

DIRTY MONEY, CLEAN HANDS CONFERENCE OPENING ADDRESS

Dr. Bryan Schwartz*

THIS IS THE INAUGURAL conference of the Asper Chair on International Business and Trade Law. I want to spend a minute or two talking about the program, where it came from, and what we have been doing with it, as well as express my appreciation for the sponsors of today's program. The Asper Chair of International Business and Trade Law is the first endowed chair of the University of Manitoba Law School. We have won only a handful so far at the University of Manitoba, but we are hoping that this will be the inspiration for many more. It was created with the vision to identify an area of law and public policy that would be exciting from the point of view of students, while giving them practical instruction to increase their professional opportunities.

Since the program was created, we have established a teaching program that offers courses in International Trade Law and International Business Law. Our intent from the beginning was to be student-oriented, and in the previous two years, we have sent students to the International Moot Court Competition in Vienna. While there, they participated in a very realistic exercise in International Commercial Arbitration, and met students from about sixty different countries and a hundred different law schools. We have tried to establish a publishing program which will be both of high scholarly standards and readable, and will encourage high student involvement. Our internship program allows two student interns to help edit the Asper Review of International Business and Trade Law, which is supported by the Canadian Credit Management Foundation. The Foundation also supports our work in International Business and Trade Law, and is responsible for the very generous subsidies to students, enabling them to participate today. The Asper Review is found in a number of electronic databases such as Quicklaw and LexisNexis, making it available to millions of people throughout the world.

For someone who has been a constitutional lawyer for a very large part of my career, I certainly see International Trade Law and International Business Law as a natural continuation of what I have been

* L.L.B. (Queen's); L.L.M. (Yale); J.S.D. (Yale); Asper Professor of International Business and Trade Law, University of Manitoba.

doing from the beginning. International trade agreements are not the more glamorous components of the international system, such as the Security Council, but are on the cutting edge of building some sort of world order. In the Canadian experience, the creation of an economic union in 1867 was the commencement of building a more comprehensive nation. The United States began as a more imperfect economic union, and only through time did it become much more integrated. The European Union started as the European Coal and Steel Union, which was a very modest economic enterprise. In many societies, wide-scale constitutionalism begins on the economic front, and I believe that is the case with the entire planet. We can see that a nation's central institutions deal not only with economic matters, but have begun to manage social policy that affects human rights, the environment, language, and all kinds of issues.

Turning to the subject matter of our conference – what is all this talk of ill-gotten gains, dirty money, and clean hands? What are we talking about and where do all of these laws come from? Just yesterday, I was speaking to a large group of investment dealers and wealth management advisors about Canada's sweeping new privacy law, which I believe to be the most important and far-reaching area of private law that has come about since the *Bankruptcy Act* was reformed. This privacy law affects every commercial organization in the country and deals with the non-disclosure of information. At today's conference, we are talking about the most comprehensive piece of legislation in recent times that *requires* disclosure of information. The same professionals, who were told in 2001 not to say anything about anyone without their consent, are now being told that they may have to make disclosures about their client, without telling them that they are doing so. In effect, these two comprehensive pieces of legislation are somewhat in conflict in terms of their operation.

Both pieces of legislation are the direct product of globalization and international pressure. With respect to privacy laws, we are trying to maintain international comity in an attempt to keep up with the level of privacy protection established by the European Union. In 1995, the European Union issued a data protection directive, which established a very high standard for the protection of privacy. Information would not be allowed to be sent out of the European Union, unless it was being sent to a place that complied with European standards. The Canadian government decided that in order to maintain free economic interaction with Europe, we would have to meet their privacy standards. Therefore, globalization led to a very high increase in our own level of privacy protection.

Money laundering, proceeds of crime and the offences that underlie them, as well as the entire apparatus of proceeds of crime law, forfeiture

of property law, and FINTRAC (the Financial Transactions and Reports Analysis Centre of Canada) are the product of international commitments that Canada has made or been subjected to by international pressure. Underlying offences, which trigger the application of money laundering and proceeds of crime law, are largely the product of international agreements or international influences. We have very tough laws on controlled substances and drugs partly because we are committed by treaty to do so. Canada is a party to three international conventions on controlled substances. They include strong provisions dedicated to suppressing trafficking and pursuing proceeds of crime from drug sales. If Canadian domestic policy were ever to change in this regard, we would have to persuade others to change the treaties, or withdraw from them altogether and face whatever economic consequences would follow. Currently, our entire institutional apparatus, FINTRAC, and the laws associated with them, are congruent with and a product of international recommendations and organizations to which Canada is a party.

The most critical theory of globalization contends that globalization leads to a lowering of regulatory standards. The "race to the bottom" theory takes the view that regulatory standards steadily plummet in response to globalization. It is based on the assertion that once you open up boundaries, you create a one-world market that leads to intensive price pressure. Since everybody is under pressure to sell their goods and services at the lowest possible cost, the theory claims that environmental standards become less stringent, workers are paid less, and occupational safety standards decrease, resulting in a competitive pressure that achieves lower levels of public safety.

In actual practice, money laundering, proceeds of crime, and privacy laws have experienced a substantial increase in regulatory standards through the use of the criminal law power – the most powerful instrument of state enforcement. In an era of globalization, states are more vulnerable to each other. They are progressively more concerned with what is happening in other countries and start to insist, through either moral suasion or economic sanctions, that other states increase their standards. In effect, the European Union raised Canada's privacy standards because they would not conduct business with us in data protection otherwise. With respect to the United States, the Canada-U.S. border is seen as a very permeable one, and therefore the United States insists that we maintain our drug policy for better or for worse. Some Canadians feel that the current drug policy should be tempered; however, our ability to change it is considerably influenced by the fact that we have a very powerful neighbour to deal with, one who is concerned about the border, and is very adamant that we maintain our current standards in this regard.

Similarly, other countries are worried about Canada becoming a money-laundering haven. They insist on stringent standards and a bureaucratic apparatus to go with it, such as a well-regulated banking system and rule of law, because they do not want Canada to become a pleasant place for money launderers to put their money. I make this comment parenthetically because although it goes beyond the immediate context of money laundering, this phenomenon, known as “the race to the top,” is much more widespread in this era of globalization than one would think. For example, investors are not necessarily looking for the most evil, corrupt, lawless, and insensitive place to put their money, but instead are looking for places governed by the rule of law, which is good for everybody. Investors may be looking for places with relatively good social programs, as this could mean that private enterprises would not have to pay for programs such as healthcare. They may be looking for places to invest in with a high standard of education and worker training, which may lead to increased productivity gains. Despite this, globalization does not always lead to increased standards. There are instances where globalization makes it easier to do business with corrupt dictators. Nonetheless, I think the “race to the bottom” theory is demonstrably oversimplified, and serious attention must be paid to the existence of the alternative “race to the top” theory.

For the purposes of the *Criminal Code* and the whole system under federal law, proceeds of crime are the product of indictable offences under the *Criminal Code* or any other federal statute. For example, if you sold marijuana and you have the money in your hands, that money is proceeds of crime. A similar regime deals with offence related property; if you drove your motor boat and used your cell phone to make a drug deal, that property used to commit the offence can be seized in the same way that proceeds of crime can be seized by the State. The government applies to the court to have your property declared forfeited, and if the court agrees that it is proceeds of crime or offence related property, then it is forfeited.

The opportunity to launder money arises when there are proceeds of crime. Laundering, in the criminal law sense, means to take money from one form or another with the purpose of disguising it or converting it. Converting is a very broad concept and according to the case law, it does not necessarily require you to have any kind of nefarious intent. It could consist of changing money from Canadian currency into American currency for the purposes of visiting Disney World. As well, a person who takes their proceeds from a drug deal and buys an SUV with it is converting. It is, in a sense, beyond the original offence of selling the illicit drug.

Money launderers are engaged in what can be a very technical and sophisticated enterprise. One technique called ‘*smurfing*’ involves spread-

ing the money around through small transactions, thereby making it much harder to detect. Another technique known as '*layering*' consists of setting up one company, which owns other companies, which own other companies, and so on, making it extremely difficult to detect and unravel. It often requires a complicated flow chart to determine who has what money and where.

FINTRAC is responsible for receiving reports about money laundering, in an attempt to better track and detect how it is occurring. It has enlisted financial intermediaries to cooperate in tracking proceeds of crime, money laundering, and terrorist property. This means that all financial intermediaries in Canada adhere to very stringent reporting requirements. These financial intermediaries not only include banks and credit unions, but also lawyers. For example, a lawyer engaged as a financial intermediary in a situation where a lot of cash is deposited as a down payment on a house has reporting requirements. As a result, a lawyer may be in circumstances that legally oblige them to report a suspicious transaction to FINTRAC about their own client. This has raised some very substantial ethical and legal concerns on the part of some members of the legal community.

A sacred part of the legal profession's operation has always been the protection of client confidentiality. Lawyers are now in the position where they not only have to breach that confidentiality, but also cannot disclose to the client that they have reported them. A provision of the federal money laundering laws states that you cannot tip off a client to the fact that you reported them if you have the intent of prejudicing a criminal investigation, whether that investigation be current or future. A number of law societies, although Manitoba is not one of them, have brought forth lawsuits. They are asking that the law not apply to them until there can be a full exploration by the courts of the constitutional limitations in applying these money laundering laws to lawyers. My own view, which is probably not the most popular one among the legal community, is that lawyers should not be the black hole of the money laundering system. There are some difficulties with the scope of some of the money laundering laws, but if we are to have them, it does not seem appropriate to have lawyers being the biggest institutional loophole in the whole system. If we assume 99.5% of lawyers are honest and ethical, that would still leave a substantial number of lawyers available to do the dirty work involved in money laundering. Therefore, protection for lawyers should be more restrictive than anything a lawyer does for a client, but it should be restricted to functions like defending in criminal prosecution.

In the aftermath of 9/11, a regime was developed to contend with terrorist property. These laws came about in association with stringent

international requirements and deal with possession of terrorist property, use of property in any way to assist terrorist organizations, and the financing of terrorist organizations under the guise of charities that later claim tax deductions.

There are some large policy concerns that exist with these laws. On initial examination, they seem to be righteous, good, and at least have a reasonable prospect of being effective. The idea that proceeds of crime should be seized seems like elementary justice; however, it is not quite so simple. First, proceeds of crime is a much larger concept than profits from crime. If a person spends \$30,000 to do \$40,000 of illegal business like selling marijuana, they have actually only gained \$10,000. However, the proceeds amount to \$40,000, which the State may attempt to declare forfeited. This may be a little harsh. Ordinarily, in assessing a monetary fine, the State follows the principle of proportionality based on the nature of the offence and the nature of the offender. One might receive a very light fine or no fine at all in engaging in a comparable transaction apart from the forfeiture. In the event of not having the money to pay, the court may order a fine in lieu of the forfeiture. If the fine is unable to be paid, the court has no choice but to order jail time. Under the *Criminal Code*, if you do not have the money to pay a fine in lieu of forfeiture, a sliding scale determines jail time according to the amount of forfeiture that cannot be paid. Therefore, we actually have mandatory minimum imprisonment based on an arguably arbitrary figure—proceeds not profits. This determination is not related in any way to the level of moral culpability of the accused, the extent to which innocent people have been injured and the need to compensate victims, and the extent to which the money is available. There are certainly some legitimate concerns about fairness in this respect.

The *Charter of Rights and Freedoms* might be of some assistance in more extreme cases. The provisions against unreasonable search and seizure will probably not be effective with respect to forfeiture provisions. The courts have indicated that search and seizure under section 8 of the *Charter* has to deal with privacy, and is not intended to protect privacy in and of itself. On the other hand, section 12 of the *Charter* might be of some use, although this remains uncertain. Section 12 guarantees against cruel or unusual treatment or punishment. Grossly disproportionate punishment may be a violation of section 12, but if the gross disproportionality is in relation to property, the courts may not be interested. The verbiage of protection of property in the *Canadian Bill of Rights* also remains to be tested.

From the point of view of law enforcement, several concerns arise at a practical level. First, there is now the prospect of profitable law enforce-

ment, which in one sense sounds like an excellent idea. In Manitoba, we should be especially sensitive to the complaints of law enforcement officials of being inadequately resourced. They do not have enough money to have Crown counsel, while we do not have enough money to pay defense counsel so that the process can take place. If these are the concerns of this province, what is wrong with property from crime going to the State and being made available to finance law enforcement or other public policy purposes? From a civil liberties perspective, there are several concerns.

Right now, the criminal law process is an earthy bargaining process. There is a big book that the government can throw at you, and if any of you have seen the recent *Criminal Code*, it is a big book. It is certainly a lot bigger from what it was when I went to law school twenty years ago. Issues of herniation do arise, and if the State wanted to invoke the full force of the criminal law, including all maximum penalties and crimes, it has more opportunities to do so now than ever. In the United States, small drug crimes used to be tried in state courts, but have now become racketeering prosecutions occupying several years in the federal courts. In Canada, an old-fashioned drug offence can be turned into a criminal organization offence with extra penalties, a forfeiture of offence related property issue, or even a proceeds of crime issue. It can be turned into a whole lot of additional offences on top of the basic offence, with a whole lot of penalties attached to them. It is discretionary of the Crown to decide whether to seek all of these penalties or not. Naturally, the bargaining power between the accused and the prosecution is affected; they have a big book to throw at you, and you may be a person with few resources to resist the State.

The challenge for the criminal law system is not separating the guilty from the innocent, but that of proportionality. Most people charged with offences are guilty, but the challenge for the system is responding in a way that is not unduly harsh, yet not overly lax, constructive where possible, provides opportunity for rehabilitation, does not produce unnecessary collateral damage to family and friends of the accused, and ideally creates the possibility of rehabilitation and reconstruction. In some cases, one can be legitimately concerned about whether the balance in favour of the prosecution may be distorted because of extra and discretionary powers given to the prosecution. Keep in mind that most cases in our system are settled by plea-bargaining, and so it is relatively rare that a case goes through the full litigation process.

American literature on proceeds of crime and money laundering has identified other concerns, but it is too early to tell whether these concerns will be borne out in Canada. I do not think speculative sociology has

much value, as one must actually determine what goes on in practice. In the United States, critics claim that once law enforcement officials see there is a profit to be made in law enforcement, they will follow the natural Marxian analysis and go after the money. Therefore, United States law enforcement authorities will always go after the buyers of drugs, but not the sellers of drugs. They will perform sting operations that involve big bags of cash, but not those that involve big bags of drugs. A seized bag of drugs under the money laundering/proceeds of crime law is contraband, which the police cannot sell. But, if there is money in a suitcase, it becomes profitable law enforcement, giving police the resources they need to engage in other activities. Some are concerned about an increasing emphasis of law enforcement on drug offences, because of the amount of money involved, and not enough emphasis on non-profitable policing. For example, people who commit crimes of violence are not necessarily wealthy or do not necessarily have resources, and it is very expensive to incarcerate them. In contrast, pursuing drug crimes, which may be done with arguably excessive enthusiasm in the United States, is in fact an area of profitable law enforcement.

Turning to the area of effectiveness, we talk all the time in metaphors when it comes to this area of law – the war on drugs, the war on crime, and the war on terrorism. If we are going to think in terms of war, then I would suggest that we learn from the literature on military strategy. This literature teaches us that there is no area of human affairs as fraught with paradox and unexpected consequences as military endeavours. This is true for material reasons and because military endeavours, and I am extending this now to law enforcement activities and drug dealing, are thinking advent adversaries whose responses are not static and not always predictable. In the military area for example, early success in a war sounds like an uncontroversial good, but in reality, it can be the seeds of its own destruction. Materially, if you advance too far and too quickly, you are beyond your supply lines, the territory is unfamiliar, and the local population is a hostile one—you do not have a secure source of supply.

At the psychological level, early success does not cause you to question your methods in the same way that failure would. Early failure is the greatest lesson in terms of evaluating what you have done wrong. I have seen it seriously argued that the reason the North won the Civil War was that they did so badly in its early stages. They were forced to develop new techniques and change their commands, whereas the South did very well in the beginning and therefore never had the early incentive to change its methods of technology, leadership, or strategy.

There exist many unexpected consequences in endeavours where one

is going after a thinking adversary in a way that involves the use of force. The whole area of drug policy may be one of the areas where this paradox is actually realized to the maximum extent. Many have argued that our approach with respect to soft drugs is counter-productive in that we are doing more human harm than good. At the minimum, using soft drugs may not be good for some people, but putting people in jail is not good for most people. The disruption in people's lives with an addict in the family can be very serious, and having a spouse or a father or mother in jail can be equally as disruptive. The use of marijuana or other drugs may lead to more crimes, since being in prison provides the opportunity to learn from the best criminals out there. As well, the fact that drugs are illegal raises their price so high that people often are forced to steal and engage in other crimes in order to access them.

If we examine money-laundering laws, the obvious consequences appear to be good; however, some areas produce paradoxical results. With respect to the operation of our tax laws and profits from the drug trade, there is no longer the sacrosanct protection of income tax returns for people who traffic in narcotics and other illicit substances. The counterproductive effect of the non-reporting of profits to tax authorities results in an even bigger loss to the public welfare and the public good than if a more moderate approach had been taken.

The illegality of money laundering creates both a primary and secondary black market. The primary black market is the drug market, which creates opportunities for criminals including terrorists to make money. The secondary black market exists in laundering the proceeds of crime. Again, this may have counter-productive consequences. Since money can be so freely seized from the hands of people in this country, it provides an extra incentive not to report it and not recycle it into the legitimate economy. Instead, the money is moved offshore where it cannot be redeemed by the legitimate economy and cannot be used to make restitution of victims when the person is ultimately detected. This is not to say that these laws are all fundamentally misguided, because for the most part, they are entirely justified. I just wanted to raise some questions as to ways in which these laws are subject to critical evaluation and how they might be refined or moderated in the future.

In regards to the bigger picture, I have spoken about how internationalization has so fundamentally affected the entire area of legal development. There are several issues surrounding our ability to change or develop these laws, if we were inclined to do so. One of these is Canada's openness of the border with the United States. It is the single most important economic issue for Canada, with over 30% of Gross Domestic Product (GDP) being sold to the United States. In the province of Manitoba alone,

85% of exports go to the United States. Even if we wanted to change our drug policy, and there is a strong case to be made that we ought to, a very substantial limitation is the response of the United States. We could only change our drug policy if we could do it in a way that would convince Americans that we are not enhancing their own drug problem, but might in fact, be reducing it.

With respect to our laws on terrorism and proceeds of crime, again we receive substantial international pressure to respond. There is significant debate about Canada and our sense of where and when to establish our national identity. A case could be made that if there were an area where we wanted to assert our independence, it would be in the area of drug policy; and the area where we should not be asserting our independence for the sake of being different, is in the area of terrorist policy. Some have argued that we have been too soft on terrorism, while being too hard on recreational drug use; that we have not sufficiently tightened our procedures on documented persons arriving in the country and have gone out of our way to differentiate ourselves as a matter of national policy with respect to the pre-emptive attacks on terrorism in Iraq. Therefore, two large forces shape our approach to policy-making. The first is a necessity to respond in a serious and responsible way to international pressure, as well as to pressure from the United States, since it is economically essential for maintaining our own social well-being. The second is the desire to maintain our own national identity, which, some would argue, is a good in itself. Others would argue that it is inappropriate to do things merely to be different, and not because we have an independent and autonomous reason for doing so.