

# LAUNDERING AROUND THE WORLD: LEGISLATIVE RESPONSES TO MONEY LAUNDERING IN CANADA, THE UNITED STATES, AND BERMUDA

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ON MARCH 21, 2003, THE *DIRTY MONEY, Clean Hands* conference was held at the Fort Gary Hotel in Winnipeg, Manitoba. The conference featured a number of speakers on topics ranging from Canadian Federal perspectives on money laundering, to provincial statutes and civil remedies concerning "dirty money." One of the speakers, Humberto Aguilar, appeared live via teleconference technology from Miami. Mr. Aguilar, a criminal attorney disbarred because of money laundering and drug trafficking convictions, spoke openly about his experiences. In addition to his colourful anecdotes of fur-clad drug-dealers, duffel bags full of cash, weekly trips to Switzerland, and an encounter with General Manuel Noriega, Mr. Aguilar suggested that the future of anti-money laundering efforts is futile at best. He pointed out that illegal drugs are still being sold on the streets, and will continue to be sold. Dealers and manufacturers of these drugs are earning profits as much as ever and those profits continue to find their way into the legitimate financial system. This is a sobering point, especially when one considers the now widely recognized link between money laundering and terrorist financing.

Indeed, the threat posed by money laundering and terrorist financing remains very real. Therefore, the fundamental objective of an anti-laundering effort is to ensure that criminal misuse of the financial system is detected and defeated. Confronting terrorist financing has taken on new urgency since the terrorist attacks on New York and Washington in 2001. That said, money laundering is an evolving activity that law enforcement and legislators alike are still learning about, including the various methods available to terrorists, drug dealers, and other criminals for 'cleaning' their ill-gotten cash.

Despite the criticism and ambivalence exhibited by those like Mr. Aguilar, the international community has responded by enacting far-reaching laws rendering it illegal to launder money, requiring extensive reporting of suspicious and other cash transactions by financial interme-

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diaries. This paper will provide a comparative overview of the criminal and other laws that target laundering transactions within Canada, the United States, and Bermuda. Ultimately, money laundering laws in these jurisdictions are tough and appear to be getting tougher as a greater number of third-parties, such as financial intermediaries, are being required to disclose information about relevant and suspicious transactions.

## CANADA

*The Proceeds of Crime (Money Laundering) and Terrorist Financing Act. The Proceeds of Crime (Money Laundering) and Terrorist Financing Act (POCTF)*<sup>1</sup> makes it official: Canada is serious about finding and punishing money launderers. The POCTF's primary objective is to "detect and deter money laundering and the financing of terrorist activities and to facilitate the investigation and prosecution of money laundering offences and terrorist activity financing offences."<sup>2</sup> To accomplish this, the POCTF goes beyond targeting just the launderers, but also targets the otherwise impartial professionals who function as financial intermediaries. The POCTF imposes a strict obligation on all financial intermediaries, such as banks, co-ops, credit unions, insurance companies, trust companies and casinos, to report suspicious transactions, large cash transactions,<sup>3</sup> and the import and export of large financial instruments.<sup>4</sup> The test for a suspicious transaction is an objective one, which will be met when there are reasonable grounds to suspect the transaction is related to money laundering or the financing of terrorist activity.<sup>5</sup> These transactions must then be reported to the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC), a new intelligence-gathering agency created under the POCTF, which serves as the reporting centre for all suspicious financial transactions in Canada.

### *Lawyers and the New Law*

Lawyers could find themselves in a precarious position in the fight against money laundering. The POCTF considers lawyers to be financial

<sup>1</sup> *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, c.17 ("POCTF").

<sup>2</sup> POCTF, s.3(a).

<sup>3</sup> Transactions in excess of \$10,000. See POCTF, ss. 12-52.

<sup>4</sup> See POCTF, s. 7, for example, that requires "every person or entity" to which the Act applies to report "every financial transaction that occurs in the course of their activities and in respect of which there are reasonable grounds to suspect that the transaction is related to the commission of a money laundering offence or a terrorist activity financing offence."

<sup>5</sup> POCTF, s.7.

intermediaries, therefore requiring them to report suspicious and large cash transactions to FINTRAC. Further, under the Act, lawyers (like all financial intermediaries) are prohibited from informing (or 'tipping off') their clients when a report has been made,<sup>6</sup> to discourage alleged launderers to flee or otherwise cover their tracks to avoid detection.

This requirement was not well received by the legal profession. In the fall of 2001, the legislation was challenged by the Law Society of British Columbia (LSBC),<sup>7</sup> which argued that the forced disclosure of privileged information would place lawyers in a "profound conflict of interest between their duty of solicitor-client confidentiality... and their duty to report that client to the government."<sup>8</sup> This, in turn, would threaten the independence of the bar, solicitor-client confidentiality, and the duty of loyalty owed by lawyers to their clients.

Justice Allan of the British Columbia Supreme Court concluded that "[w]hile the Government's goal of deterring and prosecuting money laundering offences is laudatory, the fundamental values of the Constitution must be protected."<sup>9</sup> Accordingly, the court granted an order exempting legal counsel from POCTF reporting requirements. The order was granted on an interlocutory basis, pending a full trial on the various constitutional issues. The British Columbia Court of Appeal upheld that decision,<sup>10</sup> and the Federal government has agreed to be bound by the exemption until a full trial on the constitutional issues is concluded. The full trial is set to begin in November, 2004.<sup>11</sup> Therefore, as it currently stands, lawyers are not required to report any transactions to FINTRAC regarding their clients. However, recognizing that lawyers should assist in preventing money laundering, the LSBC has enacted Rule 3-51.1, which prohibits a lawyer from accepting more than \$10,000 in cash.<sup>12</sup> Exceptions to this rule are circumstances in which a lawyer in the capacity of executor of a will or administrator of an estate and pursuant to a court order receives funds from a law enforcement agency, or as professional fees, disbursements, expenses, or bail. As a result, any client in British Columbia who wants to deposit large amounts of cash with a lawyer will first have to convert the cash into negotiable instruments, thereby creating a paper trail that can be traced in the event of a subsequent criminal investigation. As of the date of writing, other Canadian Law Societies have not yet enacted similar rules.

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<sup>6</sup> POCTF, s.8.

<sup>7</sup> *The Law Society of B.C. v. A.G. Canada* (2001), B.C.S.C. 1593.

<sup>8</sup> *Ibid.* at paragraph 76.

<sup>9</sup> *Ibid.* at paragraph 107.

<sup>10</sup> *The Law Society of B.C. v. Canada (Attorney General)* (2002) BCCA 49.

<sup>11</sup> See online:

<[http://www.lawsociety.bc.ca/new/body\\_whatsnew.html#money%20laundering](http://www.lawsociety.bc.ca/new/body_whatsnew.html#money%20laundering)>.

<sup>12</sup> *Ibid.*

### ***The Criminal Code***

The POCTF is not the only Canadian statute to target money laundering. Part XII.2 of the *Criminal Code* contains a series of provisions dealing with proceeds of crime. Section 462.31(1) creates the substantive offence of laundering money and prohibits: the use; the transfer of possession; the sending or delivery to any person or place; and the transporting, transmitting, altering, or disposing of (or otherwise dealing with) any property or any proceeds "with intent to conceal or convert that property or those proceeds, knowing or believing that all or a part of that property or of those proceeds was obtained or derived directly or indirectly as a result of [the commission of an offence]." Pursuant to section 462.31(1), any property "in respect of a designated offence alleged to have been committed" may be seized by judicial order.

### **THE UNITED STATES**

The United States was one of the first nations to recognize the threat posed by money laundering. It was also one of the first nations to link money laundering with terrorist activity and target them as co-dependent evils. Congress enacted the first currency reporting statutes in the 1970s, in response to routine deposits of large quantities of cash into the banking system by drug traffickers. Like the POCTF, the laws (which are now part of the Bank Secrecy Act<sup>13</sup>) require banks and other financial institutions to file a report for any cash transaction in excess of \$10,000.

Unfortunately, the launderers responded to these currency reporting laws by developing evermore sophisticated means of hiding and spending their money. For example, they began dividing their cash deposits into amounts smaller than \$10,000, (a practice commonly referred to as "smurfing"), commingling it with income from legitimate businesses, and engaging in transactions in the name of third parties. In 1986, legislators responded by rendering the act of money laundering itself a crime in the United States. At that time, Congress passed the Money Laundering Control Act,<sup>14</sup> which criminalized the participation in any "monetary transaction knowing that the funds have been derived through unlawful activity,"<sup>15</sup> regardless of the amount or nature of the transaction.

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<sup>13</sup> 31 U.S.C. 5311.

<sup>14</sup> 18 U.S.C. §§ 1956, 1957.

<sup>15</sup> Georgetown University Law Center, "Money Laundering" (Spring, 2002) 39 *American Criminal Law Review*, No. 2 839.

### **Correspondent Accounts**

United States' lawmakers also recognized early on that proceeds from foreign crimes, or proceeds successfully smuggled out of the country, could re-enter the country through what are commonly referred to as "correspondent bank accounts." These accounts are held in North America by a foreign bank. The foreign bank is a 'shell bank'—existing only on paper in an offshore jurisdiction—and it deposits money into the account on behalf of its clients.

Shell banks have been extremely attractive to money launderers because these institutions could accept criminal proceeds and then deposit those proceeds into an account maintained at a major North American bank. Through this scheme, the launderer, remaining comfortably offshore, was able to withdraw the funds from the foreign bank at any time, while secure in the knowledge that the money was safely invested in the United States, under the name of the shell bank. Funds could not be seized from those accounts because technically, the funds belonged to the shell bank—an innocent third party. Accordingly, the USA Patriot Act<sup>16</sup> (discussed in more detail below) enacted forfeiture provisions concerning shell banks. The Patriot Act now permits the U.S. government to seize money from a foreign bank's correspondent account equal to the amount of money it believes has been obtained through criminal means. To get around the 'innocent third-party' dilemma, the statute deems the money to be owned by the depositor and not by the shell bank. The onus falls on the depositor to challenge the forfeiture action and prove that the money was not obtained through criminal activity.<sup>17</sup> If the depositor is unsuccessful in that challenge, the foreign bank will recover the funds taken from its correspondent account by debiting the foreign bank account of its unscrupulous customer.<sup>18</sup>

### **USA Patriot Act**

In September 2001, money laundering took on a new and insidious significance. It no longer represented the mere and unsavoury success of some drug dealer or other. It represented the means by which North American targets could be attacked by foreign aggressors. On September 14, 2001, in response to the September 11<sup>th</sup> terrorist attacks, U.S. President Bush declared a state of emergency and invoked special presidential powers in defence of the "continuing and immediate threat of

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<sup>16</sup> USA Patriot 18 U.S.C. § 981(k).

<sup>17</sup> Georgetown University Law Center, *supra* note 15.

<sup>18</sup> *Ibid.*

future attacks on the United States.”<sup>19</sup> The Bush Administration, which viewed the attacks as acts of war rather than criminal acts requiring redress by the justice system, asked Congress for broad new powers to enable the Administration to conduct its burgeoning “War on Terrorism.”<sup>20</sup> In the eyes of then Attorney General John Ashcroft, that war redefined the Department of Justice’s general mission. The defence of the nation suddenly took priority above all else, including many previously sacrosanct civil liberties. Thus, the focus of federal law enforcement shifted from apprehending and incarcerating criminals, to detecting and halting terrorist activity before any harm had occurred.<sup>21</sup> This emphasis on pre-emptive detection is embodied in the current generation of tattle-tale laws, which impose disclosure obligations onto third parties. This is justified by the perceived interdependency of terrorist activity and other criminal enterprises, and by the assumption that terrorists usually operate in two phases: in the first phase, they raise money (usually by criminal means) and launder that money to fund the second phase, the terrorist act itself.<sup>22</sup> Therefore, it is hoped that by detecting and stopping the first phase, it will help in preventing the latter.

Perhaps chief among the tattle-tale laws is the *USA Patriot Act*<sup>23</sup> that was enacted in October 2001. Title III of that Act is formally known as the *International Money Laundering Abatement and Anti-Terrorist Financing Act of 2001 (IMLA Act)*,<sup>24</sup> which, in addition to third party reporting requirements, grants authorities significant powers of search and seizure. This statute casts a very wide net and will have a major impact on the way financial institutions do business. Further, it targets many businesses not traditionally seen as “financial institutions,” such as securities brokers, money transfer businesses, credit unions, travel agencies, car and boat dealers, real estate developers, jewellers, pawnbrokers, and some credit-card system operators.<sup>25</sup>

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<sup>19</sup> Whitehead & Aden, “Forfeiting ‘Enduring Freedom’ For Homeland Security: A Constitutional Analysis of the USA Patriot Act And The Justice Department’s Anti-Terrorism Initiatives,” (August 2002) 51 American University Law Review. 1083. See also: “Declaration of National Emergency By Reason of Certain Terrorist Acts,” online: <<http://www.whitehouse.gov/news/releases/2001/09/20010914-4.html>>.

<sup>20</sup> See written testimony of John Ashcroft, Attorney General, available at <[http://judiciary.senate.gov/testimony.cfm?id=612&wit\\_id=42](http://judiciary.senate.gov/testimony.cfm?id=612&wit_id=42)>.

<sup>21</sup> *Supra* note 19.

<sup>22</sup> Levitt, Mathew, “Stemming the Flow of Terrorist Financing: Practical & Conceptual Challenges”, 27 SPG Fletcher F. World Aff. 59 (Spring, 2003).

<sup>23</sup> USA PATRIOT is an acronym that stands for: Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism.

<sup>24</sup> USA Patriot Act §§ 301-377.

The changes are designed to enlist all possible financial intermediaries in the war against terror, and represent something of a paradigm shift in law enforcement. While previous anti-laundering enforcement efforts focused on gathering evidence of illegal conduct to support prosecutions, they now emphasize deterrence and prevention.<sup>26</sup>

Section 5318 of the *USA Patriot Act* requires domestic financial institutions and domestic financial agencies to take any of the five new "special measures" if the Secretary of the Treasury finds that such action is warranted to deter a "primary money laundering concern" imposed by sources outside the United States. These special measures require domestic financial institutions and financial agencies to:

- 1) perform additional record-keeping and reporting in respect to transactions identified as posing a "primary money laundering concern," including tracking the name and address of parties to such transactions and identifying the legal capacity in which a party acts;
- 2) identify the beneficial owner(s) of an account opened or maintained in the United States by a foreign person;
- 3) maintain records of customers who make use of "payable-through" accounts connected to any foreign jurisdictions, financial institutions, or classes of transactions that are of "primary money laundering concern;"
- 4) identify customers who use correspondent accounts; and
- 5) prohibit the opening or maintenance of correspondent and payable-through accounts involving a "primary money laundering concern."

Failure to comply with the above "special measures" can result in stiff penalties totalling "not more than two times the amount of the transaction, but not more than \$1,000,000."<sup>27</sup>

Although it has been recognized that the IMLA Act will have certain benefits, such as the improved ability to target and prosecute drug trafficking and tax evasion, its relative worth has been criticised. For example, one observer has written, "[the IMLA Act] will reduce the competitiveness

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<sup>25</sup> Goncharoff, Katherine, "New Laundering Rules Draw VCs' Interest," *Daily Deal*, Mar. 18, 2002. online (Westlaw): 2002 WL 6788514.

<sup>26</sup> Becker & Strassberg, "Know Your Customer: Designing an Effective Anti Money Laundering Plan," 20 *American Corporate Counsel Association Docket* 20, No. 10, (Nov/Dec 2002).

<sup>27</sup> 31 USC, section 5318.

of U.S. financial institutions and other businesses to an extent that will cause most critics to conclude that the Act's burdens outweigh its benefits."<sup>28</sup>

## **THE NEW PATH: INTERNATIONAL MONEY LAUNDERING**

Combating money laundering is a dynamic process because the criminals who launder money are continuously seeking new ways to achieve their illegal ends. Moreover, as many countries strengthen their financial systems to combat money laundering, criminals may exploit weaknesses in other jurisdictions to continue their laundering activities. In order to foster global implementation of international anti-money laundering standards, regional anti-money laundering groups have been established to help countries with weaker laundering legislation develop stronger laws.<sup>29</sup>

The drive to launder increasingly results in schemes that send money through a complex series of transactions involving shell corporations and offshore banks that operate in countries with ineffective currency reporting requirements. For example, millions of dollars in proceeds from a credit card fraud scheme in Los Angeles may be laundered through an offshore bank in the Caribbean and another bank on the island nation of Vanuatu, before being deposited in the name of a false corporation in Australia. Alternatively, millions of dollars in cash proceeds of drug sales in New York may be smuggled out of the United States and deposited into Mexican banks, or sold on the black market in Colombia, only to end up in the bank account of an Italian corporation in Milan.

It is also possible to avoid the currency reporting laws by keeping the dirty money out of the banking system entirely. Instead, one may engage a series of couriers to transport volumes of cash in boxes, suitcases, and concealed compartments in vehicles on the highways and through airports, to be smuggled out of the country and placed in a bank within a jurisdiction with lax enforcement.

Without international cooperation we are left with a patchwork of domestic, bilateral, and regional efforts that at best, work in parallel (and not in a complementary fashion), and at worst, work at complete cross-purposes.<sup>30</sup>

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<sup>28</sup> Lyden, George, "The International Money Laundering Abatement and Anti-Terrorist Financing Act: Congress Wears a Blindfold While Giving Money Laundering Legislation a Facelift," (Winter 2003) 8 *Fordham Journal of Corporate and Financial Law*, i 1. 201.

<sup>29</sup> See the FATF, discussed below.

<sup>30</sup> *Supra* note 22.



## INTERNATIONAL RESPONSES

It has been suggested that offshore financial centres such as Grenada and St. Vincent have encouraged money laundering by allowing the development of "a shroud of secrecy surrounding the financial services sector."<sup>31</sup> It is estimated that \$5 trillion is now held in offshore funds.<sup>32</sup> Accordingly, these centres are facing increased pressure by the international community to comply with efforts to eradicate illegal financial transactions.

At the forefront of this campaign are the Organization for Economic Co-operation and Development (OECD) and the Financial Action Task Force on Money Laundering (FATF), an operational wing created by the OECD to report on money laundering issues.<sup>33</sup> The OECD, consisting of 30 member countries, has indicated that globalization and the removal of exchange controls and other barriers to the free movement of capital have encouraged the proliferation of harmful financial practices, including money laundering.<sup>34</sup> According to the FATF, new opportunities have opened for individuals and enterprises to launder vast amounts of money using shell companies, credit cards, and electronic transfers in foreign jurisdictions.<sup>35</sup>

In June 2002, the FATF published a report entitled "Third Review to Identify Non-Cooperative Countries or Territories," in which it identified a number of offshore countries as 'non-co-operative' in the money-laundering clampdown. Included in that list are the Cook Islands, Dominica, Guatemala, St. Vincent, and the Grenadines.<sup>36</sup> The FATF worked from a list of countries through its past research that had warranted investigation

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<sup>31</sup> Clissold, Gillian et. al., "Survival at What Cost? The Impact of Financial Services on Small Caribbean States," (Trinity College Briefing Paper) online: <<http://www.trinitydc.edu/academics/depts/Interdisc/International/caribbean%20briefings/bp6.pdf>>.

<sup>32</sup> United States Department of the Treasury, online: <<http://www.irs.gov/businesses/small/article/0,,id=106568,00.html>>.

<sup>33</sup> According to its website, the "Financial Action Task Force on Money Laundering" (FATF) is an inter-governmental body which develops and promotes policies, nationally and internationally, to combat money laundering. As a 'policy-making body,' its primary goal is to generate the political will necessary for bringing about national legislative and regulatory reforms in this area. See online: [www.fatf-gafi.org](http://www.fatf-gafi.org)

<sup>34</sup> See online: <[www.oecd.org](http://www.oecd.org)>.

<sup>35</sup> See online: <[http://www.fatf-gafi.org/pdf/TY2003\\_en.pdf](http://www.fatf-gafi.org/pdf/TY2003_en.pdf)>.

<sup>36</sup> The complete list of non-cooperative countries is: Cook Islands, Dominica, Egypt, Grenada, Guatemala, Indonesia, Marshall Islands, Myanmar, Nauru, Nigeria, Niue, Philippines, Russia, St. Vincent and the Grenadines, and Ukraine. See online: <[http://www.fatf-gafi.org/pdf/NCCT2002\\_en.pdf](http://www.fatf-gafi.org/pdf/NCCT2002_en.pdf)>.

for bad laundering laws. The reviews involved "gathering the relevant information, including laws and regulations, as well as any mutual evaluation reports, related progress reports and self-assessment surveys."<sup>37</sup> In some cases, the reviewed jurisdictions were asked to answer specific questions aimed at determining their position on laundering issues. A failure, or finding of non-compliance, is a red flag to the international community, and trade consequences could follow.

Most of these offshore countries operate with very little infrastructural or committed expenses, which is why they can afford low (or no) income taxes and other corporate incentives. In countries that have lax money laundering laws, there is profit to be made as increased wealth flows through the jurisdiction. Their motivation for conducting their affairs in this manner could indicate that they place greater importance on the constant influx of cash flowing into their banks, than to give the international community the perception of propriety. This perception of propriety may be significant where trade and commerce are affected, but many offshore jurisdictions rely less on trade and more on tourism for national income. Therefore, a listing on an FATF non-compliance sheet may not be a considerable factor to some offshore countries. That said, there are some offshore jurisdictions that pride themselves on thriving tourism industries, low operational costs (and accordingly, low tax burdens), and strong anti-laundering laws.

## OFF-SHORE CASE STUDY: BERMUDA

Bermuda has advertised its commitment to 'knowing its customers,'<sup>38</sup> and today, according to its authorities, "money-launderers are high on the list of 'enemies.'"<sup>39</sup> With that in mind, Bermuda's recent legislation provides "key ammunition in fighting this important battle."<sup>40</sup>

Bermuda enacted the *Proceeds of Crime Act* (PCA)<sup>41</sup> in 1997, which became operative in January 1998. The PCA was initially aimed at preventing offences relating to the proceeds of drug trafficking, serious crime,

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<sup>37</sup> See online: <[www.fatf-gafi.org/pdf/NCCT2002\\_en.pdf](http://www.fatf-gafi.org/pdf/NCCT2002_en.pdf)>.

<sup>38</sup> See, for example, Bermuda Monetary Authority: online: <[http://www.bermuda.org.uk/monetry\\_authority.htm](http://www.bermuda.org.uk/monetry_authority.htm)>.

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*

<sup>41</sup> Bermuda Statutes 1997: 34 See online: <<http://www.fortknox.bm/NXT/gateway.dll?f=templates&fn=default.htm>>.

and other defined money laundering activities in Bermuda.<sup>42</sup> The *Proceeds of Crime Amendment Act 2000* (PCA 2000) amended the PCA to bring fiscal offences, such as those relating to the fraudulent evasion of taxes, within the definition of relevant offences.

The PCA provided a framework for the confiscation of the proceeds of criminal conduct, defining "criminal conduct" as drug trafficking offences and any "relevant offence." The PCA 2000 redefined "relevant offence" to mean any indictable offence in Bermuda, and any act or omission outside Bermuda, which would have constituted an indictable offence had it occurred in Bermuda.<sup>43</sup>

Bermuda's enactment of the PCA 2000 is an interesting example of the result of international pressure. Notwithstanding the earlier adoption of the PCA, Bermuda (and other offshore jurisdictions) was still criticized by the United States and a number of overseas governments about the issue of "fiscal offences."<sup>44</sup> Bermuda was recognized as always having had an enviable reputation for keeping "dirty money" out of the jurisdiction, but was permissive of tax evasive practices harmful to other countries. In order for Bermuda to maintain and solidify its position as a premier offshore financial services centre, it adopted legislation in line with that of other major financial services centres.

Part V of the PCA contains the following substantive offences of money laundering:

- 1) Section 43(1)(a): concealing or disguising property which represents proceeds of criminal conduct for the purpose of avoiding prosecution or the enforcement of a confiscation order;
- 2) Section 43(1)(b): converting or transferring property representing proceeds of crime or removing it from Bermuda for the purpose of avoiding prosecution or enforcement of a confiscation order;

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<sup>42</sup> See, for example, the preamble, which states, "it is expedient to extend the powers of the police and the courts in relation to the tracing and confiscation of the proceeds of drug trafficking; to make new provision in relation to the tracing and confiscation of the proceeds of certain other indictable offences; to make new and amended provision in relation to money laundering; to extend the powers of seizure and forfeiture on import or export of cash suspected of being the proceeds of criminal conduct; and to make connected and consequential provision."

<sup>43</sup> PCA 2000, subsection 2(1).

<sup>44</sup> Mondaq Business Briefing - Conyers Dill & Pearman, "Bermuda: Money Laundering - An Explanation Of The Recent Amendments To The Bermuda Proceeds Of Crime Act And The USA-Bermuda Tax Convention Act" (Nov, 1999).

- 3) Section 43(2)(a): concealing or disguising another person's property representing proceeds of crime or removing it from Bermuda for the purpose of assisting another to avoid prosecution or the enforcement of a confiscation order;
- 4) Section 43(2)(b): converting or transferring another person's property which represents proceeds of crime or removing it from Bermuda for the purpose of avoiding prosecution or enforcement proceedings;
- 5) Section 44(1): entering into or being concerned with arrangements to enable another to retain proceeds of criminal conduct or using the proceeds of criminal conduct to benefit another;
- 6) Section 45(1): the acquisition, possession or use of proceeds of criminal conduct, knowing that the property represents the proceeds of criminal conduct;
- 7) Section 46(2): failure to disclose knowledge or suspicion of money laundering related to drug trafficking to a police officer;
- 8) Section 47(1): tipping off any person about a police investigation into money laundering; and,
- 9) Section 47(2): disclosure of information likely to prejudice an investigation into money laundering.

The reporting authority under the PCA is the Financial Investigation Unit (FIU). The legal duty to report to the FIU is confined to knowledge or suspicion about a person who is engaged in laundering the proceeds of drug trafficking. Section 46(2) makes it an offence for a person to fail to report knowledge or suspicion of money laundering relating to the proceeds of drug trafficking, where the information on which the knowledge or suspicion is based is derived from his trade, profession, business or employment. There is no legal duty to report knowledge or suspicion of other relevant offences, but a person who does not make a report in such circumstances will risk being exposed to prosecution in his or her own right for section 43, 44 and 45 money-laundering offences. In other words, by not reporting the use of criminal proceeds, one risks becoming a passive participant in the laundering scheme.

The first regulations to be made under the PCA were the Proceeds of Crime (Money Laundering Regulations) 1998 (the "Regulations"), which came into force on January 30, 1998. The primary purpose of the Regulations is the designation of businesses as "regulated institutions," which become subject to additional obligations to establish identification, record-keeping, internal reporting, and training procedures. Failure to

comply with the Regulations is an offence punishable by fines of up to \$100,000 for a second offence. The following businesses are regulated institutions:

- banks;
- deposit companies;
- investment businesses licensed under the Investment Business Act;
- trust companies, and persons carrying on trust business as a business or profession;
- insurance companies, to the extent that they are carrying on long term business other than life or disability business;
- credit unions;
- persons processing subscriptions and redemptions for collective investment schemes;
- trading members of the Bermuda Stock Exchange; the Bermuda Commodities Exchange or the Bermuda Commodities Exchange Clearing House;
- a person licensed by the BMA to offer currency exchange services;
- a voluntary regulated institution (a person who does not fall into the above categories may apply to the Minister of Finance to become a regulated institution).

There are certain benefits to becoming a voluntary regulated institution. These benefits flow from the co-requisite requirements under the 'know your customer' policy. Under the Regulations, regulated institutions may introduce clients to one another, without undertaking further client identification procedures. A regulated institution may rely on the written assurance of another regulated institution that such identification procedures are being followed.

Regulated institutions are required by the Regulations to appoint a "reporting officer," who is the person ultimately responsible for determining whether the regulated institution should report a suspicious customer or suspicious transaction to the FIU. It is noteworthy that Bermuda law firms are not currently designated as "regulated institutions" for the purpose of the Regulations, and so presumably are not under any reporting obligations whatsoever with respect to their clients.

## **CONCLUSION**

In response to the threat posed to the financial system and national security by money laundering (particularly when these illegal funds are used for terrorist financing), an international anti-laundering effort is

underway to ensure that criminal misuse of the financial system is detected and defeated. This effort has taken on new urgency since the terrorist attacks on the United States in 2001. As law enforcement and legislators alike learn about the evolving methods available to terrorists, drug dealers, and other criminals for 'cleaning' their ill-gotten cash, they respond by enacting new and tougher legislation. Since much laundering activity now takes place across international borders, the effort is necessarily global, involving offshore as well as onshore jurisdictions.

To that end, the OECD-created FATF monitors the laws and policies of the international community and generates annual reports with respect to non-cooperative countries, or countries with lax laundering policies and laws. While some countries, such as the Cook Islands, Dominica, Guatemala, St. Vincent, and the Grenadines remain on the non-cooperative list, many others have responded to the pressure by changing their policies and enacting compliant laws. Indeed, the push towards international harmonization of money laundering standards seems to be well under way.

Under the Canadian POCTF, the American *USA Patriot Act*, and the Bermudan PCA, the act of money laundering itself is a criminal offence. These acts require financial intermediaries to report to specially created agencies any suspicious or 'large cash' transactions involving more than \$10,000. The similarities between the Canadian, United States, and Bermuda legislative schemes are noteworthy and represent a model towards which all countries should aspire. All three schemes target third-parties, with extensive financial reporting requirements; all have similar target ranges for 'large cash transactions' over which all transactions must be reported; all rely on a subjective belief in impropriety as the reporting standard; and all provide for the seizure of property used in committing an offence or generated by the commission of an offence.

Whether these efforts will be effective in eliminating the scourge of drug trafficking and terrorism remains to be seen. Certainly, as Mr. Aguilar pointed out at the "Dirty Money, Clean Hands" conference, illegal drugs continue to be sold and the producers of those drugs still benefit from the cash generated. Unquestionably, financial intermediaries are key players as they are on the front lines of the cash flow. Unfortunately, some financial intermediaries continue to ignore the illicit sources of money that moves through their systems. On the other hand, there is much to hope for in that we are in the early stages of a global and high-tech community, one in which surveillance, monitoring, and harmonized laws and policies may ultimately make even the smallest transgressions impossible.