to banks, but also to non-bank financial institutions.</p>	<p><b>9.</b> The appropriate national authorities should consider applying Recommendations 10 to 21 and 23 to the conduct of financial activities as a commercial undertaking by businesses or professions which are not financial institutions, where such conduct is allowed or not prohibited. Financial activities include, but are not</p>

<sup>41</sup> FATF Plenary III Report at 13 at para. 66, 37 (Annex IV, on Recommendation 13), accessible online: <[http://www1.oecd.org/fatf/pdf/AR1992\\_en.pdf](http://www1.oecd.org/fatf/pdf/AR1992_en.pdf)>.

<sup>42</sup> Canada was the subject of two mutual evaluations. The first was in 1993, where a précis of the evaluation is set out in the Plenary report at 19, para. 48, which is accessible online: Organisation for Economic Co-operation and Development <[http://www1.oecd.org/fatf/pdf/AR1993\\_en.pdf](http://www1.oecd.org/fatf/pdf/AR1993_en.pdf)>. Canada's second mutual evaluation occurred in 1996. A précis of that evaluation is set out in FATF Plenary IX Report at 12-13, which is accessible online: Organisation for Economic Co-operation and Development <[http://www1.oecd.org/fatf/pdf/AR1998\\_en.pdf](http://www1.oecd.org/fatf/pdf/AR1998_en.pdf)>.

	<p>limited to, those listed in the attached annex. It is left to each country to decide whether special situations should be defined where the application of anti-money laundering measures is not necessary, for example, when a financial activity is carried out on an occasional or limited basis. (See Interpretative Note)</p>
<p><b>16.</b> If financial institutions suspect that funds stem from a criminal activity, they should be permitted or required to report promptly their suspicions to the competent authorities. Accordingly, there should be legal provisions to protect financial institutions and their employees from criminal or civil liability for breach of any restriction on disclosure of information imposed by contract or by any legislative, regulatory or administrative provision, if they report in good faith, in disclosing suspected criminal activity to the competent authorities, even if they did not know precisely what the underlying criminal activity was, and regardless of whether illegal activity actually occurred.</p>	<p><b>15.</b> If financial institutions suspect that funds stem from a criminal activity, they should be required to report promptly their suspicions to the competent authorities.</p> <p><b>16.</b> Financial institutions, their directors, officers and employees should be protected by legal provisions from criminal or civil liability for breach of any restriction on disclosure of information imposed by contract or by any legislative, regulatory or administrative provision, if they report their suspicions in good faith to the competent authorities, even if they did not know precisely what the underlying criminal activity was, and regardless of whether illegal activity actually occurred.</p>
<p><b>21.</b> Financial institutions should give special attention to business relations and transactions with persons, including companies and financial institutions, from countries which do not or insufficiently apply these Recommendations. Whenever these transactions have no apparent economic or visible lawful purpose, their background and purpose should, as far as possible, be</p>	<p><b>21.</b> Financial institutions should give special attention to business relations and transactions with persons, including companies and financial institutions, from countries which do not or insufficiently apply these Recommendations. Whenever these transactions have no apparent economic or visible lawful purpose, their background and purpose should, as far as possible, be</p>

examined, the findings established in writing, and be available to help supervisors, auditors and law enforcement agencies.	examined, the findings established in writing, and be available to help supervisors, auditors and law enforcement agencies.
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Note that the original Recommendation #16 specified that financial institutions that suspected they had funds from criminal activity “should be permitted or required” to report their suspicions. Recommendation #15, in the 1996 *40 Recommendations* deleted the more innocuous “be permitted” and required a mandatory reporting system.<sup>43</sup> Canada, in the FATF’s second mutual evaluation, received a negative finding in light of its reliance upon s. 462.47 of the *Criminal Code*.<sup>44</sup>

### **FATF Countermeasures**

The FATF and its *40 Recommendations* have a real impact upon states in light of Recommendation 21. Recommendation 21 calls upon states, including FATF member states, to apply countermeasures when countries do not sufficiently apply the FATF Recommendations. The Recommendation is addressed to financial institutions, and is directed against business relations and transactions from specified countries. The Recommendation purports to require financial institutions to target business relationships and transactions from non-compliant countries. The implication that this Recommendation has against international financial transactions is significant. The concept that financial institutions should carefully consider business relations and transactions from another state would have a significant financial implication in a world where financial markets are global and interdependent. This is not a meaningless authority in light of International Conventions and the Basel Committee or the *Wolfsberg Principles*. The reality is that individual states do not exist in a financial vacuum and that effective countermeasures have a real financial impact upon nations and their citizens.

To observe this reality, one merely has to consider briefly the Financial Action Task Force’s *NCCT Initiative*.<sup>45</sup> The NCCT process has

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<sup>43</sup> It must be recalled that section 462.47 of the *Criminal Code* only provided for voluntary reporting while the then existing *Proceeds of Crime (Money Laundering) Act* did not require any type of reporting to any body.

<sup>44</sup> *Supra*, note 10.

<sup>45</sup> Space and time prevent a detailed analysis of the impact of the *NCCT Initiative*. Concerns surrounding bank ownership and supervisions are important but less relevant to this paper. There have been three public reports issued by the FATF

blacklisted more than fifteen countries. The money laundering concerns that led to the *NCCT Initiative* focused on many criteria, but the most salient, for our purposes, are in the *NCCT Initiative*.<sup>46</sup> The twenty-five *NCCT* criteria include the following:

4. Existence of anonymous accounts or accounts in obviously fictitious names.
5. Lack of effective laws, regulations, agreements between supervisory authorities and financial institutions or self-regulatory agreements among financial institutions on identification by the financial institution of the client and beneficial owner of an account: (bulleted items not reproduced)
6. Lack of a legal or regulatory obligation for financial institutions or agreements between supervisory authorities and financial institutions or self-agreements among financial institutions to record and keep, for a reasonable and sufficient time (five years), documents connected with the identity of their clients, as well as records on national and international transactions.
10. Absence of an efficient mandatory system for reporting suspicious or unusual transactions to a competent authority, provided that such a system aims to detect and prosecute money laundering.
11. Lack of monitoring and criminal or administrative sanctions in respect to the obligation to report suspicious or unusual transactions.

In the second *NCCT* Report by the FATF, four countries (i.e. Bahamas, the Cayman Islands, Panama and Liechtenstein) out of fifteen listed countries were de-listed. The mere threat of a Recommendation 21 countermeasure directed against States appears to have had the desired effect. If one analyses the *NCCT* Report's outline on the de-listing of these four jurisdictions, you will note substantial legislative responses to identified deficiencies were the justification for a decision to de-list. This decision was taken in light of evidence of solid and irrevocable implementation of the law by each jurisdiction. Also noteworthy is that the mere enactment of laws is followed up with an FATF evaluation of the jurisdiction's implementation of their new laws. It is clear that this is not

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on their *NCCT* work. They are accessible online: Organization for Economic Co-operation and Development <[http://www1.oecd.org/fatf/NCCT\\_en.htm](http://www1.oecd.org/fatf/NCCT_en.htm)>.

<sup>46</sup> The *NCCT* criteria can be accessed online: Organization for Economic Co-operation and Development <[http://www1.oecd.org/fatf/pdf/NCCT\\_en.pdf](http://www1.oecd.org/fatf/pdf/NCCT_en.pdf)>.

a mere paper exercise. On the other hand, consider tiny Nauru. Nauru is described in the NCCT 1<sup>st</sup> Report as follows:

It lacks a basic set of anti-money laundering regulations, including the criminalization of money laundering, customer identification and a suspicious transaction reporting system. It has licensed approximately 400 offshore “banks”, which are prohibited from taking deposits from the public but are poorly supervised. The excessive secrecy provisions guard against the disclosure of the relevant information on those offshore banks and international companies.<sup>47</sup>

Nauru did not enact the required laws and was the subject of advisories by banking supervisors who acted in support of the NCCT effort.<sup>48</sup> Advisories have the potential impact of closing access for any financial transactions. Does this have an impact? In February 2003, the *National Post* reported that the telephone system in Nauru no longer operated. They speculated that the country's financial system was crippled because of NCCT advisories, to the extent that they could not pay their bills to operate their telecommunication system. This may be pure speculation, but it is clear that four hundred banks in a tiny spec of a country cannot operate without access to the international financial community.

The reality is that the international financial community applies effective anti-money laundering regimes rather than risk their reputation and access to the financial world. Anyone could run a net search on the FATF's *NCCT Initiative* and quickly observe the palliative or financial effect this initiative has on States as they try to comply with anti-money laundering concerns advanced by the FATF and regional-style FATF bodies.

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<sup>47</sup> Financial Action Task Force on Money Laundering – Review to Identify Non-Cooperative Countries or Territories: Increasing the Worldwide Effectiveness of Anti-Money Laundering Measures (22 June 2000) at 8. The report is accessible online: Organization for Economic Co-operation and Development <[http://www1.oecd.org/fatf/pdf/NCCT2000\\_en.pdf](http://www1.oecd.org/fatf/pdf/NCCT2000_en.pdf)>.

<sup>48</sup> For example, look at the United States advisory, where on December 20, 2002, the United States Treasury announced that it intended to bar U.S. financial institutions from opening or maintaining correspondent accounts with Nauru-based financial institutions. See Press Release, “U.S. Designates Ukraine, Nauru as Money Laundering Concerns” (20 December 2002). Online: <<http://www.usconsulate.org.hk/usinfo/terror/2002/122001.htm>>.

## Conclusion

In the last 33 years, the world has accepted that crime should not pay. States have targeted proceeds of crime. The banking community, domestically and at the international level, has developed principles and policies to at least hinder criminals as they attempt to move their cash through the financial system. States have imposed reporting obligations resulting from international commitments to a number of Conventions. The effort against money laundering has gone beyond traditional financial institutions. All of these factors should be considered as part of the context of the *Proceeds of Crime (Money laundering) and Terrorist Financing Act*. It may be appropriate to paraphrase and slightly modify Justice LaForest's observation in *Cotroni*; Modern communications and the financial system have shrunk the world and made McLuhan's global village a reality.