PROCEEDS OF CRIME

A Guide

Dirty Money, Clean Hands

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The Dirty Money, Clean Hands conference is the first conference to be hosted by the Asper Chair for International Business and Trade Law in partnership with the Canadian Credit Management Foundation.

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PROCEEDS OF CRIME UNDER THE CRIMINAL CODE

Scope of legislation

Property involved

- Proceeds of crimes means any "property, benefit or advantage" that is derived, within or outside of Canada, directly or indirectly, from the commission of a designated offence [s. 462.3(1)].

  - Designated offence means: an indictable offence under the Criminal Code or other Act of Parliament. Also included are:
  - → conspirators
  - → accessories after the fact
  - → those who engage in attempts
  - → and counsellors of such offences [s. 462.3(1)].

- "Property" includes any interest in property, there does not have to be full ownership. *R.* v. *Stone Estate,* 2001, 155 C.C.C. (3d) 168.

Extraterrorial application

- The "designated offence" can occur anywhere as long as it would have been a designated offence if committed in Canada, and the proceeds can also be anywhere.

- A Canadian court can also order forfeiture of property located abroad [s. 462.371(2.1)].

- A forfeiture order from one province can be executed in any other province [s. 462.371(2)].

Powers of a court to order forfeiture

- A court must order forfeiture if:
  - → an accused is convicted of a particular "designated offence"
  - → property is proved, on a balance of probabilities, to be proceeds from that offence [s. 462.37(1)].

- A court may order forfeiture if:
  - → an accused is convicted of a "designated offence"
  - → property is proved, beyond a reasonable doubt, to be proceeds from another designated offence [s.462.37(2)].

Fines in lieu of forfeiture

- A court may substitute a fine in lieu of forfeiture where the property:
  - → cannot be located
  - → is outside of Canada
  - → has been transferred to a third party
  - → has lost a substantial part of its value
  - → has been inseparably mixed with other property [s. 462.37(3)].

Jail time in lieu of fine

- If the court orders a fine and it is not paid, it must order the offender to serve jail time. The amount of jail time is based on a sliding scale, i.e. 6 to 12 months if the fine is $10,000 to $100,000 [s. 462.37(4)].

- A court should not take into account ability to pay in imposing a fine *R.* v. *Garoufili* (1998), 131 C.C.C. (3d) 242; disagreeing is *R* v. *Savard* (1998), 126 C.C.C (3d) 562 (Que. C.A.).

Pre-trial orders to forfeit property

- On application of the Attorney General, prior to the trial of the designated offence, a court may:
  - → authorize the seizure of potentially forfeit property [s. 462.32].
  - → make an order freezing that property [s. 462.33] (See also *The Proceeds of Crime Registration Act* S.M. 1997, c. 25)
  - → authorize various steps to manage or destroy the property [s. 462.34].

- A court can order forfeiture with respect to an accused who dies or absconds before conviction [s. 462.38].

Third party interests

- A court can set aside any transfer of property to a third party that is transferred to avoid a forfeiture order, except when the new owner bought the property in good faith [s.462.4]

- A person who claims an interest in property forfeited can apply for relief from the court [s. 462.42].

- Relief is only available to persons who are "innocent of any complicity" [s. 462.42(4)].

- Relief is discretionary. A court may hold that proceeds should be used for restitution of victims of the offence, rather than a third party with a

property interest. *R* v. *CIBC* (2000), 151 CCC (3d) 439 (Ont. C.A).

Immunity for informants

- A person is "justified" in disclosing to police, or to the Attorney General, a reasonable suspicion that:
  - → property is proceeds of crime [s. 462.47]
  - → a person has committed, or is about to commit, an indictable offence [s. 462.47].

- The immunity for informants does not extend to officials who breach section 241 of the *Income Tax.*

- The Attorney General may apply for, and a court may grant, an order that CCRA officials release confidential information. The context must be an investigation of a drug or money laundering offence [s. 462.48].

Offence related Property

- The Criminal Code provides a regime for forfeiture of "offence related property" that is similar to that for "proceeds of crime"; sections 490.1 to 490.9.

- "offence related property" means any property that is:
  - → within or outside Canada and that is the means by which an indictable offence under the Criminal Code is committed
  - → used in connection with such an offence
  - → intended for use for the purpose of committing such an offence.

Policy issues

- Forfeiture laws can result in:
  - → penalties to the accused that greatly exceed any profits (as opposed to revenues) generated
  - → penalties in excess of any injury to a "victim"
  - → penalties that exceed the ability of the defendant to pay. Fines under the C.C. usually have a ceiling, often a modest one, and the court must ordinarily take into account the offender's ability to pay [s.734(2)]. Participating in a work program, in lieu of the fine, is often an option [s.736(1)]
  - → the potential for harsh and disproportionate punishment raises issues of basic fairness.

- The various provisions for mandatory forfeiture, fines or imprisonment

[s. 462.37(1)] are triggered by a discretionary decision of the Attorney General to seek these penalties. Is too much discretion given to the prosecutor, and too little to courts, which are impartial and must make their decisions openly and with the benefit of full argument?

- Does the ability to seek and obtain mandatory forfeitures, or fines or imprisonment in lieu of fines, sometimes give a prosecutor unfair leverage in plea bargaining negotiations?

- Does the prospect of obtaining forfeiture risk distorting the priorities of law enforcement agencies? Might the prospect of "profitable law enforcement" divert some attention from other kinds of crime? Might it lead to overzealous, rather than fair-minded, prosecutions?

Charter issues

- Courts have been reluctant, or altogether unwilling, to use the *Canadian Charter of Rights and Freedoms* ("Charter") to protect against fines or forfeitures. They have noted that the Charter, unlike its U.S. counterpart, the Bill of Rights, does not contain any provisions that expressly protect property rights.

- It is doubtful that courts will use s. 8 (which prohibits "unreasonable search and seizure") to invalidate court-ordered forfeitures; they may hold that s. 8 is confined to the taking of property in the context of investigatory or other preliminary procedures; see *Quebec (A.G.) v. Laroche*, [2002] SCC 72, at paragraph 53.

- The provision for mandatory forfeiture [s. 462.37(1)] might be challenged under Charter s. 12 on the basis that it has too much potential for producing intolerably harsh results – judicial discretion should instead be permitted. *R.* v. *Lambe* (2000), C.R.R. (2d) 273 (Nfld. C.A.) (cited in *Turner* v. *Manitoba* (2001), Man. R.(2d) 256) the court rejected a Charter s. 12 challenge to a provincial provision that requires the forfeiture of all-terrain vehicles driven in prohibited areas.

- The provision for mandatory minimum sentences in lieu of fines [s. 462.37(4)] might similarly be challenged. Charter challenges to mandatory minimum sentences, however, have rarely succeeded [*Lambe* (supra)].

Canadian Bill of Rights

- The *Canadian Bill of Rights* by contrast does contain, under s. 1(a), a right to the enjoyment of property. Lawyers might wish to attempt s. 1(a) arguments when forfeiture seems unduly harsh on offenders or unfair to innocent third parties.

Developments in the United States

- Courts in the United States have recognized that forfeiture can, in some circumstances, breach constitutional guarantees against "excessive fines" and "cruel or unusual punishment." See United States v. Bajakajian 524 U.S. 321 (1998), holding that a particular forfeiture constituted an excessive fine, based, among other things, on disproportionality between the maximum fine for the offence and the amount of the forfeiture, and the fact that the cause of forfeiture was failure to report money, rather than its illegal origins; see also Austin v. United States, 509 US 602 (1993).

- The Civil Asset Forfeiture Reform Act of 2000 moderated U.S. civil forfeiture laws by placing the burden of proof on the government to show that property is subject to forfeiture and that a substantial connection exists between the illicit conduct and the property.

- Some academic commentators in the United States have charged that forfeiture provisions lead to serious distortions of the priorities of law enforcement agencies. See, for example, Eric Blumenson & Eva Nilsen "Policing for Profit: The Drug Wars' Hidden Economic Agenda" 65 U. Chi. L. Rev. 35 (1998).

Money Laundering

Criminal Code

- Money laundering consists of:

→ dealing with property, in any way (use, transfer, send or deliver, transport, transmit, alter, dispose of) with the intent to conceal or convert that property

→ knowing, or believing, that the property is proceeds conduct in Canada that is a designated offence, or conduct outside of Canada that would have been a designated offence if committed in Canada [s.462.31(1)].

- "Convert" means "change or transform" (e.g., can include converting from one currency to another); *R v. Tejani* (1999), 138 C.C.C. (3d) 366 (Ont. C.A.).

- The property does not actually have to be proceeds of crime – it is sufficient that the accused believed it to be.

***Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, c.17 ("POC(ML)TFA")**

The Act states that its aims include both effective law enforcement and the protection of privacy [POC(ML)TFA s. 3(b)].

This statute establishes:

- Reporting requirements for financial intermediaries (e.g., banks, lawyers who transfer funds on behalf of clients) including:
  - → suspicious transactions
  - → large cash transactions
  - → the import and export of large financial instruments.

- A federal government FINTRAC (Financial Transactions Reports and Analysis Centre of Canada) to collect, analyze and assess the reports, and pass on certain information to law enforcement agencies.

Accompanying regulations and guidelines

- POC(ML)TFA is accompanied by both regulations and a detailed set of "guidelines" issued by FINTRAC <http://www.canafe.gc.ca/intro_e.asp>

- The "guidelines" state they are "general information' and not "legal advice".

- Tax "interpretation bulletins" issued by the government might be given "some weight" when the meaning of the section is unclear; *Harel v. Deputy Minister of Revenue* (Quebec), [1978] 1 S.C.R. 851 at 859. They do not "estop" governments; *Getty v. the Queen* [2000] D.T.C. 1597.

FINTRAC's mandate to proactively provide "bare bones" information to law enforcement agencies

- FINTRAC receives and analyzes reports from a variety of financial intermediaries (e.g., banks, lawyers handling funds transfers).

- FINTRAC must generally respect the privacy of any information provided [POC(ML)TFA s. 55(1)].

- FINTRAC must disclose the information to law enforcement agencies if, after analyzing and assessing information, it has reasonable grounds to believe that the information provided would be relevant to the inves-

tigation of a terrorist financing or money laundering offence [POC(ML)TFA s. 55(3)].

- The report can contain only "designated information" – name of the person involved, type of transaction, time, place and amount [POC(ML)TFA s. 55(7)].

- The report can be provided to:
  - → the appropriate police agency [s. 55(3)(a)]
  - → customs and revenue Canada, where FINTRAC believes the information would assist an investigation of a tax evasion offence [s. 55(3)(b)]
  - → the Department of Citizenship and Information, when FINTRAC believes the information is relevant to protecting Canada from the entry of inadmissible persons who are criminals or who would endanger national security [POC(ML)TFA s. 55(3)(d)]
  - → the Canadian Security Intelligence Service (CSIS), where FINTRAC believes that information would be relevant to threats to the security of Canada [POC(ML)TFA s. 55.1(1)]
  - → FINTRAC's counterpart organizations in other states or international organizations [POC(ML)TFA s. 56.1 (1)].

FINTRAC must provide information in response to court orders obtained by CSIS

- For the purpose of investigating a threat to Canada, CSIS may apply for, and the Court may issue, an order giving CSIS access to more detailed information held by FINTRAC [POC(ML)TFA s. 60.1(3)] The Attorney General may similarly make an application for an order of disclosure in relation to the investigation of a money laundering or terrorist financing offence[POC(ML)TFA s. 60(2)].

- The director of FINTRAC may object to providing of information to CSIS on the basis that the information is protected by a privilege or a court order, a commitment to another state, or that the order would be contrary to the "public interest" [POC(ML)TFA s. 60(7); s.60(8) for AG applications].

FINTRAC can investigate compliance by reporting entities.

- FINTRAC has the general mandate to ensure compliance by reporting entities [s. 40(e)].

- Investigations by authorized FINTRAC officials can, if a warrant is

obtained, including entering buildings and copying documents there found [s. 62-65].

Reporting entities must establish compliance regimes

- Section 71 of SOR/2002-184 requires that every reporting entity must establish its own compliance regime, which must contain these four elements:
  - → (a) the appointment of person responsible for compliance
  - → (b) the development and application of compliance policies and procedures
  - → (c) periodic review and testing of policies and procedures
  - → (d) training programs for employees of the entity.

Who must report to FINTRAC?

- The reporting requirements under Part I of POC(ML) TFA apply to:
  - → banks
  - → credit unions
  - → life insurance companies
  - → trust companies
  - → loan companies
  - → those authorized by provincial laws to deal in securities, provide portfolio management or engage in investment counselling
  - → those engage in foreign exchange dealings
  - → casinos
  - → federal and provincial departments or agencies that accept deposits or sell money orders to the public [s. 5].

Professions and businesses

- The reporting requirements of Part I also apply to various professions and businesses. For example, lawyers and law firms must report to FINTRAC when, on behalf of any person or entity, they:
  - → receive or pay funds, apart from professional fee, disbursements expenses or bail
  - → buy or sell securities, real property, business assets or entities transfer funds or securities by any means [SOR/2002-184, s. 31].

- Lawyers are not required to report any communication that is "subject to privilege" [POC(ML)TFA s. 11]; re Charter challenges by lawyers; see http://www.flsc.ca/en/committees/litigation_chronoSum.asp

- Accountants must report in comparable circumstances, except that they must also report professional fees [SOR/2002-184, s. 34(1)(c); SOR/2002-185, s. 6(1)].

- Real estate brokers or sales representatives [SOR/2002-184, s. 37]
- Life insurance brokers or agents [SOR/2002-184, s. 16; SOR/2002-185, s. 3]
- Persons engaged in foreign exchanged dealing [SOR/2002-184, s. 24]
- Money services businesses [SOR/2002-184, s.27; SOR/2002, s. 4].

What must be reported?

- Suspicious transactions with respect to money laundering or terrorist financing
  - → All persons in Canada, including Part I reporting entities, must report to FINTRAC, with respect to any transaction where there are reasonable grounds to suspect that the transaction is related to money laundering or the financing of terrorist activity [POC(ML)TFA s. 7]
  - → FINTRAC guideline 2 provides a set of indicators that may indicate a transaction is suspicious. They are both general and industry-specific; e.g., lawyers are warned to be alert where a client appears to be living beyond his or her means, refuses to discuss the business purposes of the transaction, or offers to pay unusually large fees for assistance on a matter involving a large sum of money.

- Large cash transactions. Reporting entities are required to report, and keep records of, large cash transactions – that is, those in excess of $10,000 [SOR/2002-184, ss.12 to 52].

Record keeping generally

- The regulations set out a series of record-keeping requirements for various reporting entities; e.g. financial entities must, among other things, keep a signature card for every account holder, the name, address and nature of its business, deposit slips, debit and credit memos, account statements and the accounting operating agreement [SOR/2002-184, s. 14; see FINTRAC guideline 6 for more detail].

Electronic Funds Transfers (SWIFT system)

- Financial entities must report SWIFT transfers in excess of $10,000 [SOR/2002, ss.12(1)(b);(c)].

Non-SWIFT Transfers

- Financial entities, money services business, and foreign exchange business must begin reporting non-SWIFT transfers in excess of $10,000 as of March 31, 2003 [see FINTRAC guideline 8].

Import and export of large financial instruments

- POC(M)TFA imposes reporting requirements with respect to the import or export of currency or monetary instruments in excess of $10,000. These requirements are of general application; they are not confined to Part I reporting entities [s. 12(1)].

- "Monetary instruments" includes:
  - → securities, including stocks, bonds, debentures, treasury bills
  - → negotiable instruments
  - → warehouse receipts or bills of ladings [SOR/2002-412, s. 1].

- Reports are made to customs offices [SOR/2002-412, s.4, re: importation reporting].

- The person reporting to a customs office must identify himself or herself, the type of instrument and the amount involved [SOR/2002-412, s.3].

- Customs officers can seize instruments that are not reported. They will be returned on payment of a penalty unless the officer has reasonable grounds to suspect that they are proceeds of crime or used in financing terrorist activity [POC(ML)TFA ss.18(2); 23]. The forfeiture can be appealed to the Minister [POC(ML)TFA s. 25] and if that is denied, to the Federal Court [POC(ML)TFA s. 30].

Terrorist Property Reports

- POC(ML)TFA requires that every reporting entity report:
  - → any property in their possession or control that they know is owned or controlled by a terrorist group
  - → information about any transaction or proposed transaction in respect of that property [POC(ML)TFA s. 7.1(1); CCC s. 83.1].

Must a transaction that is merely proposed be reported?

- Section 83.1 of the Criminal Code (re: terrorist property) requires reporting of "proposed transactions". Other Criminal Code provisions and regulations generally refer to "transactions."

- FINTRAC guidelines state that a reporting entity is not required to report a transaction unless it is completed [FINTRAC guideline 2.3].

- The lack of reporting requirements for proposed transactions seems like a major loophole in the legislation. A money launderer could broach

transactions with various intermediaries, and back away if the intermediary appears to be attentive to legal, ethical, or moral concerns about dealing with ill-gotten gains or terrorist property.

Does a person have immunity for reporting suspicious activity to FINTRAC when that person is not strictly required to do so by law?

- Section 10 of POC(ML)TFA provides immunity from criminal or civil proceedings for any person who complies with the reporting provisions of the Act, or who "provides the Centre with information about suspicions of money laundering or of the financing of terrorist activities."

Reporting entities cannot "tip off" that they are reporting.

- Section 8 of POC(ML)TFA prohibits disclosing the content of a report "with the intent to prejudice a criminal investigation.

Ascertaining identify of clients

- The POC(ML)TFA regulations require in specified circumstances that various ascertain the identity of persons for whom they are acting [SOR/2002-184, ss. 53-67].

- All reporting entities must ascertain the identity of any person who engages in a large cash transaction, other than a deposit to a corporate account or an automatic banking machine [SOR/2002-184, s. 53].

- A financial entity, for example, must also ascertain the identity of everyone who signs a signature card, conducts a large cash transaction, engages in certain casino or foreign exchange transactions in excess of $3,000, or is a corporation, casino or other entity that opens an account [SOR/2002-184, s. 54].

- Reporting entities must take reasonable measures to determine whether the individual giving the cash (over $10,000) is acting on behalf of a third party [SOR/2002-184, s. 8].

- A record must be kept of the identity of the third party where a large cash transaction is involved [SOR/2002-184, s. 8].

- The reporting entity is required to keep:
  - → a signature card or operating agreement [SOR/2002-184, s. 9]. This is *not* required where an account is opened by a lawyer, accountant, real estate broker or sales representative on behalf of clients [SOR/2002-184, s. 9(6)]

→ a client identification record [SOR/2002-184, s. 10].

Policy considerations

- Will FINTRAC prove effective in practice? Will money launderers adopt effective countermeasures, and consistency stay one step ahead of regulators and reporting entities?

- Should "proposed transactions" be brought fully into the reporting requirements?

- Is the shielding of certain transactions by legal counsel too broad or too narrow?

Terrorism

Definition of terrorist activity

- Terrorist activity can be found under a general definition that includes:
  - → an act, or omission, committed for political, religious or ideological purposes, where the act is intended to intimidate the public or to coerce a person, or public authorities.

- The act must do one of the following:
  - → cause death or serious bodily harm (A)
  - → endanger a person's life (B)
  - → cause serious risk to the health or safety of the public or some segment of the public (C)
  - → cause substantial property damage (if A, B or C is also involved)
  - → cause serious disruption of an essential service (if A, B or C is also involved).

- Terrorist activity is also defined as committing any offence referred to in any of a set of international conventions; e.g., hijacking [s. 83.01(a)].

Canadian jurisdiction

- Under the general definition, Canada asserts extraterritorial jurisdiction (EJ) if the act is committed against a Canadian citizen or public facility, or aimed at coercing a federal or provincial government [s. 7(3.75)].

- For most of the offences, EJ is very broad and includes where:
  - → the offence took place on a Canadian vessel
  - → the victim was Canadian

- → the offender is Canadian or is found in Canada
- → the act is intended to coerce a federal or provincial government, i.e., hostage taking [s. 7(3.1)].

Terrorist offences

- It is a criminal offence to:
  - → participate in a terrorist group or contribute to its activities, for the purpose of helping it carry out terrorist activities [s. 83.18; EJ for Canadians, s. 7(3.74)]
  - → Facilitating terrorist activity and the commission of an indictable offence in connection with a terrorist group are also prohibited [s. 83.19; EJ for Canadians 7(3.74)]
  - → Commit an offence for a terrorist group [s. 83.2].

Investigative hearings

- A court may order a person to participate in an investigative hearing to reveal information about terrorist activity [s. 83.28].

- A peace officer may, with the prior approval of the Attorney General, initiate an investigative hearing, based on "reasonable grounds" to believe that a person has material information concerning a potential act of terrorism [s. 83.28(4)].

Pre-emptive detention powers

- A person may be detained if a court finds it is necessary to do so, in the interest of public safety (such as to prevent a likely terrorist attack) [s. 83.3(7)].

- "Preventative detention" proceeds are initiated by a peace officer who has reasonable grounds to suspect the person's arrest or release with conditions is necessary to prevent a terrorist attack [s. 83.3(2)].

- The investigative hearings and preventative detention provisions will expire at the end of 2006 unless extended by a resolution of both houses of Parliament [s. 83.32].

Financing and dealing in property related to terrorism

- The Act prohibits:
  - → providing financing or other property with the intent that it will be used for terrorist activity [s. 83.02; EJ s.7(3.73)]
  - → making property or services available for terrorist purposes [s. 83.03]

→ knowingly possessing property for terrorist purposes [s. 83.04; E.J. s. 8.374]
→ knowingly dealing in terrorist property or entering into any transaction in respect of terrorist property [s. 83.08 EJ for Canadians; 7.374].

Listing of terrorist groups

- The Governor in Council (in effect, the federal cabinet), with "reasonable grounds" can place a group on a Criminal Code list of terrorist groups [s. 83.05(1)].

- The listed group can request, to the Solicitor General, that it be delisted. If rejected, the group can seek judicial review of the decision to list by a judge of the Federal Court [s. 83.05(5)].

- The Federal Court must:
  → consider in private the security or intelligence reports considered in listing the applicant
  → provide the applicant with a statement that provides reasonable information about the reasons for the decision, without disclosing any information that would in the judge's opinion - harm national security or endanger a person
  → give the applicant an opportunity to be heard
  → determine whether the listing was "reasonable" [s. 83.05(6)].

***Charities Registration (Security Information) Act* SC 2001, C. 41**

- There is a similar process whereby the government can seek to deny or remove the registration of an organization that claims charitable status under the *Income Tax Act*; *Charities Registration (Security Information) Act* S.C. 2001, c. 41, Part 6

Audit requirements concerning listed groups

- A variety of financial institutions and managers are required to "determine on a continuing basis" whether they are in possession or control of terrorist property [s. 83.11]. Institutions required to report include: banks, credit unions, insurance companies, trust companies, loan companies, entities authorized by provincial laws to act as securities dealers, portfolio managers or investment counsellors.

- These institutions must periodically file a report with FINTRAC:
→ stating that they do not possess or control any terrorist property

→ listing the terrorist property in their possession.
→ there is no criminal or civil liability for disclosures required by this section.

Reporting Requirements

- If a person in Canada, or a Canadian outside of Canada, knows that property is owned or controlled by terrorist, that person must make a report to the Commissioner of the RCMP and the Director of CSIS [s. 83.1].

• A person who takes "all reasonable steps" to satisfy himself or herself that property belongs to a terrorist group is immune from civil liability if he freezes it. [s. 83.08(2)].

Provincial Proceeds of Crime Statutes

A number of provinces, including Manitoba, have enacted various statutes that attach civil consequences to unlawful activity, including the confiscation of the proceeds of unlawful acts – many aimed at "gang" activity. The definition of "unlawful" activity in these acts is often very broad.

Manitoba statutes

***The Civil Remedies Against Organized Crime* Act, S.M. 1997, c. 25**

Denying business licenses to members of organized crime

- On application by the chief of police, a court may find that a person is a member of "organized crime" (C.C. definition) and order:
  → The person be denied or stripped of a license under the Liquor Control Act, or under other statutes that require the retailer to collect and remit taxes, including retail sales, gasoline and motive fuel [s. 3(2)]
  → The person be prohibited from owning or managing a business whose operation requires such a license or registration certificate [s. 3(2)].

Shutting down business that promote unlawful activity

- On application by a police chief, a court may find that a person is owning or managing a business that is being use to promote an "unlawful activity" including:
  → activities contrary to an act of any jurisdiction in Canada
  → activities committed outside Canada that are unlawful in that jurisdiction, and if committed in Manitoba, would be contrary to an act of Manitoba or of Canada [ss. 1(1); 5(1)].

- A court order can prevent the person from continuing to own or manage the Manitoba business [s. 5(2)(a)(b)].

Orders against conspirators, where there is injury to the public

- On application by the chief of police, a court may find that:
  - → a person is engaged in a conspiracy to commit an unlawful act
  - → the person knows, or ought to know, that injury to the public would likely result
  - → injury to the public has resulted, or will likely result [s. 6(2)].

- The court may then:
  - → make an order that the person cease and desist from participating in the unlawful activity [s. 6(2)]
  - → make an award for damages inflicted on the public, payable to the Minister of Finance [s. 7(1)].

Policy considerations

- The power to deny or remove various licenses is arguably justified on the basis that members or criminal organizations cannot be trusted to discharge public duties such as collecting and remitting taxes, or keep alcohol and tobacco out of the hands of minors.

- "Unlawful activity" could extend to trivial matters. Should the Act be redrafted to as to identify a category of especially serious offence or provide that regulations will set out a list of specific offences that trigger its operation? Both of these measures are adopted in the Alberta counterpart of the Act, the *Victims Restitution and Compensation Payment Act*, S.A. 2001, c. V-3.5, s. 1(2)(a),(b) and (c).

- The power to shut down businesses engaged in "unlawful activity" is sweeping. Arguably, the statute should be amended, or judicial interpretation should provide, that courts should order the least draconian measure consistent with achieving the cessation of the unlawful activity.

- Conflicts of law rules ordinarily provide that provinces will ordinarily not enforce tax and regulatory statutes from other jurisdictions. The Manitoba statute, however, engages provincial authorities in providing remedies with respect to unlawful activity outside of the province. Should the extraterritorial aspects of the Act be trimmed?

- The Act does not address the interests of innocent third parties, when a business is shut down. Many stakeholders may be involved – co-owners, managers, employees, suppliers, creditors and customers. Perhaps appropriate safeguards for their interests should be enacted.

- "Injury to the public" is not defined. It might include loss of revenues or licensing fees, as opposed to any kind of physical injury or material loss to individuals.

- Manitoba has recently enacted a number of other statutes that attempt to provide civil measures for the suppression or remedying of unlawful activity; two examples follow.

***The Safer Communities and Neighbourhoods Act*, C.C.S.M. c. S5**
Remedies for those affected by "unlawful" activities

- Provides remedies for persons "adversely affected" when a "reasonable inference" can be made that another's property is being used for the unlawful sale or use of recreational drugs or alcohol or for prostitution.

- The Director, under the Act, can apply to the court for a "Community Safety Order", if he has received a complaint. The Order must include "cease and desist" provisions, and may require the property be vacated, be closed for up to 90 days, or grant an order of possession in favour of the owner of the property [s. 6(2)].

- The complainant can seek a "Community Safety Order" directly from a court of Queen's Bench, if the Director has decided not to act, or to continue to act on the complaint. [s.13(1)].

***The Fortified Buildings Act*, C.C.S.M. c. S5**
Risk to public safety

- This statute, aimed primarily at "gang bunkers." It permits the director of public safety to declare a fortified building to be a "risk to public safety" [s. 5(1)].

- The director can:
  - → order the removal of the fortifications [s. 6(1)(a)(b)]
  - → order closure of the building for a period of up to 90 days, for fortifications to be removed [s. 7(1)].

Ontario Statutes

***The [Ontario] Remedies for Organized Crime and Other Unlawful Activities Act*, 2002, S.O. 2001, c. 28**

The Ontario statute is even more sweeping than Manitoba's ***Civil Remedies Against Organized Crime Act***. Part II permits the Attorney General of Ontario to apply for an order of forfeiture with respect to the "instruments" of unlawful activity.

Orders of forfeiture

- The court must make the order unless it is "clearly not in the interests of justice" to do so [s. 3(1)].

- The court must protect the interest of "legitimate owners" unless it is "clearly not in the interests of justice to do so" [s. 3(2)] "Legitimate owner" is defined as:
  - → who owned the property and was deprived of the property by unlawful activity
  - → who bought the property for fair value after the unlawful act, and could not reasonably have known it was proceeds of crime.

- Part III, permits the Attorney General to apply for an order of forfeiture against "instruments" of unlawful activity – property used to engage in unlawful activity that is likely to:
  - → enable a person to acquire more property
  - → cause serious bodily harm to a person.

Corruption of Foreign Officials

Canada is a party to two international conventions on the corruption of public officials:

- → The Organization for Economic Development (OECD) Convention on Combating Bribery of Foreign Officials in International Business Transactions (1997)
- → The Inter-American Convention against Corruption (1996)

The *Corruption of Foreign Public Officials Act*, S.C. 1998, c. 34

- Prohibits bribery of foreign officials [s. 3(1)] Canada's COFOA is more restricted in its territorial scope than the U.S. FCPA, which has broad extraterritorial reach. It prohibits bribery based on a link to U.S. territory or a link to the activities of U.S. nationals.

- The bribery itself is only prosecutable in Canada if the conduct involved had a sufficient territorial link to Canada. See *R.* v. *Libman* (1985), 21 C.C.C. (3d) 206 (S.C.C.). The involvement of Canadian nationals is not sufficient.

Loopholes

- International conventions against bribery permit "facilitation payments" to ensure routine government operations are carried out (as opposed to bribery to win a contract in the first place). This loophole is contained in both the U.S. and Canadian statutes as well [ss. 3(3)(b)(ii); 3(4)].

Policy considerations

- Corrupt government practices are a major hurdle to economic development in many states throughout the world. Canada ought to consider making its anti-Corruption statue as stringent and far reaching as that of the United States. Accounting and disclosure rules could be enacted, on the U.S. model, and extra-territorial jurisdiction could be extended to the acts of Canadians abroad, as it now is with many terrorist offences.

- Canada could seek to make participation in the Inter-American Anti-Corruption Convention a condition for participation in the Free Trade Agreement of the Americas. (See B. Schwartz and H. Manweiller "A Proposal for Anti-Corruption Dimension to FTAA", (2002) 1 *Asper Review of International Business and Trade Law* 67.)

    - It may be that Canada is reluctant to assert jurisdiction on the basis of nationality because of concerns about interference its own sovereignty when the U .S. applies various laws to activities that take place in Canada. See the U.S. Helms Burton Act (aims at the conduct of U.S. subsidiaries in foreign countries); The Foreign Extraterritorial Measures Act (permits the government to issue orders forbidding companies in Canada from complying with the laws of other states if there are contrary to Canadian public policy).