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# Money laundering regulation in Canada

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Article abstract

La législation, la réglementation et les initiatives canadiennes sur le blanchiment d'argent sont relativement récentes, mais elles sont importantes et variées. Dans cette étude, l'auteur étudie les amendements apportés au code criminel (Bill C-61), entrés en vigueur le 1er janvier 1989. Il examine aussi les conventions auxquelles le Canada a adhérées, en 1988, l'une est internationale, « La Convention de l'O.N.U. de 1988 », l'autre est bilatérale, Canada-États-Unis, « Loi sur l'entraide juridique en matière criminelle ». Il analyse aussi les règles de pratique instituées par les banques canadiennes élaborées le 2 décembre 1988 par le Comité Basle. En outre, il fait le tour des principales recommandations dégagées par un groupe d'action, créé à l'occasion du sommet économique de Paris tenu en 1989, appelé Groupe d'action sur le blanchiment d'argent dans le domaine financier, dont le mandat était d'identifier les principales techniques de blanchiment d'argent et d'évaluer les mesures pour les contrer, au plan national et au plan international. Il ne manque pas de rapporter les règles établies par les institutions financières, en 1990, et révisées en 1995, intitulées « Pratiques optimales en vue de détecter le blanchiment d'argent ». Enfin, il termine par des commentaires sur une autre législation fédérale plus récente, « Loi sur le recyclage des produits de la criminalité » entrée en vigueur le 21 juin 1991, et la règlementation propre à cette Loi, entrée en vigueur le 26 mars 1993.

# Money laundering regulation in Canada

by

**Ani M. Abdalyan***

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## I. Introduction

The traditional philosophy of law enforcement has been combatting illegal activities. While money laundering is not a new activity, only since January 1, 1989, with the enactment of Bill C-61,[1] An Act to Amend the Criminal Code, the Food and Drug Act and the Narcotic Control Act, is money laundering[2] an offence in Canada. Money laundering has been defined as:

> the conversion of illicit cash into another asset, concealment of the true source or ownership of the illegally acquired proceeds and the creation of the perception of legitimacy of source and ownership.[3]



Proceeds of crime can arise from activities such as drug trafficking, organized crime, prostitution, child pornography, terrorism, kidnapping, fraud, extortion, corruption and use of illegal hormones.

When Bill C-61 received First Reading in the House of Commons on May 29, 1987, this coincided with the federal government's National Drug Strategy consisting of a five year plan and a $210 million program. In 1985, the Royal Canadian Mounted Police ("RCMP") and Customs Canada seized 62 kilograms of heroin, 109 kilograms of cocaine and 19,000 kilograms of hashish.[4]

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1 S.C. 1988, c. 51.

2 In the U.S. prohibition days of the 1930s, Al Capone invested crime money in a chain of laundries. Nicole Chiasson, "L'argent "sale": un danger pour tous les avocats!" (1995) v.4 no.6 National 50 at 52. The expression "money laundering" was used in the United States only recently, in U.S. v. $4,255, 625.39 (1982) 551 F. Supp. 314.

3 Art. III, para. 1(b) of the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Vienna, E/Conf. 82-15, 19 December 1988. See Canada, Tracing of Illicit Funds: Money Laundering in Canada, by M.E. Beare and S. Schneider, (Ottawa: Solicitor General 1990) [hereinafter "Tracing of Illicit Funds"].

4 House of Commons Debates, Second Session, 33rd Parliament, 36 Elizabeth II, vol. vi, 1987 (15 February 1988) at 6467. In Colombia, the Medellin drug cartel controls the drug trade. The cartel uses terror and assassination in order to retaliate against the arrest of its members, resulting in the destruction of the democracy. See House of Commons Debates, Second Session, 33rd Parliament, 36 Elizabeth II, vol. v, 1987 (May 4, 1987).

The new philosophy in law enforcement focuses on the confiscation of proceeds of crime so as to deter and punish those who undertake criminal activity, and to make law enforcement pay for itself. The thesis of this paper is that while Canada has joined the war on money laundering, the very nature of open economies i.e., the dismantling of exchange controls, the globalization of the financial sector, technological advances and the shift to an almost instantaneous payments system is such that they can intentionally be abused for purposes of money laundering.



This paper will review Canada's internally-directed legislative and regulatory efforts to combat money laundering and will set out complementary efforts with international dimension. Although money laundering is an activity which can touch different sectors of the economy,[5] the focus of this paper will be financial institutions with highlights of potential areas of abuse therein. As has been pointed out elsewhere: "The techniques of money laundering are innumerable, diverse, complex, subtle and secret."[6]

Honesty and integrity are vital for the long-term prosperity of the financial sector. Money laundering operations can cause loss of credibility and investor confidence in the financial sector. As a result, while the main regulatory concern is the stability of a financial institution, it is generally accepted in Canada that the financial sector and regulators cannot be indifferent to the use made of banks by criminals and their associates. It is generally agreed that the financial sector can and should play a preventative role in relation to money laundering activities.

The paper concludes with the acknowledgment that international intelligence support as well as co-operation across

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[5] Vehicles used by money launderers include currency exchange houses, the securities market, real estate, the incorporation of companies, precious metals and gems, boat and plane dealerships, travel agencies, gaming casinos and antiques. See Tracing of Illicit Funds, supra 3 at xii.

[6] United States, Department of State, International Narcotics Control Strategy Report, March 1, 1988, 46.

frontiers in the investigation, prosecution and confiscation of the proceeds of crime is vital.

## II. International agreements on anti-money laundering

International efforts to combat money laundering have included initiatives undertaken by the United Nations, Commonwealth initiatives, European developments and a number of other developments and initiatives. This paper will set out the international efforts as they have directly or indirectly influenced the Canadian legislative and regulatory environment regarding money laundering.



### (1) The 1988 U.N. Convention

The first initiative to combat money laundering operations occurred in Vienna, on December 19, 1988, with the creation of the U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances ("U.N. Convention").

The most significant feature of the U.N. Convention has been described as the requirement that State parties to the treaty "legislate as necessary to establish a modern code of criminal offences relating to illicit trafficking in all its different aspects".[7]

A second critical feature of the U.N. Convention is the provision dealing with the confiscation of the profits derived from drug trafficking. There was a recognition that bank secrecy laws were being used to "obstruct co-operation and the provision of information needed for the investigation of allegations of drug-related offences".[8]

The drafters of the U.N. Convention inserted a requirement that each State party empower its courts or other relevant authorities to order the availability of bank, financial or

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[7] Criminal Justice (International Co-operation) Bill: Explanatory memorandum on the Proposals to Implement the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1989, 28.

[8] Dr. W.C. Gilmore, ed., International Efforts to Combat Money Laundering, (Cambridge: Grotius Publications Limited, 1992) xii [hereinafter "International Efforts"].

commercial records. Furthermore, the treaty specifically provides that "a party shall not decline to act under the provisions of this paragraph on the ground of bank secrecy".[9]

Tournier v. National Provincial & Union Bank of England[10] held that a banker owes an implied contractual duty of confidentiality to his customer. This duty of the banker is subject to four qualifications: (i) when disclosure is compelled by law, (ii) when there is a public duty to disclose, (iii) when the interests of the bank mandate disclosure or (iv) when there is express or implied consent of the customer to disclose.



In money laundering cases, one of the ways in which criminals conceal evidence of the crime is by laundering the funds through financial institutions. In other words, there is a competition between individual interests in privacy and law enforcement interests in requiring disclosure of financial information.

The U.N. Convention also includes a provision dealing with mutual legal assistance. It provides that "the parties shall afford one another, pursuant to this article, the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings" in relation to drug trafficking offences.[11] Another feature of the U.N Convention is that it makes extradition between signatory states applicable in the context of money laundering.[12]

The U.N. Convention has been referred to as follows:

> The Convention is one of the most detailed and far-reaching instruments ever adopted in the field of international criminal law and, if widely adopted and effectively implemented, will be a major force in

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9 Ibid. at xiii.

10 [1924] 1 K.B. 461 (C.A.) at 486.

11 The David Hume Institute, "Money Laundering", in Hume Papers on Public Policy 1, no. 2, (Edinborough University Press: Summer 1993) 3 [hereinafter "Hume Papers"].

12 International Efforts, supra 8 at 10.

harmonizing national laws and enforcement actions around the world.[13]

### (2) Basle Committee on banking regulations and supervisory practices

The Basle Committee[14] on Banking Regulations and Supervisory Practices issued a Statement of Principles on December 12, 1988. The preamble provides that the Statement of Principles is:

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> a general statement of ethical principles which encourages banks' management to put in place effective procedures to ensure that all persons conducting business with their institutions are properly identified; that transactions that do not appear legitimate are discouraged; and that co-operation with law enforcement agencies is achieved.[15]

The Statement of Principles is not a treaty in terms of public international law. The implementation of the statement of principles depends on domestic law. Acknowledgment, however, by banking regulatory authorities of the failure to comply with the Statement of Principles could result in administrative sanctions.

The Statement of Principles is intended to set out how banks' management can assist in the suppression of money laundering through the national and international banking system. Specifically, the Statement of Principles deals with customer identification, compliance with laws and co-operation with law enforcement authorities.

### (3) The financial action task force

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[13] D.P. Stewart, Internationalizing The War on Drugs: The U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1990) 18 Denver Journal of International Law and Policy, 387 at 388.

[14] The Basle Committee is an unofficial arm of the Bank for International Settlements. Since its creation in 1974, the Basle Committee has become the key forum for improvement and co-operation in international banking regulation. Friesen, The Regulation and Supervision of International Lending, 20 International Law, 153 (1986).

[15] Hume Papers, supra 11 at 6.

In the July, 1989 Paris Economic Summit, the Group of Seven ("G-7") Nations established Financial Action Task Force on Money Laundering ("FATF"),[16] a cornerstone in the international anti-money laundering regime. The mandate of FATF was to examine money laundering techniques and to evaluate measures taken internationally and nationally and to enhance multilateral judicial assistance. In its first report on money laundering, published in April, 1990, FATF released a Report consisting of forty detailed recommendations relating to three key areas:



(i) The improvement of national legal systems,

(ii) The enhancement of the role of the financial system, and

(iii) The strengthening of international co-operation.[17]

Specifically, the FATF Report provides as follows:

> Many of the current difficulties in international co-operation in drug money laundering cases are directly or indirectly linked with the strict application of bank secrecy rules, with the fact that, in many countries, money laundering is not today an offence and with insufficiencies in multilateral co-operation and mutual legal assistance.
>
> 1. Some of these difficulties will be alleviated when the U.N. Convention is in effect in all signatory countries, principally because this would open more widely the possibility of mutual legal assistance in money laundering cases. Accordingly, the group unanimously agreed as its first recommendation that each country should, without further delay, take steps to fully implement the U.N. Convention, and proceed to ratify it.
> 2. Concerning bank secrecy, it was unanimously agreed that financial institutions secrecy laws should be

[16] G-7 Countries, (Britain, Canada, France, Germany, Italy, Japan and the United States) were joined by Austria, Australia, Belgium, Luxembourg, the Netherlands, Spain, Sweden, Switzerland and the European Community.

[17] Hume Papers, supra 11 at 7.

conceived so as not to inhibit implementation of the recommendations of this group.

3. Finally, an effective money laundering enforcement program should include increased multilateral co-operation and mutual legal assistance in money laundering investigations and prosecutions and extradition in money laundering cases, where possible.[18]



The recommendations of the FATF Report are recommendations and are not an international convention in international law.[19] This, however, has not decreased the effectiveness of the FATF Report in implementing the U.N. Convention.

While it is beyond the scope of this paper to review and analyze the forty recommendations contained in the FATF Report, I propose to set out the Canadian approach to the regulation of money laundering and relate it to the three central areas of the FATF Report. At approximately the same time that the international agreements on anti-money laundering were being put in place, Canada and other industrialized countries were working to enhance their own anti-money laundering measures. Basically, Canada has implemented the FATF Report, in two stages, with a view to preventing the use of Canada's financial system for the purpose of money laundering.

### (4) THE 1990 COUNCIL OF EUROPE CONVENTION

Another significant instrument to combat the financial aspects of drug trafficking is the 1990 Council of Europe Convention, which goes beyond the 1988 U.N. Convention in a number of ways. Most significant, perhaps, is the expansion of the definition of money laundering beyond drug trafficking activities. It has been stated that:

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[18] Ibid. at 21.

[19] Ibid. at 18.

> Article 6 of the Convention requires State Parties to establish an offence of intentional money laundering. The property involved in any conversion or transfer could be proceeds not only of drug trafficking or terrorism but of any criminal offence (described as the "predicate offence") and the state party prosecuting need not have criminal jurisdiction over the predicate offence. Although this constitutes a very wide definition of money laundering, it is open to States on signature or ratification to limit the definition for themselves to more limited categories of predicate offences.[20]



The 1990 Council of Europe Convention also contemplates the possible criminalisation of negligent money laundering. It has been signed by a significant number of European countries but has not yet come into force.

## III. Canadian Criminal Law: The Law of 1st January, 1989

Canada has adopted the recommendation in the U.N. Convention and the FATF Report that money laundering be a criminal offence. Section 2 of Bill C-61 contains detailed and very broad provisions dealing with proceeds of crime and sets out amendments to the Criminal Code (Canada), the Narcotic Control Act and the Food and Drugs Act. Bill C-61 amends the Criminal Code (Canada) to create the offence of money laundering.[21] It provides that:

> 462.31(1) Everyone commits an offence who uses, transfers the possession of, sends or delivers to any person or place, transports, transmits, alters, disposes of or otherwise deals with, in any manner and by any means, any property or any proceeds of any property with intent to conceal or convert that property or those proceeds and

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[20] International Efforts, supra 8 at xv.

[21] In Belgium, Netherlands and Denmark, a specific money laundering felony does not exist. Money laundering is included in a broadly defined offence of "handling stolen property". See Laurent Garzaniti, "Belgian Law on Money Laundering" (1995), v. 3, no. 1, Journal of Financial Crime, 105.

knowing that all or a part of that property or of those proceeds was obtained or derived directly or indirectly as a result of

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

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

*404* As a result, under the Criminal Code (Canada) the money laundering offence arises as a result of acts committed in Canada, as well as acts or omissions anywhere in the world.

An offender may be prosecuted by indictment, with a maximum punishment of imprisonment for ten years, or by summary conviction.

Enterprise crime offence is defined to mean any one of twenty-four offences set out in section 462.3 of the Criminal Code (Canada) including arson, bribery, extortion and fraud. Designated drug offence is defined to mean an offence set out in section 39, 44.2, 44.3, 48, 50.2, 50.3 of the Food and Drugs Act and section 4, 5, 6, 19.1 and 19.2 of the Narcotic Control Act.

Section 462.47 of the Criminal Code (Canada) provides that no civil or criminal liability is incurred by informants who disclose "to a peace officer or the Attorney General any facts on the basis of which that person reasonably suspects that any property is proceeds of crime or that any person has committed or is about to commit an enterprise crime offence or a designated drug offence."

The U.N. Convention and the FATF Report also recommend that national legislation include a provision dealing with the seizure of proceeds of crime involving money laundering. Bill C-61 includes provisions dealing with pre-trial seizure or restraint of property allegedly arising from proceeds of

crime.[22] There is also a specific provision enabling the court, upon conviction, to order the forfeiture to the Crown of funds or other properties which are the proceeds of crime. Section 462.42 also provides for written applications by third parties for relief from forfeiture.

In United States of America v. Dynar,[23] the Ontario Court of Appeal held that actual knowledge of the underlying activity is an essential element of the money laundering offence set out in section 462.31 of the Criminal Code (Canada).



Recently, the Quebec Court of Appeal overturned the conviction of Jeremy Hayes, who was sentenced to nine months in jail and fined $900 for converting $300,000 of drug sale proceeds into bank drafts. The Quebec Court of Appeal held that the Crown's case "did not establish that Hayes had specific knowledge of the illegal nature of the cash he converted".[24]

The British Columbia Supreme Court also clarified in R. v. Clymore[25] that circumstantial evidence can establish the fact that funds or other properties are the proceeds of crime for which the Attorney General may make an application for forfeiture under section 462.38 of the Criminal Code.

The court held as follows:

> The purpose of this part of the Criminal Code and of s. 462.38 of the Criminal Code is to prevent the laundering of proceeds of crime and to make liable to seizure the proceeds of both designated drug offences and enterprise crime offences including money laundering as in this case.

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[22] In the United Kingdom, Drug Trafficking Offences Act, 1986 and Part IV of the Criminal Justice Act deal with confiscation of proceeds arising from criminal activities. The courts have power to seize or to restrain property arising from crime. The courts can also substitute assets if the criminals have put the assets beyond the reach of the courts. See House of Commons Debates, Second Session, 33rd Parliament, 36 Elizabeth II, vol. v, 1987 (May 4, 1987) at 5706.

[23] [1995] O.J. No. 2616 (Q.L.). The Belgian courts have also held that the crime of money laundering can only be committed intentionally.

[24] "Court Quashes Alliance Quebec Ex-Director's Conviction," The [Ottawa] Citizen (30 November 1995) D7.

[25] (1992) 74 C.C.C. (3d) 217.

In establishing that any property which was seized is beyond a reasonable doubt the "proceeds of crime", there is no burden on the Crown to prove that the funds seized were the proceeds of any specific illegal transaction such as the sale of narcotics.[26]

## IV. The Role of Financial Institutions in the Detection of Money Laundering

### (1) Best Practices for Deterring and Detecting Money Laundering



Generally speaking, Canada measures up well to the FATF Report. In April, 1990, the Office of the Superintendent of Financial Institutions published a guideline entitled Best Practices for Deterring and Detecting Money Laundering setting out procedures and safeguards to be used by financial institutions to ensure money laundering activities are detected and acted upon. The guideline is based on the Statement of Principles published by the Basle Committee on Banking Regulations and Supervisory Practices.

The guideline mandates that a financial institution must establish a best practices policy to combat the abuse of the regulated entity for the purpose of money laundering. A senior officer or officers must also be designated to be responsible for ensuring day-to-day compliance with procedures.

The guideline also mandates internal control procedures to deter and detect laundering, record retention requirements as well as appropriate training plans and programs for personnel. Since January 1, 1990, examinations of deposit-taking institutions by the Office of the Superintendent of Financial Institutions have included an examination of money laundering detection procedures.

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[26] Ibid. at 218.

### (2) The Law of 21st June, 1991

In January 1990, a joint private sector - government Advisory Committee on money laundering, chaired by the Honorable Gilles Loiselle, Minister of State (Finance) and President of the Treasury Board, was established as part of the National Drug Strategy. The terms of reference of the Advisory Committee were as follows:

1. To look at mechanisms in place to prevent money laundering.
2. To identify areas where enhancements could be instituted.
3. To advise the government on the merits of different options being considered to address money laundering.
4. To act as a consultative link between industry and government on a technical level.
5. To increase awareness of actions being taken by Canadian financial institutions to deal with money laundering.[27]



The work of the Advisory Committee was key in the development of Bill C-9, the Proceeds of Crime (money laundering) Act, which came into force on June 21, 1991. The goal of the legislation is to catch the profits from proceeds of crime specifically at the point where they enter the Canadian monetary system in cash form. The Honorable Gilles Loiselles said:

> the Government of Canada is bringing this legislation forward to ensure that the most effective actions possible are taken against money laundering, and to build on previous legislation which made money laundering illegal under the Criminal Code. This measure also builds on action being taken within the financial sector to identify

[27] Department of Finance, Canada, News Release 90/022, "First Meeting of Advisory Committee on Money Laundering" (February 13, 1990) 3.

potential money laundering problems and report suspicious transactions to law enforcement authorities.[28]

Section 2 of the Proceeds of Crime (money laundering) Act provides that the object is:

> To establish record-keeping requirements in the financial field in order to facilitate the investigation and prosecution of offences under the money laundering sections of the Criminal Code, the Food and Drugs Act and the Narcotic Control Act.



The Proceeds of Crime (money laundering) Act applies to financial institutions in Canada including banks, life insurance companies, trust and loan companies, securities dealers, credit unions and caisses populaires. It also applies to foreign exchange dealers and persons e.g., professionals, who receive cash on behalf of others.

It imposes a record-keeping requirement and provides that everyone to whom this legislation applies must keep and retain records relating to financial activities in accordance with the Proceeds of Crime (money laundering) Regulations. The potential penalty for lack of compliance with the Act or the regulatory record-keeping requirements on summary conviction is a fine of up to $50,000 and imprisonment for up to six months. Proceedings for summary conviction have a limitation period of one year from the time when the subject matter of the proceedings arose. There is also a fine of up to $500,000.00 and imprisonment for a term of up to five years for a conviction or indictment.

An officer, director or agent of a financial institution who directed, authorized, assented to, acquiesced in or participated in the contravention of the Proceeds of Crime (money laundering) Act or the regulations thereunder is liable on conviction for

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[28] Ibid. at 2.

similar penalties whether or not the financial institution is prosecuted or convicted.[29]

The federal government's special focus on anti-money laundering program was driven by the desire to ensure that Canada does not become a haven for money launderers. One of the factors driving Bill C-9 was the realization by the RCMP that while Canadian financial institutions were previously maintaining records, there was lack of consistency, with the result that investigations could be frustrated.



### (3) Proceeds of Crime (Money Laundering) Regulations

Proceeds of Crime (money laundering) regulations (the "Regulations") came into force on March 26, 1993. The Regulations set out the records that financial institutions must keep for the purpose of facilitating money laundering operations and prosecutions.

The Regulatory Impact Analysis Statement, published with the Regulations in the Canada Gazette,[30] provides that:

> Different record keeping requirements were considered before arriving at those contained in the regulations. The requirements contained in the regulations represent, in light of the current record-keeping practice of interested parties, the least intrusive measures which will allow the objectives of the Act to be satisfied.

The Regulations require that financial institutions maintain records relating to large cash transactions, i.e., a transaction in which cash in the amount of $10,000 or more is received.

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[29] The U.S. Bank Secrecy Act sets out both civil and criminal penalties for money laundering. The potential penalty for civil liability is $10,000.00 and the criminal penalties are up to $250,000.00 or five years. The Australian legislation has either a strict liability offense which could be committed negligently or where there is a mens rea requirement. For the strict liability offense, there is a penalty for individuals up to $5,000.00 or two years imprisonment and the potential criminal penalty is up to $10,000.00 and five years. See testimony of Robin Geller, Research Officer, Canadian Bar Association, House of Commons, Minutes of Proceedings and Evidence of Legislative Committee F on Bill C-9 (June 10, 1991) at 1:22-23.

[30] Canada Gazette, v. 124, no. 4 [1993], SOR/93-75, 1015.

With respect to every large cash transaction, every financial institution is required to keep and maintain the following information: (i) the date and nature of the transaction and (ii) the amount of cash received and the currency in which it is received. Where an employee of a financial institution has reason to believe that the individual from whom cash is received is acting on behalf of a third party, the Regulations require the recording of the name, address and nature of the principal business of the third party or evidence that the individual conducting the transaction keeps and retains large cash transaction records.

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With respect to every large cash transaction, every deposit-taking financial institution[31] must record the name of the person in whose account the money is deposited.[32] Every life insurance company, securities dealer and foreign exchange dealer must record the name of the individual from whom the cash is received, and the individual's address and nature of principal business or occupation where such information is not readily obtainable from other records.[33]

The Regulations also set out general record-keeping requirements, for deposit-taking financial institutions, which are as follows:[34] a signature card for each account holder, every account operating agreement received or created in the normal course of business, a deposit slip in respect of every deposit made to an account, every debit or credit memo received or created in the normal course of business, a copy of every account statement sent to a client and every customer credit file created in the normal course of business.

With regard to cheques, the Regulations[35] require every deposit-taking financial institution to maintain the original of

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31 Bank, cooperative credit society, credit union, caisse populaire, trust company or loan company.

32 Proceeds of Crime (money laundering) Regulations, SOR/93-75 s. 4(1)(a)(i) [hereinafter "Regulations"].

33 Ibid. s. 4(1)(a)(ii).

34 Ibid. s. 5(a)-(e) and (g).

35 Ibid. s. 5(f).

every cheque deposited to or drawn on an account unless the cheque is drawn on and deposited to accounts at the same branch of the financial institution, or there is a microfilm or electronically imaged copy of the cheque that is readily ascertainable and reproducible, and is retained for at least five years from its date.

The Regulations also set out various retention periods.[36] There is a five-year retention period from the date on which the relevant account is closed for signature cards, account operating agreements, customer credit files, client application forms and account application forms. For all other types of documents, the mandated retention period is five years from the date the document was created.



The Regulations also contain provisions dealing with general records for currency exchange transactions as well as records to be kept by securities dealers.[37]

A life insurance company is required to keep and retain a client application form for every purchase of an immediate or deferred annuity, or another insurance policy, for which the client will pay $10,000 or more.[38]

The Regulations also contemplate the possibility of the retention of machine-readable copies of certain types of documents, as long as a printed copy can be readily reproduced.[39] The documents include large cash transaction records, deposit slips, credit memos, account statements, and customer credit files. Original records must, however, be retained during the requisite retention period, for signature cards and account operating agreements.

The Regulations also contain a provision dealing with verification of identity of individuals who open accounts. Every

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[36] Ibid. s. 10.

[37] Ibid. s. 6, s. 7.

[38] Ibid. s. 8. There is an exemption for a policy under s. 306(1) of the Income Tax Regulations.

[39] Ibid. s. 9.

financial institution must ascertain identity by reference to the individual's birth certificate, driver's licence or passport or to "any similar document".[40] It has been suggested that it is reasonable to assume that a "similar document" is likely to be a document issued by a government, e.g., a Canadian citizenship certificate.[41]

A deposit-taking financial institution must ascertain the identity of every individual who signs a signature card in respect of an account.[42] A life insurance company must ascertain the
412 identity of every individual who conducts a transaction with that life insurance company for which the life insurance company is required to keep a general record.[43]

Every financial institution must ascertain the identity of every individual who conducts a large value transaction with that financial institution, unless the deposit of funds is made to a corporate account or by means of an automated banking machine.[44] There are also provisions dealing with verification of identity by foreign exchange dealers and securities dealers.

### (4) Revised Best Practices for Deterring and Detecting Money Laundering

In October 1995, the Office of the Superintendent of Financial Institutions released a revised draft Best Practices document. The revisions take into consideration changes which have come about as a result of the promulgation of Proceeds of Crime (money laundering) Act and Regulations as well as further understanding of deterrence and detection of money laundering. Some of the changes contemplated by the revised draft Best Practices document include the implementation of record retention procedures that comply with the Regulations

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[40] Ibid. s. 11(2).

[41] Edward K. Rowan Legg, "Money Laundering", Regulation of Financial Institutions: A Complete Course, (Infonex) (Nov. 21-22, 1994) 8.

[42] Supra, note 32 s. 11(1)(a).

[43] Ibid. s. 11(1)(c).

[44] Ibid. s. 11(1)(d).

and a process to promptly report suspicious transactions to management and the RCMP.

### (5) FATF Report and Canadian Anti-Money Laundering Measures Covering the Financial System

Canadian banks have implemented the know-your-client principle which is intended to address the use of "smurfs" i.e. money couriers, a significant characteristic identified in money laundering cases.[45] They also have measures dealing with proper customer identification, adequate record-keeping and increased vigilance including internal investigations. Canadian banks also have employee training programs which include video productions dealing with money laundering.[46] Each month, Canadian banks report approximately 100 suspected money laundering transactions.[47] Banks also monitor developments used by money launderers, both domestically and abroad.



## V. Mutual legal assistance treaty

In order to strengthen co-operation between legal authorities, Canada entered into the Mutual Legal Assistance Treaty with the United States. The Mutual Legal Assistance Treaty gives each country access to the judicial processes of the other country. The Mutual Legal Assistance Treaty was implemented in the Mutual Legal Assistance in Criminal Matters Act (Canada).[48] It provides "the necessary legal authority and sets out the procedural requirements for executing requests made

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[45] The term "smurf" refers to a person who makes multiple deposits which are under currency transaction reporting requirement levels. It originates from the name of the small, blue cartoon characters with high energy levels, who are hard-working and are led by Papa Smurf, who is the chief money-launderer and may work for drug traffickers. See B. Zagaris & S.B. McDonald, "Money Laundering, Financial Fraud, and Technology: The Perils of Our Instantaneous Economy", (1992) 26 George Washington Journal of International Law and Economics, 75, [hereinafter "Instantaneous Economy"].

[46] Michael Ballard, "On the Safe Side", Canadian Banker (July-August 1990), 44.

[47] Ibid.

[48] S.C. 1988, c. 37.

by a treaty partner. It also provides a mechanism for considering requests from countries with which there is no treaty."[49]

Section 9 of the Mutual Legal Assistance in Criminal Matters Act (Canada) provides that:

> (1)Where the Minister (of Justice) approves a request of a foreign state to enforce the payment of a fine imposed in respect of an offence by a court of criminal jurisdiction of the foreign state, a court in Canada has jurisdiction to enforce the payment of the fine, and the fine is recoverable in civil proceedings instituted by the foreign state, as if the fine had been imposed by a Court in Canada.[50]



## VI. Technological Advances

Cross-border movement of money is inherent in money-laundering operations, which, according to a British intelligence estimate have been in the range of $500 billion worldwide in 1993.[51]

While money laundering has always had the air of mingling "dirty" money with clean money, the nature of global finance and the electronic payments system have changed the ways criminals use to disguise the true origin of money.

There is no doubt that, with the globalization of the financial sector, controlling money laundering requires international co-operation between governments, law enforcement agencies and banks. Investigations into the failure of Bank of Credit and Commerce International ("BCCI") have shown that BCCI, through its global network, handled billions of dollars arising from criminal activities. These difficulties of tracking proceeds of crime allowed BCCI's illegal money

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[49] Tracing of Illicit Funds, supra note 3 at 290-1.

[50] Quare the extent to which Canadian courts willl enforce the criminal law of a foreign state.

[51] Economist, (June 25, 1994) 22. According to a publication by the Canadian Bankers Association, "The Fight Against Money Laundering" in Canada, the drug-trafficking industry is estimated to be worth $4 to $10 billion annually.

laundering operations to continue for several years. It has been noted that:

> financial technology, electronic markets, payment and settlement systems and custodianship facilities ...increase the danger of financial instability being transmitted from one banking system to another, raising questions about the safety and soundness of local institutions.[52]

Although Canada has embraced the need to criminalize money laundering, as a result of technological developments and an almost instantaneous payments system, financial institutions continue to be at risk of being targets of abuse. Potential areas of abuse include commodity transactions, credit cards, automated teller machines, and electronic wire transfers.



Commodity transactions such as trading in over-the-counter derivative securities and currency, interest rate and exchange rate swaps allow the transfer of money without leaving a paper trail.[53]

The use of credit cards for money laundering, especially proceeds from the sale of narcotics, apparently involves credit card counterfeiting. Organized crime groups obtain valid account numbers and expiry dates from crime group associates who work at legitimate businesses including banks. The groups emboss and encode lost, stolen or counterfeit cards with the account information obtained from associates. Fraudulent purchases are then made by members of the group who travel around the world to give the impression that they are affluent travelers.[54] Apparently, sophisticated criminal gangs combine illicit drug operations with credit card counterfeiting.

VISA regularly cooperates with international enforcement agencies in order to fight against electronic counterfeiting. VISA

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[52] Instantaneous Economy, supra note 45 at 77.

[53] Ibid. at 73.

[54] Ibid. at 74.

International also requires issuers of VISA credit cards to add a card verification value to the magnetic stripe.[55]

> The card verification value ... can prevent transactions involving a counterfeit magnetic stripe because during the authorization it validates the other information, such as the name of the account holder and the bank account number(s), contained on the magnetic stripe.[56]

Automated teller machines ("ATM"s) allow for transaction within a jurisdiction as well as across international borders.
*416* Furthermore, the human element of the banking business is removed with the use of ATMs such that questions which might expose a suspicious transaction will not be asked. As a result, ATMs can be a useful vehicle for money laundering.

Electronic wire transfer systems are another potential vehicle for money laundering especially in the international context. Although Canada's regulatory environment has implemented the "know your client" rule,

> ...the vast volume of electronic wire transfers, their instantaneity, and the significance of this financial medium to international trade combine to make it a difficult area to police.[57]

In other words, technological advances and access to the payments system can jeopardize gains that have been made in the regulation of money laundering, in Canada and internationally.

## VII. The Kerry Amendment

The regulation of money laundering in Canada has been criticized by Senator John F. Kerry, a Massachusetts Democrat,

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[55] Ibid. at 101.

[56] Ibid. at 101.

[57] Ibid. at 77.

as being lax.[58] The Kerry amendment to the U.S. Anti-Drug Abuse Act of 1988 "requires the Secretary of the Treasury to negotiate bilateral agreements with other countries to maintain records in U.S. dollar cash transactions of $10,000 and over. The Kerry amendment also requires these records be made accessible to U.S. law enforcement agencies."[59]

Apparently, the American system of currency transaction reporting was rejected in Canada and a suspicious transactions recording system was preferred so as not to unduly violate the privacy of customers. It was felt that the American system, if adopted in Canada, would be expensive to administer both for financial institutions and regulators.



## VIII. Conclusion

In recent years, Canada has implemented legislative and regulatory measures to join the war on money laundering which can undermine legitimate economies, and threaten the security and stability of a state. Generally speaking, the Canadian legal framework parallels the U.N. Convention and the FATF Report.

The criminalization of money laundering and the imposition of record-keeping requirements in the financial sector have revealed Canada's present policy choices and have been meaningful measures to prevent Canada from becoming a haven for money launderers.[60] Solicitor General Robert Runciman

[58] In the United States, The Bank Secrecy Act, which came into force in 1970, imposes record-keeping and reporting requirements on financial institutions, which are required to submit a currency transaction report to the Internal Revenue Service on all cash transactions of $10,000 U.S. or more. The Right of Financial Privacy Act of 1978 protects the right to financial privacy. The Money Laundering Control Act of 1986 creates the criminal offence of money laundering.

[59] The Fight Against Money Laundering, International Developments, Canadian Bankers Association publication.

[60] The Republic of Seychelles has recently introduced a bill which offers immunity from prosecution to investors who bring U.S. $10 million to the island state. The bill has been described as legalizing money laundering. "The bill defines three concessions or incentives, starting with immunity from prosecution for all criminal proceedings whatsoever except criminal proceedings in respect of offences involving acts of violence and drug trafficking in Seychelles. The second concession is a guarantee that assets will not be seized unless the seizure arises from a criminal case involving violence or drugs in Seychelles. The third covers incentives established under other laws." See

announced that on November 22, 1995 the federal government and the province of Ontario signed an agreement to share the money and other assets seized by the federal government from criminals convicted of crimes such as drug trafficking. The money seized will be invested in the criminal justice system of Ontario.[61]

The Annual Report 1994-95 of the FATF on Money Laundering provides that great progress has been made by the members of the FATF in implementing the forty
418 recommendations of the FATF Report. Most of the members have achieved an acceptable standard and, in the future:

> The FATF will continue to scrutinise closely the performance of its members in applying the Recommendations, although the emphasis will now increasingly shift towards assessing the effectiveness of the laws and systems in practice - the focus of the second round of mutual evaluations which will begin in 1996. In addition, the FATF will continue to urge its members to establish good bilateral contacts between law enforcement agencies and to develop co-operation agreements so as to strengthen the international fight against money laundering.[62]

Money laundering has been referred to as a "dynamic activity" and the FATF Annual Report 1994-95 highlights the need "to examine the implications of new technology and alternate payments systems for money laundering".[63] These developments, in conjunction with the globalization of the financial sector, have opened new areas to abuse by money launderers. Sophistication in criminal financial activity i.e., development of new ways of using the banking system, necessitates refinements to international co-operation in

D. Westell, "Seychelles offers haven for money launderers." Financial Post, (December 2, 1995) 3.

61 Globe and Mail, November 23, 1995.

62 FATF on Money Laundering, Annual Report 1994-5, 8 June 1995, at 23.

63 Ibid.

monitoring money laundering techniques, as well as investigating the crime, prosecuting the perpetrators and confiscating the proceeds.

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