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INTERNATIONAL MONEY LAUNDERING: ENFORCEMENT CHALLENGES AND OPPORTUNITIES

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INTRODUCTION

Criminals have long taken advantage of the cover offered by operating in several different jurisdictions. All but the most incompetent criminal organization knows that investigation and prosecution are more difficult if multiple jurisdictions are involved. From the perspective of the criminal, it is of course even better if different legal systems, different cultures and languages can be added to the mix. Ideally, at least one jurisdiction with bank secrecy laws and other legal mechanisms to facilitate money laundering will be included.

Making life even easier for criminal organizations are the continuing trends toward globalization

and increased international trade in almost everything. The *North American Free Trade Agreement* is just one mechanism easing trade restrictions and expanding opportunities for international commerce. Financial services are already global and electronic, allowing transfers of money around the globe, literally in seconds. International communications, as well, are easier and less expensive than they have ever been. Criminals have quickly, more quickly than most law enforcement agencies, adopted new means of communicating and are taking advantage of facsimile transmissions, mobile encrypted telephones, and no doubt the Internet. Many criminal organizations have also been adept at using the full range of laundering vehicles, shifting from one to the other as legislation and law enforcement focuses on particular targets and laundering schemes.

National governments have responded in a variety of ways to the growth in organized crime and money laundering. In the last two decades the most promising line has been to enact and refine legislation to take the profit out of crime. It had long been evident that law enforcement operations against organized crime, even when successful, seldom yielded more than front line soldiers. Those who directed operations, and ultimately profited from the enterprise, were too well insulated to be prosecuted. The rationale behind the move to take the profit out of crime is that this would reduce the ability to finance further criminal operations or to undermine legitimate business by investing tainted assets. Moreover, some principals would be convicted and, presumably, incarcerated.

The paper concludes with some comments on the extent to which the promise of the theory has been realized. First, the American legislation in the area is briefly reviewed. The paper then provides a fuller description of the Canadian proceeds of crime legislation and the experience with the statute. The paper then considers the nature and extent of international cooperation in containing organized crime.

THE UNITED STATES

The United States has led the world in proceeds of crime legislation and enforcement action. The array of legal instruments and powers is equaled in no other country. A brief overview of the legislation regarding forfeiture is presented here.

In American law, the term "forfeiture" covers situations where the government takes property illegally used or acquired, without compensating the owner. Forfeiture, in the United States, can be achieved either through a civil procedure or through a criminal procedure. This provides a degree of flexibility and power to American prosecutors enjoyed by their counterparts in few other countries, and as we will see, greater powers than those conferred by Canadian legislation.

CIVIL AND CRIMINAL FORFEITURE

A civil forfeiture is achieved through an *in rem.* proceeding against the property itself and is independent of any criminal charges against the owner of the property. The *in rem.* proceeding depends on the legal fiction that the property is guilty of the offense of being used illegally.

There are many civil forfeiture laws in the United States. Among the most significant in the context of organized crime are the civil forfeiture provisions in the *Controlled Substances Act (CSA).* These provisions were initially limited to property directly involved in the drug trade - vehicles, equipment and raw materials. The *CSA*, however, did not include the power to confiscate the proceeds of trafficking.

This power was, however, provided in the same year, 1970, by two criminal forfeiture statutes: The *Racketeer Influenced and Corrupt Organizations Act (RICO)* and the *Controlled Substances Act, Continuing Criminal Enterprise Offense (CCE).* Also, in 1970, Congress enacted The

Currency and Foreign Transactions Reporting Act as Title II of the *Bank Secrecy Act*. This act imposes reporting and record keeping requirements upon various financial institutions handling monetary instruments of $10,000 or more in value. In addition to these statutes, the *Money Laundering Control Act (MLCA)* of 1986 provided both a criminal and a civil forfeiture provision. The *MLCA* has been strengthened in each election year since its enactment. The MCLA is as a result powerful legislation. It includes all forms of financial transactions and all types of monetary instruments, not just cash. Although the desire to control drug trafficking was the dominant rationale for the legislation it is not limited to drugs and drug dealers. Moreover, laundered money is, under this legislation, never clean. Thus, for example, the equity from the sale of a house whose purchase was facilitated by drug money may be forfeited.

These statutes (*CSA, RICO, CCE, BSA, MLCA*)provide the most significant weapons in the legal arsenal and there are more than two hundred other federal civil and criminal forfeiture statutes that can be called into play if warranted. Other statutes that are frequently used are those dealing with the transportation of gambling devices, illegal gambling businesses, motor vehicle thefts, sexual exploitation and other abuses of children, and the illegal exportation of war materials.

The range and power of these statutes provide an unprecedented ability to take the profit out of crime, to get at the proceeds. The statutes allow anything to be seized and forfeited if it was used to facilitate the commission of a range of crimes or if the asset is shown to have been acquired through the proceeds of crime.

Consider first the facilitation theory, most commonly used in drug cases. Under United States law there is a way to seize and forfeit virtually anything that is used to help or facilitate a drug deal. Thus conveyances (cars, boats, planes, etc.) used to transport drugs, or drug dealers, are commonly forfeited. Real property used to facilitate certain felonies can also be forfeited. The facilitation must be substantial in the case of real property. If it is, as for example with a drug dealer growing marijuana on a small portion of a larger farm, the entire property is subject to forfeiture. Similarly, money, negotiable instruments and securities used or intended to be used to facilitate a felony can be forfeited. Essentially, most assets can be forfeited either through a civil procedure or through a criminal procedure or both. Moreover, often a prosecutor can proceed civilly if the evidence will not sustain a criminal burden of proof.

Frequently, assets used to facilitate crime can be shown to have been purchased with the proceeds of previous crimes. Thus, when a drug dealer drives his luxury automobile to a drug buy, both the facilitation and the proceeds arguments can be advanced. The prosecution may be able to show, for example, that he has not reported sufficient income to have purchased the car through legitimate income. Prosecutors, of course, will advance as many grounds for forfeiture as the facts will allow. But in the typical civil forfeiture case the government does not need very much to win. The prosecutor has to show that the property was used in an illegal act or that it was acquired with the proceeds of an illegal transaction. In drug cases the government can show probable cause using hearsay evidence from police informants that would not be admissible in most other cases.

To keep the property, the owner or a party having an interest in the property must prove "innocent owner" status. That is, the owner must prove that he or she did not know about any illegality in the use or acquisition of the property. Moreover, hearsay evidence is insufficient; the owner "must prove [his or her] innocence by a preponderance of the evidence, using the rules of evidence that have stood up to the test of admissibility and reliability."

Recently, the courts, including the Supreme Court, have begun to show that they are troubled by the degree of latitude the government has had. Consider, for example, the following from the United States Supreme Court:

> We continue to be enormously troubled by the government's increasing and virtually unchecked use of the civil forfeiture statutes and the disregard for due process that is buried in these statutes. The district courts, in order to preserve some modicum of due process to criminal defendants (and civil forfeiture claimants) should be vigilant in approving seizures *ex parte* only upon a showing of the most extraordinary or exigent circumstances . . . until the criminal conduct underlying the claimed forfeiture can be established in the context of a proper criminal proceeding with its attendant constitutional protection to the accused. In addition, because of troublesome fifth amendment problems potentially generated by the government's use of the civil forfeiture statutes, district courts - absent some sort of extraordinary situation - should exercise their discretion to stay civil forfeiture statutes pending the completion of related criminal proceedings against the claimants. Through such courageous and sensitive application of their discretionary powers the district courts can then ensure that "due process" remains a reality and is not reduced to some encomium.

While the Supreme Court will require that more attention be paid to due process and restrain the zeal of prosecutors, the fact remains that the United States has the most impressive set of legal tools to take the profit out of crime. The United States may also have the greatest need for such measures. The Bureau of International Narcotics Matters of the United States Department of State has for example estimated that one hundred billion dollars of illegal income is laundered each year in the United States. This represents a third of the amount they estimate is laundered world wide.

CANADA

In 1990 a United States Senate report named Canada along with Switzerland, the Bahamas, Luxembourg, Hong Kong and Panama among the jurisdictions most used to launder drug money from the United States. Canada may deserve the distinction, but not for reasons of bank secrecy that characterize some other nations named. Canada shares a very long border with the United States and even before the *North American Free Trade Agreement* there was free trade in crime. Canada also has a large and efficient banking system with branches located around the world. The two nations also have the largest bilateral trade relationship in the world and the growing integration of the two economies provides increasing opportunities for legal and illegal transactions.

Canada has its own crime problems and its recognition that money laundering is an important issue has led to significant legislative and enforcement action. The development of a legislative response to organized crime and money laundering started with a recognition that deficiencies in the criminal law made it exceedingly difficult to get at the proceeds of crime. First, there was an almost exclusive focus on single crimes by individual offenders. Second, there were inadequate provisions for the confiscation of the proceeds of crime. Third, assets could not be frozen prior to conviction and therefore could be sold, transferred out of the jurisdiction or otherwise hidden before judgment could be rendered.

CANADIAN PROCEEDS OF CRIME LEGISLATION

Canadian Proceeds of Crime Legislation came into force on January 1, 1989. The legislation amended the *Criminal Code,* the *Narcotic Control Act*, the *Food and Drugs Act,* and the *Income Tax Act.* As a consequence of the legislation, criminal courts can order the pre trial restraint of suspected proceeds of crime, order the forfeiture of proceeds of certain criminal activities, and authorize the search for intangible property and realty. The legislation also created new "designated drug offences" and enterprise crime offences.

Designated drug offences

A designated drug offence is a contravention of specified provisions of the *Food and Drugs Act* and the *Narcotic Control Act*. Included are: trafficking in controlled drugs or narcotics; possession of narcotics for the purpose of trafficking; importation; exportation; cultivation of narcotics; possession of property obtained by trafficking in controlled drugs, restricted drugs or narcotics; and laundering the proceeds of trafficking in controlled drugs, restricted drugs, or narcotics. Included as well are the inchoate acts of conspiracy, attempts, accessories to, and counselling of the above offences.

Enterprise Crime Offences

The legislation also defines twentyfour provisions of the *Criminal Code* as "enterprise crime offences." The list includes most of the economically motivated crimes: bribery, frauds, breach of trust by public officers, corrupting morals, child pornography, keeping gaming or betting houses, bookmaking, keeping a common bawdy-house, procuring, murder, theft, robbery, extortion, forgery and uttering forged documents, secret commissions, arson, counterfeiting, laundering proceeds of crime and possession of the proceeds of an enterprise crime. As with designated drug offences, conspiracies, attempt to commit, accessory after the fact and counselling any enterprise crime, are also enterprise crime offences.

Proceeds of Crime

> " "proceeds of crime" means any property, benefit or advantage, within or outside Canada, obtained or derived directly or indirectly as a result of
>
> offence, or
>
> (b) and act or omission anywhere that, if it had occurred in Canada, would have constituted an enterprise crime offence or a designated drug offence."

Parliament clearly intended the definition of proceeds to be as broad as possible to allow the greatest possible scope to what could be considered a criminally acquired asset.

New Offences

The proceeds legislation added the following new offences to the *Criminal Code,* the *Food and Drugs Act,* and *the Narcotic Control Act*: possession of property obtained by trafficking in controlled drugs, laundering proceeds of trafficking in controlled drugs, possession of property obtained by trafficking in restricted drugs, laundering the proceeds of trafficking in restricted drugs, possession of property obtained by narcotics offences, and laundering the proceeds of narcotics offences.

In addition the offence of laundering the proceeds of crime was added to the *Criminal Code:*

> "462.31. (1) 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 those proceeds and knowing that all or 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 drug offence; or

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

(2) Every one who commits an offence under subsection (1)

(a) is guilty of an indictable offence and is liable to imprisonment for a term not exceeding ten years; or

(b) is guilty of an offence punishable on summary conviction."

The wording of this provision is very broad but the Crown must prove beyond a reasonable doubt that the accused intended to convert or conceal property that he/she knew to be the proceeds of an enterprise crime offence or a designated drug offence.

Special Search Warrants and Restraint Orders

Before the proceeds of crime legislation the courts would not allow the seizure of realty and intangibles (deposits in financial institutions). The new special search warrant must be sought by the Attorney General to a judge of a superior court of criminal jurisdiction. Such a warrant is sought when property need to be secured to ensure its availability should forfeiture be ordered. A restraint order may then be obtained on application to a superior court to prevent the dissipation, concealment, or removal of the real property or intangibles.

While special search warrants and restraint orders can be applied for *ex parte,* the court can require that notice be given to anyone who may have a valid interest in the property. Innocent third parties are further protected by the requirement that the Attorney General make an undertaking to indemnify any innocent party adversely affected by the special search warrant or restraint order.

Methods of Forfeiture

Forfeiture of the proceeds of crime can occur where there is a conviction for an enterprise crime or designated drug offence. If there is a conviction the court may make a forfeiture order if it is satisfied on a balance of probabilities that the assets are proceeds of crime. Consider, for example, *Regina v. Nayanchandra Shah.* Following a conviction on a charge of forgery of Pharmacare Claim forms and Pharmacare Prescription Invoices, the Crown prosecutor applied for forfeiture of the proceeds of crime. In brief, the Crown alleged that at least $635,000 was illegally obtained, that these funds were moved through 36 bank accounts in Canada and then transferred offshore, some to England, some to the Isle of Man and some to the Channel Islands; and that the illegal funds were co-mingled with legitimate funds, making it impossible to determine exactly what was legitimate and what was not. The defense responded by an application that, among other things, challenged the appropriateness of using civil standards of proof in criminal court.

In refusing the defense application Judge W. J. Kitchen addressed the standard of proof:

The objective of the lower standard of proof is to resolve the difficulty of proving matters of which only the criminal likely has knowledge. The Crown must prove beyond a reasonable doubt the fact of the crime and the quantum of proceeds. But proof of the identification of the proceeds of crime is a different matter. The disposition of the proceeds by the accused will have been a manipulation of the property when it was likely well beyond the control and observation of others. Such surreptitious activity is becoming easier with the increasing

> sophistication of commercial transactions and the capability to make computer and electronic dispositions of property on a national and international level.

Further, Judge Kitchen observes at page 23 that:

> The accused has a correlative burden - to prove on the balance of probabilities that the subject property is not the proceeds of crime. If such is not done, the facts are "presumed." Placing a burden on the accused to prove this furthers the objective of not putting a burden on the Crown which is virtually impossible to meet.

There will no doubt be further constitutional challenges to the use of a lesser burden of proof in criminal proceedings. Thus far Canadian courts have not had difficulty in accepting a lower standard as provided for by the proceeds of crime legislation. The Supreme Court of Canada has not yet considered a case on the issue.

Forfeiture may also be ordered if there is no conviction but the court is satisfied beyond a reasonable doubt that the property is the proceeds of crime.

The court can also impose a fine in an amount equal to the value of the property in lieu of forfeiture when an offender has been convicted of a designated drug offence or an enterprise crime offence but the property in question is unavailable. Should the fine not be paid there is a term of imprisonment specified for each level of fine, culminating in a term of between five and ten years where the amount of the fine exceeds one million dollars.

***In Rem.* Forfeiture**

Unlike the United States, Canada does not make use of *in rem.* forfeiture. In part, this stems from a philosophical aversion to mixing civil and criminal procedures. Perhaps more significant is the structural consideration that Canada has one *Criminal Code* that applies across the country and is federal. That is, the federal government has exclusive power to enact criminal legislation. The provinces have exclusive power over civil law, and these vary by province. The federal government therefore could not have included civil forfeiture procedures in the proceeds of crime legislation. There is nothing preventing the provinces from enacting civil forfeiture statutes, although none has done so. At least one province is exploring the question.

There are, however, limited circumstances under which a quasi *in rem.* procedure can be used. Under the proceeds of crime legislation all actions are commenced *in personam* but where the accused dies or absconds from the jurisdiction, the action can be continued against the property. The provision also deems a person to have absconded in circumstances where a warrant has been issued and reasonable attempts to execute it have been unsuccessful for six months.

Consider *R. v. Clymore.* Here the accused and his father brought approximately one million dollars in currency into Canada and were in the process of converting it to treasury bills when they were arrested for impersonation. They were using several false names in the conversion process. They were released on bail and they returned to the United States before money laundering proceedings commenced in Canada. The accused was subsequently arrested in the United States when he attempted to import a large quantity of marihuana from Mexico into the United States. He was incarcerated in the United States.

The Crown applied for forfeiture based on having established, beyond a reasonable doubt, that the property was proceeds of crime. The court held that, while the Crown had to prove beyond a reasonable doubt that the money was the proceeds of crime, there is no requirement to prove that

the seized assets were the proceeds of any specific illegal act. Moreover, the court held that proof of abscondment need be established on the balance of probabilities. Although the fact that the accused was incarcerated in the United States was known, the court held that he absconded and there was no need to bring the accused before the court through extradition proceedings.

Inference from Unexplained Increase in Net Worth

The proceeds of crime legislation provides that, for the purposes of forfeiture, the court may infer that property was obtained or derived from the commission of an enterprise crime or designated drug offence where there is evidence that:

> (i) the values of all of the property of the offender exceeds the value of his property before the commission of the offence, and
>
> (ii) the court is satisfied that the income from the offender's sources unrelated to enterprise crime offences or designated drug offences committed by that person cannot reasonably account for such an increase in value.

Disclosure Provisions

The proceeds legislation contains provisions to protect from criminal and civil liability any person who provides the authorities with information that certain property is the proceeds of crime or that any person has committed, or is about to commit, an enterprise crime or a designated drug offence. Note that there is no duty to make such disclosures; there is protection should a person make a disclosure. The protection is particularly important to employees of financial institutions who have a duty of confidentiality to their customers.

The proceeds amendments also allow a limited exception to the *Income Tax Act's* stipulation that information obtained under the authority of the Act can only be used for the administration and enforcement of the Act. The proceeds legislation contains a provision that permits the Attorney General to apply for the disclosure of books, records, writings, returns, or other documents held on behalf of the Minister of National Revenue for income tax purposes. The provision is limited to designated drug offences.

Use and Effectiveness

It is too early to make firm judgments about the Canadian proceeds of crime act. Nonetheless, there has been sufficient experience with it to arrive at some interim conclusions.

Clearly the proceeds legislation can be a powerful tool in taking the profits out of crime. Since 1989 more than 150 million dollars of assets has been seized and more than 30 million doallars of assets have been forfeited.

As a result of the proceeds legislation some significant criminal enterprises have a greatly reduced ability to finance further criminal operation and some have been put out of business altogether. Nonetheless, the gains that have been made are smaller than those that were expected C hardly a surprising result with any legislative scheme. There are several reasons for this. First, the investigative and prosecutorial skills required to handle effectively complex money laundering cases takes time to develop. Second, there has been a dampening effect on investigation and prosecutions caused by the requirement that the Attorney General of Canada or of a province enter into an undertaking to indemnify any innocent party adversely affected by a special search warrant or restraint order. Immediately following the proclamation of the legislation all Attorney Generals (federal and provincial) were exceedingly cautious. There has

been some movement and the Attorney General of Canada and the Attorney General of British Columbia have been more willing to make the necessary undertakings. Nonetheless, the requirement has reduced the number of prosecutions that one would have expected. Moreover, one suspects that there is a more significant dampening effect when suspicions center on large corporations or other going concerns where a mistake could leave the government liable for significant damages. This has had the unfortunate effect of shielding some types of criminal organization that inspired the legislation in the first place. The vast majority of prosecutions under the legislation are for drug offences; enterprise crimes of other types have not received the attention they deserve.

INTERNATIONAL MONEY LAUNDERING

Several recent trends, taken together, have greatly increased the scope of international crime. Besides the international drug trade, these include the continued growth in world travel and immigration, the growth in world trade in goods and services, the communications revolution, and the relaxation of border controls in many countries. Whereas only a few years ago international crimes were novel, they are now commonplace.

In Canada, a recent study of police cases involving money laundering found that 80% of them had an international component. The percentage of cases with an international element may be higher in Canada than elsewhere because of Canada's proximity to the United States, its openness, and the fact that it has a very efficient and international banking system. Canada may not, however, be that unusual. In 1991, 80% of the serious securities fraud investigated by the London, England, police had some cross-border aspects. The estimates in the United States are smaller;in 1984, a Presidential Commission report speculated that 10 to 15% of the drug money moved into the international arena. Whatever the actual percentage, clearly crime, like much else, is increasingly international.

Money, of course, has long been international and fewer and fewer countries attempt currency controls. Some, like the United States, Australia and Italy, require the reporting of currency movements over a threshold amount. With or without controls, money moves. The least sophisticated method is bulk smuggling of cash. Given the volumes of legitimate goods and the legitimate movement of millions of people every day, smuggling of cash is not as risky an endeavor as one would suppose. Money is also moved internationally by the various money transfer mechanisms of financial institutions, via the securities markets, and through the purchase of assets elsewhere. Add to these the use of courier services, the post, currency exchanges and underground banking. There is no shortage of methods and the volume of legitimate international financial transactions makes it difficult to distinguish between legitimate finance and proceeds of crime.

There is no methodologically clear procedure for estimating the size of proceeds of crime but it is clearly very high and growing. Fortunately there is no particularly compelling reason to spend much time on estimates. Clearly the proceeds of crime have reached unacceptable levels and action must be taken to contain criminal profits. The sums involved finance, domestically and internationally, extensive criminal operations in drugs, arms, exploitation of women and children, manipulation of markets, infiltration of business, commercial frauds, corruption of officials and politicians and destabilization of nations.

We list a variety of crimes along with drug crimes to make several points. First, the proceeds of crime legislation in the United States, Canada and many other countries are not restricted to drug crimes, although a perusal of the cases considered by the courts shows a dominance of drug offences. Most government resources devoted to organized crime and the proceeds of crime more generally are focussed on drugs. In the United States, and to a lesser extent in Canada, this

focus has been maintained for several decades. Billions of dollars are spent each year on drug law enforcement and yet the drug problem has not abated. Indeed, many observers, including many in law enforcement, believe that the drug problem has become worse not better. One paradoxical result of our drug policies has been that the profits to be made are so large that the deterrent effect of the criminal law is swamped. If some are convicted, and if profits from a few operations are forfeited, there is simply more room for other dealers. Without being too cynical, it is possible to view our drug policies as providing an incentive to organize criminally and then a continuing subsidy to maintain the criminal organization. It is not the purpose of this paper to engage the debate on drug prohibition and alternatives to prohibition, except to note that it is time for a reappraisal.

A reappraisal may be particularly important considering the fact that organizations that get their start through drugs and drug profits do not restrict their activities to drugs. Drugs may provide the bulk of the initial funds but, through money laundering, many become involved in other crimes, either through investing the proceeds of crime in legitimate markets or to finance additional criminal operations. There is compelling evidence that the traditional organized crime groups are deeply involved in large-scale commercial fraud. For example, organized crime was found to have been involved in 35% of more than 1,000 cases referred to the Commonwealth Commercial Crime Unit since 1981. The involvement of organized crime was suspected in a further 25% of cases.

Nearly all these cases and indeed, most big cases involving both economic and drug crimes, have international components. Sometimes international connections are necessary to secure the supply of illicit goods, drugs and arms, for example. In other cases, illicit or counterfeit goods or services are sold offshore, for example, supplying fake pharmaceuticals or customers for offshore centers for the exploitation of women and children. And, in most large cases, offshore laundering facilities are used, frequently involving tax-haven countries with bank secrecy laws and efficient money transfer facilities. Most of these countries have regulations that allow for the easy establishment of shell companies and the use of nominees. Many allow bearer shares.

The use of multiple jurisdictions greatly exacerbates problems of investigation and prosecution. But, in most jurisdictions, serious problems of investigation begin long before money is moved offshore. Many police forces are poorly equipped to investigate sophisticated criminal operations. Their training, funding and rewards are tied to operations against violent crime, street-level drug dealing, and the ubiquitous property offenses. With some notable exceptions they do not have the resources to either employ, or buy, the forensic accounting, financial analysis, computer skills, and ongoing legal advice to unravel sophisticated criminal networks. The result is that if the operation hasn't been detected, and a successful counter strike made before the proceeds of crime are moved around, even within the domestic sphere, there will be little chance of a successful prosecution resulting in convictions, much less of forfeiture of proceeds. This is not to disparage what police forces can do. Many significant cases detected by the police, through developing good intelligence or though following leads and exploiting lucky breaks, have exposed criminal operations that had successfully survived repeated audits by professional auditors. Sophisticated criminal operations are frequently run by practitioners who are themselves very skilled, or who hire skilled help.

Once the proceeds of crime are successfully deposited in the financial system many laundering operators take the precaution of moving money, not just offshore, but through more than one tax haven and through a maze of shell companies and respectable nominees. Investigators run into obstacles that are nearly impossible to penetrate, even if they get co-operation from their opposite numbers in the jurisdictions in question. Fortunately, not all laundering operations go to such lengths. The more steps in the operation, the more expensive it is and the more

opportunities criminal colleagues have to take a portion for themselves.

Although the most sophisticated operations may effectively be immune from prosecution, there is room for optimism. Laws have been strengthened and several countries have had notable success in convicting those higher up in criminal networks. The United States and Italy are the leading examples. Much of their success is due to the resolve and dedication that an epidemic of crime has created. Success rates against major crime figures have been increased by appropriate resourcing of investigations and prosecutions and by allowing the specialization necessary to carry out the full range of investigations, and evidence gathering, called for by proceeds of crime legislation.

Successful operations against criminal networks require specialization by both the police and the prosecutor's office. Moreover, they need to work together from the outset so that investigators can get continuing legal advice regarding evidence. Further, usually parallel files should be created from the start: one aimed at obtaining criminal convictions on the specific criminal offenses; another at the proceeds, which, depending on the particular legislation, may be handled either criminally or civilly. Unfortunately, very few police and prosecutors proceed this way. It is not just a question of resources, although there is no denying that resource levels are frequently the determining factor in decisions to pursue or abandon cases. Tradition, and the endemic tensions between segments of the criminal justice system frequently create other difficulties.

In many jurisdictions, the police assigned to work drug money laundering cases are those officers who have handled drug cases on the street. There is no question that such experience is valuable but unless they can work effectively with forensic accountants, lawyers, computer experts, and other specialists there is little chance that effective forfeiture cases will proceed. Police forces and prosecutors frequently complain that the legislation is too cumbersome and unworkable. Perhaps, but some police forces and prosecution offices are making it work despite the difficulties. Too often police investigators do not want what they call "paper cases." They have, as a result, to be content with small operations that net a few street dealers and low-level suppliers, but do not attack the proceeds and do not make use of the more powerful features of proceeds of crime legislation.

The prosecution also needs specialists to handle forfeiture and complex money laundering cases. In cases where forfeiture of the proceeds is possible, prosecution specialists should be involved from the outset of the investigation. Some jurisdictions will have more options than others but success comes to those who integrate forfeiture considerations early and think through the issues carefully. Practical questions of exactly what is to be seized and when cannot be neglected and should not conflict with other aspects of the game plan. Similarly others working on the case should be alive to developing evidence in support of seizing, freezing and eventual forfeiture.

There is no question that proceeds of crime cases can be complex and difficult to prepare. In jurisdictions that do not have procedures for civil forfeiture a conviction must be obtained for a predicate offence prior to triggering a proceeds case. The criminal profits must have been traced and frozen or at least found. And all legal and logistical hurdles for a seizure and forfeiture must have been cleared. When investigations are well handled and the cases are properly presented, the courts have not had great difficulty with the various proceeds of crime statutes. This has been the case in the United States, Australia, Italy and Canada.

INTERNATIONAL CO-OPERATION

The growth in international crime has, fortunately, been followed by an increase in international co-operation. Many new multilateral and bilateral arrangements have been negotiated in the last decade and more are in the process. The list includes: The United Nations Convention Against

Illicit Traffic in Narcotic Drugs and Psychotropic Substances, the Financial Action Task Force, the Basle Committee on Banking Regulations and Supervisory Practices, the Council or Europe Convention on Laundering, Search, Seizure and Confiscation of Proceeds of Crime, the European Community Council Directive on prevention of the use of the financial system for the purpose of money laundering, the Organization of American States Model Regulations and Draft Mutual Legal Assistance Treaty. In addition, Interpol has become a significant player in providing model legislation to facilitate the obtaining of evidence for forfeiture proceedings. Interpol continues to facilitate co-operation in investigations and in tracing and arresting international offenders.

The Commonwealth has also been active. Commonwealth Heads of Government at their 1993 meeting supported enhanced international co-operation to combat money laundering. Subsequently, law Ministers of the Commonwealth stressed their desire to have the issue addressed as a matter of urgency. They resolved, individually and collectively:

> ... to put in place comprehensive provisions criminalizing money laundering in respect of the proceeds of all serious crimes, facilitating the disclosure by financial institutions of information giving rise to suspicion of money-laundering activities, enabling confiscation of the proceeds of crime, making money-laundering extraditable, and promoting international co-operation in the investigation and prosecution of money-laundering and in confiscation proceedings.

The growing consensus regarding the importance of combating organized crime and money laundering and the need to improve international co-operation, culminated at The World Ministerial Conference on Organized Transnational Crime held in Naples, Italy in November 1994. The World Ministerial Conference brought together representatives from 113 countries together with representatives of the appropriate international organizations.

The political declaration adopted by the conference proposes that greater national and international priority be given to organized crime; that international cooperation be improved; that technical assistance be enhanced and made more effective, and that the highest priority be accorded the implementation of the political declaration and the Global Action Plan.

The Global Action Plan presents a broad range of measures to combat organized crime including measures to improve:

- national legislation;
- international cooperation at the investigative, prosecutorial and judicial levels;
- guidelines for international cooperation at the regional and international levels; and
- prevention and control of money-laundering and control of the proceeds of crime.

The Naples conference was attended by Ministers and officials at the highest level and the unanimous agreement on the Political Declaration and the Global Action Plan represents a level of resolve seldom seen in the international legal area. While there is no assurance that nations will live up to the commitments made in Naples, the conference did include agreement that implementation would be monitored and assisted through the United Nations Crime and Criminal Justice Commission.

MUTUAL LEGAL ASSISTANCE

The recent conventions, the Naples conference and other international agreements signal a growing consensus that money laundering must be contained through international action. Without effective co-operation criminal operations are much more likely to evade law enforcement and only in only the rarest of circumstances will forfeiture of profit be possible. Even with international co-operation forfeiture is an unlikely prospect.

When jurisdictional considerations enter the picture complexities multiply for investigators and prosecutors. Consider, for example, a drug-trafficking operation conceived of by citizens of the United States and Canada. Add financing from Hong Kong. We then have our American and Canadian operators direct associates in supplying countries and couriers of various nationalities to transport the drugs to one or more additional countries. Add to this the distribution and money laundering operations, which will almost certainly involve additional jurisdictions. If our organized crime group is at all skillful, associates at each stage of the operation will know just enough to do their part, but not enough to betray other parts of the operation.

Leaving aside for the moment questions of cost, and assuming a solid basis for suspecting a particular group, investigators are going to face problems of co-operation with police and regulatory bodies, and bank secrecy laws. They must cope with delays, language barriers, and perhaps corrupt police or other officials. If they manage to overcome these difficulties and collect evidence they may face even more serious problems. In most common-law jurisdictions, for example, only evidence that can be tested through cross examination before the court is admissible. Many expensive, and time consuming, investigations have foundered on this offshore rock.

There has been progress, however. Informal co-operation between police forces and regulatory bodies continues and is being strengthened. This kind of co-operation depends, however, on personal contacts, which can be effective, but are frequently short-term due to personnel changes. As invaluable as the informal arrangements are, they can also lead to procedures being short-circuited, resulting in, for example, evidence being collected that is inadmissible. Beyond informal co-operation, letters rogatory and commission evidence provide modest and slow assistance in many jurisdictions.

Given the growth in international crime and the many difficulties of international investigations, many bilateral and multilateral mutual legal assistance treaties have been negotiated and ratified in recent years. The United Nations has developed model treaties that can be used by Member States in negotiating such arrangements. The Model Treaty on Mutual Assistance in Criminal Matters contains provisions that deal with, among other things: the scope of application; the designation of competent authorities, the contents of requests; refusal of assistance; the protection of confidentiality; service of documents; obtaining of evidence; availability of persons in and out of custody to give evidence; safe conduct; search and seizure; certification and authentication; and costs. Treaties based on this model will contribute to improvements in international investigations.

For example, Canada has eight bilateral treaties in force, two more are awaiting ratification and ten are being negotiated. In addition, Canada has ratified the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and nearly 100 countries are party to the convention in force. The convention includes provisions related to mutual legal assistance. Canada has also contributed to the development of the Organization of American States Convention on Mutual Legal Assistance. With respect to the proceeds of crime, the Canadian policy allows for execution of orders related to the proceeds of crime. The treaty with the United States includes the provision that:

1. The Central Authority of either Party shall notify the Central authority of the other party of proceeds of crime believed to be located in the territory of the other party.

2. The Parties shall assist each other to the extent permitted by their respective laws in proceedings related to the forfeiture of the proceeds of crime, restitution to the victims of crime, and the collection of fines imposed as a sentence in a criminal prosecution.

Consequently, the proceeds of crime can be pursued no matter whether a conviction was obtained in Canada or in the United States.

Under the international agreements now in place, States can make the following kinds of request in proceeds cases:

1. request for investigative assistance in locating and identifying suspects and forfeitable assets;

2. requests for assistance to conduct discovery and evidence gathering regarding assets located abroad;

3. requests for assets to be returned for use as evidence;

4. request for seizure of assets, particularly bank accounts;

5. requests for repatriation of assets.

Given the nature and extent of international organized crime and international money laundering, the number of requests for assistance can easily begin to set limits on the assistance actually received. This will particularly be the case for a country like Canada, with a population one tenth that of the United States. Already the number of requests for assistance coming from the United States to some police forces is beginning to strain resources and soon more intense negotiations will be necessary to decide which cases receive scarce resources.

Mutual Legal Assistance Treaties can also be negotiated to deal with special difficulties. For example, several recent Canadian cases have involved Canadian authorities taking commission evidence in civil-law countries and having to work with the civil-law procedure for taking evidence. This can have the unfortunate consequence that the evidence is then inadmissible in a common-law jurisdiction.

It is possible, however, to fashion an agreement to overcome this serious obstacle. The Mutual Legal Assistance Treaty between Canada and the Netherlands, which came into force on May 1, 1992, provides that:

Whether or not the testimony of a person is requested to be taken under oath or affirmation:

a. the requesting State may specify any particular questions to be put to that person;

b. the requested State may permit the presence of the accused, counsel for the accused and any competent authority of the requesting State, as specified in the request, at the execution of the request;

c. the competent authority of the requested State shall permit questions to be put to the person

> called to testify by any persons allowed to be present at the execution of the request.

It is worth emphasizing the importance of formal agreements between states. From the perspective of operating police and prosecutors, formal arrangements are frequently seen as slow, bureaucratic, time consuming and frustrating. They can be. And informal arrangements between investigators across borders can be effective and satisfying. They can also lead to mistakes and to expensive and fruitless investigations. Informal arrangements too frequently result in cases that cannot be concluded. The result is that authorities responsible for assigning resources increasingly see international cases as adventures and a waste of scarce resources. This is precisely the opposite reaction to that required to deal with the increasing internationalization of criminal enterprises. Mutual Legal Assistance Treaties should be seen not as substitutes for informal co-operative arrangements but as means of solving difficult issues when and if they arise.

CONCLUSION

It has long been a principle of the criminal law, and the fond hope of the citizen, that no one should profit from illegal acts. Nonetheless, the criminal law has, until recently, been surprisingly ineffective at taking the profit out of crime. This has partly been due to the traditional criminal law focus on individual acts of individual offenders. The criminal law and the criminal justice apparatus were simply not organized to look effectively at organizations and ongoing criminal operations. Even when the justice system managed a sustained examination of a criminal organization, it was most often the case that the foot soldiers suffered; the criminal generals were too far from the scene. So, too, were the profits derived from the criminal operation. The criminal organization's ability to finance new ventures and replace the captured associates was hardly impaired.

Over the past twenty five years in the United States, and much more recently in most other countries, the balance has shifted. The movement to take the profit out of crime effectively arrived with the passage in 1970 in the United States of the Controlled Substances Act, the Continuing Criminal Enterprise Act, the Currency and Foreign Transactions Reporting Act and the Racketeer Influenced and Corrupt Organizations Act. As we have seen, the United States has since added the Money Laundering Control Act of 1986 to this legal line up.

Taken together, these statutes represent a radical attempt to refocus the criminal law on organizations, on criminal enterprises, and to move away from the criminal justice focus on individuals. They do not, however, represent a complete break with tradition. Prosecutors must, in most cases at least, still prove predicate criminal acts and the defendant's involvement in them. Given the predicate acts, the statutes (RICO and CCE, for example) then criminalize and add significant penalties for organized, enterprise crime. Moreover, given the clear legislative intent, the courts have given an expansive reading to terms like "enterprise." In *United States v. Turkette,* the court held that "enterprise":

> includes any union or group of individuals associated in fact. On its face, the definition appears to include both legitimate and illegitimate enterprises within its scope; it no more excludes the criminal enterprise than it does legitimate ones.

The inclusion of strong civil and criminal forfeiture provisions in the statutes stems from the same theoretical assumptions that led to the focus on organization. The assumption is that criminal enterprises exist to make money and to gain power. If economics and power are the incentives then efforts to deter or dissuade should focus on economic loss, hence forfeiture.

This view of the appropriate development and application of the criminal law to organized crime has led not only to significant American reform, but also to similar, if less broad, changes in other countries. This paper has focused on American and Canadian law, but the American influence has extended around the world. Indeed, the American influence was effectively institutionalized internationally in the 1988 United Nations Convention Against Illicit traffic in Narcotic Drugs and Psychotropic Substances. The United States had a dominant role in drafting this convention. The convention requires that signatories criminalize money laundering and make it an extraditable offense. The convention also requires that signatories facilitate the identification, tracing, seizure and forfeiture of the proceeds of narcotics trafficking and money laundering. Among nations ratifying the convention, Italy and Australia appears to have gone further than most in emulating American practice.

Canada has also ratified the convention and has complied with the convention's provisions.

Canada was also directly influenced by the American experience with RICO and related statutes.

The Canadian Proceeds of Crime legislation, described in this paper, subscribes to the theory that containing organized and economic crime requires that the profit be taken out of criminal operations. The Canadian version of proceeds of crime legislation does not provide the sweeping provisions that some American statutes do, particularly in terms of civil forfeiture. It is nonetheless, a powerful legislative package. Many criminal operations have been curtailed and significant profit has been removed from criminal use. Canadian police and prosecutors are becoming more familiar with the legislation and they are gaining more experience in carrying out the frequently complex investigations required in money laundering cases. Also, Canadian Attorneys General are becoming less reluctant to make the undertakings required by the Canadian legislation to indemnify innocent parties.

The United States, Canada and many other countries now have more powerful legal tools to address organized crime. In some countries, such as the United States, these tools have been vigorously used for over two decades, primarily against the drug trade. Since the primary motivations for the development of the new legal tools was the desire to curtail the drug trade and since they have now been extensively used, is it now fair to judge their utility?

Perhaps, but it is a difficult question. At one level it is easy to give a negative response. The drug trade has not abated; it seems instead to grow, partly in response to law enforcement ensuring high prices for the illegal commodities and periodically taking competitors out of the game by incarcerating them or seizing and forfeiting their capital. Other criminal entrepreneurs are keen to take over the market. The enormous profits generated by the drug trade can counter the deterrent effect of even the most severe punishments.

Another set of factors also masks the effectiveness of new legal responses. The internationalization of crime has occurred in response to the same trends that are making nearly every thing more international: increased trade, increased movement of people, the free flow of capital and the globalization of financial services, the revolution in communications. Also as particular governments have enacted new laws making, for example, money laundering a criminal offence, criminal organizations have diversified their money washing apparatus and made use of countries with less stringent requirements and laws of their own that protect bank secrecy and allow shell companies, bearer bonds and other devices designed to facilitate money laundering. The need for international co-operation has thereby grown and, as the paper illustrates, there has been an explosive growth in international conventions and in multilateral and bilateral arrangements.

These arrangements are beginning to improve international co-operation and more international

cases are being investigated. All too frequently, however, the tendency in many countries is to avoid investing resources in international cases unless there is significant national self-interest and a set of circumstances that produce the following elusive combination: good intelligence, likely involving an inside informant; co-operation from all the relevant authorities; the right personal contacts; the appropriate Mutual Legal Assistance Treaty; extradition agreements; appropriate budgets; and management willing to authorize international investigations and travel.

Given all this it is not surprising to find that so few international cases are pursued. Moreover, without sustained and meaningful international pursuit, we should not be surprised to find criminal enterprises becoming increasingly international. If the growth in international crime is to be contained, more cases must be investigated and prosecuted, even if the odds are long. This is fundamental to preserving trust in the international financial and economic structures.

It is premature to make definitive judgments regarding the new legal structures developed to contain organized crime. They need to be refined and, in particular, effective international mechanisms must be developed to ensure that the camouflage provided by jurisdictional complexities no longer so effectively hides international criminals.

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TARIFA DE HABILITAÇÃO

	R$	Vigência
Tarifa de habilitação	51,36	11/02/98

ASSINATURA BÁSICA

TOPO

	R$	Vigência
Residencial	13,82	
Não residencial	20,73	19/05/97
Tronco	27,64	

LIGAÇÕES LOCAIS

TOPO

	R$	Vigência
Pulso (excedente à franquia de 90 pulsos)	0,08	04/04/97

TARIFAÇÃO DAS LIGAÇÕES LOCAIS
Dias Úteis (das 6:00 às 24:00 horas); Sábados (das 6:00 às 14:00 horas)

- 1 pulso: quando a chamada for completada
- 1 pulso: entre 0 e 4 minutos (aleatório)
- 1 pulso: a cada 4 minutos excedentes

Segunda a Sábado: (das 00:00 às 6:00 horas); Sábado: (das 14:00 às 24 horas); Domingos e Feriados Nacionais: (o dia todo)

- 1 pulso por chamada, independente do tempo de conversação

LIGAÇÕES INTERURBANAS NACIONAIS

TOPO

Degraus - Km (Distância Geodésica)	Tarifa por minuto	Vigência

DC - Áreas Vizinhas	0,03	
D1 - Até 50	0,07	
D2 - Acima de 50 até 100	0,12	19/05/97
D3 - Acima de 100 até 300	0,18	
D4 - Acima de 300	0,24	

OBSERVAÇÃO:

1. Tarifa referente ao horário normal. Nos demais horários a tarifa sofre acréscimo ou redução, conforme indicado na linha "VARIAÇÃO", na tabela abaixo.

TABELA DE HORÁRIOS PARA TARIFAÇÃO INTERURBANA

(Vigência 19/05/97)

	Tarifa Diferenciada	**Tarifa Normal**	**Tarifa Reduzida**	**Tarifa Super Reduzida**
Dias Úteis	09:00 às 12:00 14:00 às 18:00	07:00 às 09:00 12:00 às 14:00 18:00 às 21:00	06:00 às 07:00 21:00 às 24:00	00:00 às 06:00
Sábados	-	07:00 às 14:00	06:00 às 07:00 14:00 às 24:00	00:00 às 06:00
Domingos e Feriados Nacionais	-	-	06:00 às 24:00	00:00 às 06:00
Variação	Acrescida de 100% em relação à tarifa normal	-	Desconto de 50% em relação à tarifa normal	Desconto de 75% em relação à tarifa normal

OBSERVAÇÕES:

1. As chamadas automáticas são tarifadas com tempo mínimo de 1 minuto.
2. As chamadas manuais (Classes Especiais) são tarifadas com tempo mínimo de 3 minutos, com acréscimo de 50% nos 3 minutos iniciais.
3. O tempo adicional para chamadas automáticas ou manuais deverá ser tarifado a cada 6 segundos, sendo que qualquer fração inferior ao décimo de minuto deverá ser arredondada para 6 segundos.

CHAMADAS DE CLASSES ESPECIAIS

São aquelas efetuadas: a determinadas pessoas: com uso de

São aquelas efetuadas: a determinadas pessoas; com uso de mensageiro; com aprazamento; a determinado ramal CPCT; ou a cobrar via telefonista. • Tarifação: mínimo de 3 minutos. Acréscimo de 50% nos 3 minutos iniciais.

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