

**CHASING THE CIRCLE OF MONEY:  
A BRIEF OVERVIEW AND PROSPECTUS ON THE  
PROCEEDS OF CRIME  
(MONEY LAUNDERING) AND TERRORIST FINANCING ACT\***

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## **Introduction**

In 2000 Parliament enacted the *Proceeds of Crime (Money Laundering) Act* (Canada) (the “Pre 9-11 Act”)<sup>1</sup> in an effort to identify funds derived from criminal activity and to eliminate - or at least substantially reduce – the flow of “dirty” or “black” money into Canada’s legitimate economy. This legislation, consistent with efforts in other western economies had an essentially one-way focus: on illegitimate financial inputs into the legitimate economy; hence, the traditional “laundering metaphor”.

Then, in the aftermath of the September 11, 2001 terrorist attacks on New York City, Canada’s lawmakers quickly implemented sweeping amendments to the *Act*, drastically expanding its scope by including within the existing legislation the identification and prevention of terrorist financing activities. The amended legislation became the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (Canada) (the “Post 9-11 Act” or the “Post 9-11 Amendments”)<sup>2</sup>, to reflect its new dual focus. Parliament additionally targeted the flow of money opposite from that of traditional money laundering schemes by attempting to identify and prevent initially legitimate funds from reaching the hands of terrorist organizations. Thus amended, the new federal legislation purported to essentially complete a statutory regime for bringing to account what this article describes as the “circle of money” from illegitimate origins to purportedly legitimate purposes and back again.

The completion of this circle now projects considerable burdens beyond financial institutions – by law and experience well schooled in scrutinizing the flow of money – to private actors and other professionals engaged in both international and domestic business activity. At the same time, the completion of the statutory circle poses a substantial increase in the burden of public enforcement. The latter will require an intense, sustained effort to yield the intended results; in this regard both the criminal and terrorist enemies are patient, clever and resourceful. The business community, previously less concerned with – and less inquiring of – such matters, now finds itself squarely between the focus of public good and its declared enemies.<sup>3</sup>

### **The Pre 9-11 Regime**

The objectives of the Pre-9-11 *Act* focused on the detection and deterrence of money laundering as it is traditionally understood to occur. Proceeds of criminal activity enter the legitimate financial system and are channelled through various legitimate sources, often travelling from country to country, in order to obfuscate their criminal origins.

The Pre 9-11 *Act* sought to staunch this flow of money by placing monitoring and reporting obligations on those institutions and professionals who often – and for the most part unwittingly serve as points of entry for illegal money into the financial system. Banks, financial institutions, insurance companies, securities dealers, certain professionals and casinos among others, must all keep records relating to both the identities and financial activities of their clients. Where transactions are over a certain size<sup>4</sup> or where there are “reasonable grounds” to suspect money laundering, these record keeping obligations go further, and require reports to be made to the federal government through its newly established Financial Transactions and Reports Analysis Centre of Canada (“FINTRAC”).<sup>5</sup> Information reported to FINTRAC may be passed on to the RCMP or to law enforcement agencies in other countries.

### **Effect of the Post 9-11 Amendments**

The Post 9-11 Amendments come from another direction entirely by attempting to identify and seize money and other assets being used to fund and carry out terrorist activities, whatever their source – a far more daunting task than the traditional anti-money laundering agenda. It entails the creation of additional monitoring and reporting obligations for financial institutions, certain professionals and, indeed, for every individual with regard to tracking money proactively,<sup>6</sup> to prevent it from being used to finance terrorists. The novel and startling revelation here is that otherwise “clean“ money can also be tainted. The substance of the 9-11 Amendments is derived from an anti-terrorist legal framework developed at the international level, to which Canada had committed itself over time through the ratification of various U.N. conventions, but had not specifically implemented in federal legislation prior to this enactment.<sup>7</sup>

### **The International Anti-Terrorist Financing Regime**

While 9-11 may have pushed terrorist financing issues into the global spotlight, responses to address this issue had been developing at the international level for a number of years prior to the attacks. Fundamental to this global effort was United Nations General Assembly approval of the U.N. Convention on Suppression of Terrorist Financing on November 9, 1999 (the “UNCSTF”).<sup>8</sup>

The UNCSTF creates the broad offence of “terrorist financing” which includes direct and indirect attempts to fund terrorist acts as set out in other U.N. conventions, which are incorporated by reference, as well as acts intended to cause death or serious bodily harm to civilians with the purpose of intimidating or compelling government or international action. The UNCSTF requires State Parties to criminalize terrorist financing and identify, freeze and seize terrorist financing funds and proceeds. It further requires State Parties to co-operate with one another and to share information. Implementation of UNCSTF obligations further requires domestic tracking and reporting procedures, which include placing reporting obligations on financial institutions and professionals. Hence, the initial pre 9-11 Canadian legislative regime on point.

In September, 2001, as part of its immediate response to 9-11, the U.N. Security Council adopted Resolution 1373 (“S.Res. 1373”),<sup>9</sup> which urged U.N. member states to take immediate and sweeping steps to prevent terrorist financing. The Security Council called on all states to: criminalize terrorist financing; freeze all funds and assets directly and indirectly connected to terrorism; prohibit nationals from making funds available directly or indirectly for persons connected to terrorist activity; co-operate and assist other states to investigate and prosecute terrorist financing; become parties to relevant U.N. conventions; and to recognize the link between international terrorism and money laundering.<sup>10</sup>

Running parallel to the UNCSTF effort, is the work of the Financial Action Task Force on Money Laundering (“FATF”) a voluntary intergovernmental anti-money laundering watchdog with its head quarters hosted by the OECD in Paris.<sup>11</sup> In response to 9-11 FATF issued eight recommendations to states as to how their domestic policies should be adapted as soon as possible to combat terrorist financing.<sup>12</sup> The eight recommendations are:

1. Ratify & implement S. Res. 1373;
2. Criminalize terrorist financing and money laundering;
3. Freeze and confiscate terrorist assets;
4. Report suspicious transactions;
5. Co-operate with other countries;
6. License & register all money or value transmission services;
7. Require wire transfers to include detailed information about source of funds (name, address, account number, etc.); and
8. Protect non-profit organizations from abuse and exploitation by terrorists.

FATF requires member states to self assess and report on a regular basis as to their domestic policies, procedures and progress with regard to combating money laundering and terrorist financing within their borders. Failure to report or failure to take steps to implement FATF recommendations and policies, leads to categorization as a “non-cooperative country or territory”.<sup>13</sup>

### **Canadian Implementation of the International Regime**

In the days and months immediately after the terrorist attacks, Canada’s policies with regard to money laundering and terrorist financing, track international developments in virtual lockstep. Canada signed the UNCSTF on February 10, 2000 but did not ratify it until February 19, 2002. The UNCSTF came into force on April 10, 2002. Not surprisingly, perhaps, the majority of ratifications required to bring the U.N. Convention into force, occurred in the months after 9-11.<sup>14</sup> Prior thereto, the international community of nations clearly lacked the sense of urgency that ultimately triggered for rapid legislative action and concomitant acceptance of the expense of implementation. But it is instructive for the private sector to note that the domestic legislative responses to this United Nations’ call for action are arguably unprecedented in their rapidity and comprehensiveness. In this regard, Canada put itself clearly among those nations that wasted little time.

On October 2, 2001 the Government of Canada enacted U.N. Suppression of Terrorism Regulations under the *United Nations Act*.<sup>15</sup> These regulations created a list of persons and groups who cannot be funded and whose assets cannot be dealt with,<sup>16</sup> and placed an obligation on *every* Canadian to disclose to the RCMP or CSIS in the event they are in possession of a

listed person's property or if they have any information about a transaction involving such property.<sup>17</sup> As an incentive to encourage compliance, the penalties for a violation of the *United Nations Act* were substantially stiffened to include fines of up to \$100,000 and imprisonment for up to 10 years.<sup>18</sup> Further, this initial set of regulations placed monthly reporting obligations on financial institutions, foreign banks and foreign insurance companies.<sup>19</sup>

Shortly after the implementation of the U.N. Suppression of Terrorism Regulations, on October 15, 2001, the Chretien government introduced Bill C-36 which set out the formal framework for Canada's anti-terrorism legislation, including amendments to the *Pre 9-11 Act*. Bill C-36, enacted as the *Anti-Terrorism Act* by Parliament on November 28, 2001, received Royal Assent on December 18, 2001.<sup>20</sup> On December 14, 2001, Canada submitted its first compliance report to the U.N. Security Council on measures taken to implement S. Res. 1373.<sup>21</sup> Then, on March 21, 2002, Canada submitted its first self-assessment questionnaire to the FATF with regard to its compliance with the 8 Recommendations on Terrorist Financing.<sup>22</sup>

The bulk of Canada's domestic regime for compliance with its international obligations to suppress terrorist financing is housed in the *Post 9-11 Act*. The scope of record keeping and reporting requirements has been expanded under the *Post 9-11 Act* to include a terrorist activity financing offence. "Terrorist Activity" is defined in the *Anti-Terrorism Act*, to include violations of 10 different U.N. anti-terrorism conventions, including the U.N. Convention for the Suppression of Terrorist Financing.<sup>23</sup> The *Anti-Terrorism Act* further criminalizes terrorist financing<sup>24</sup> and grants law enforcement agencies the ability to both seize assets connected to terrorist groups or activities and freezes the assets of terrorist groups by prohibiting every Canadian and person in Canada from dealing with them.<sup>25</sup>

Funds involved in terrorist financing do not have to be "laundered" to be captured by the legislation. Funds which were "clean", for example, donations that are to a registered charity, but nevertheless have a questionable purpose or destination, are also caught by the legislation if they fall within the definition of terrorist financing. Where terrorist financing and money laundering intersect, like ships passing in the night, is with respect to the steps taken to disguise money and channel it through various different business, financial institutions, currencies,

countries, etc. With respect to money laundering the objective is to obscure where the money has come from; with respect to terrorist financing, it is to prevent detection of where it is going.

The Post 9-11 Amendments expanded the role of FINTRAC as a clearinghouse for financial transactional information. FINTRAC's mandate was expanded to include receiving reports of terrorist financing. As a consequence anyone who is required to report under the Criminal Code or any other statute must also report to FINTRAC.<sup>26</sup> Concomitant with the expansion in its reporting obligations is an expansion in its disclosure obligations. FINTRAC has an obligation to report all threats to the "Security of Canada" to ("CSIS") and its ability to exchange information with other jurisdictions was also broadened by the amendments, which granted the Minister the right to enter into agreements regarding the exchange of information relevant to an investigation of a terrorist financing or money laundering offence.<sup>27</sup>

### **Where We Are Today**

Some interesting developments have arisen from Canada's post 9-11 rush to implement its international money laundering commitments at the domestic level. One of the most significant to members of the legal profession reading this journal is the subsequent repeal of the provisions found in both the Pre 9-11 and Post 9-11 *Act*, which would have placed financial reporting obligations on lawyers.<sup>28</sup> Law societies across the country launched challenges to prevent this controversial piece of legislation from coming into force on the grounds it would erode the relationship between lawyer and client, by forcing lawyers to breach the duty of confidentiality owed to clients.<sup>29</sup> The irony of the federal government's repeal of these provisions is that it may create reporting problems for the federal government in the international arena. As noted above, the federal government has compliance reporting obligations resulting from its commitments in the international sphere. Canada's federal policies may be caught between particular domestic legal concepts of privacy, privilege and forbearance on the one hand, and international norms of compliance and consent to international treaty instruments and concomitant duties of compliance on the other.<sup>30</sup>

The effectiveness of the greatly expanded mandate for FINTRAC remains to be proven. Despite its sweeping powers, the new regime does not appear to have really captured all that much

terrorist financing. Fintrac’s first Annual Report indicates that the amount of funds “laundered:” worldwide is estimated to be in the range of \$500 billion to \$1 trillion each year. Although by the end of its first full year it had received over 2 million transaction reports, just over 100 disclosures were made to law enforcement agencies. Of these only 25 were related to “threats to the security of Canada” and suspected terrorist activity financing, with one of that number being both a money laundering and terrorist financing report. The report indicates that the aggregate estimate of the value of suspicious financial transactions disclosed was only \$460 million.<sup>31</sup>

### **Concluding Observations**

The statutory reach of Canada’s lawmakers in addressing the circle of money from illegitimate origins to legitimate purposes and back again to illegitimate purposes – the disposition of assets for terrorist causes – may well exceed its immediate grasp. It remains to be seen whether sufficient resources will be devoted to the task, and how much the conduct of business will be transformed in the result. But one thing is clear: manifest transformation has already occurred in that both international and domestic law have inextricably unified legal responsibility as between the disposition of financial means, however innocuous and substantive conduct the law condemns. This was not always so, and involves fundamental questions commercial actors frequently did not like to ask. The difficult questions must be asked and carefully responded to going forward. To that end, the necessary due diligence is necessarily good business.

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

<sup>2</sup> *Anti Terrorism Act*, S.C. 2001, c.41, Part 4.

<sup>3</sup> See e.g., H. Scott Fairley, “After 9/11: Legal Premises for the New War Against Terrorism and Some Thoughts on the Legacy”, 4 *Cdn. Int. Lawyer* 175, at 182-185.

<sup>4</sup> Pre 9-11 Act, *supra* note 1, s. 9(1); see *Cross Border Currency and Monetary Instruments Reporting Regulations*, S.O.R./2002-412, s.2(1) which places reporting obligations on the importation or exportation of currency or monetary instruments over \$10,000.

<sup>5</sup> Pre 9-11 Act, *supra* note 1, s. 7.

<sup>6</sup> Post 9-11 Act, *supra*, note 2, s.52.

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<sup>7</sup> *Id.* s.4, (Definitions: “terrorist activity”, provisions in the *Criminal Code* amendments, Part II. 1, s. 83.01, referencing: the *Convention for the Suppression of Unlawful seizure of Aircraft* (1970); the *Convention for the Suppression of Unlawful Acts against the Safety of Civil Action* (1971); the *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents* (1973); the *International Convention against the Taking of Hostages* (1979); the *Convention on the Physical Protection of Nuclear Material* (1980); the *Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Action* supplementary to the *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation* (1988); the *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Aviation* (1988); the *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf* (1988); the *International Convention for the Suppression of Terrorist Bombings* (1997); and the *International Convention for the Suppression of Terrorist Financing* (1999).

<sup>8</sup> U.N. General Assembly, A/Res./54/109 (1999), 9 November 1999.

<sup>9</sup> U.N. Security Council, S/Res/1373 (2001), 28 September, 2001.

<sup>10</sup> For a more detailed discussion, see Fairley, *supra*, note 3, at 176-178.

<sup>11</sup> Foundation documents and background to FATF are available on its website: [www1.oecd.org/FatF/](http://www1.oecd.org/FatF/).

<sup>12</sup> Text available at: [www1.oecd.org/FatF/S\\_RecsTF\\_en.htm](http://www1.oecd.org/FatF/S_RecsTF_en.htm).

<sup>13</sup> See generally: Financial Action Task Force on Money Laundering, *Report on Money Laundering Typologies, 2001-2002* (FATF XIII, 1 February, 2002).

<sup>14</sup> The UNCSTF was opened for signature on 9 November, 1999. Canada ratified on 19 February, 2002, one of the 20 instruments of ratification within the 6 months period after 11 September, 2001, of the 24 required to bring the treaty into force. For text of General Assembly Resolution and related documents on ratification see: [www.undcp.org/terrorism.html](http://www.undcp.org/terrorism.html).

<sup>15</sup> S.O.R./2001-360 pursuant to the *United Nations Act*, R.S., c. U-3 (the United Nations Regulations).

<sup>16</sup> *Id.*, s. 2-5.

<sup>17</sup> *Id.*, s.8.

<sup>18</sup> Post 9-11 Act, *supra* note 2, s. 112.

<sup>19</sup> United Nations Regulations, *supra* note 15, s.7.

<sup>20</sup> The *Anti-Terrorism Act*, S.C. 2001, c.41.

<sup>21</sup> Department of Foreign Affairs International Trade, *Canada Reports to U.N. Security Council on Counter-terrorism Measures*, News Release No. 164 (December 14, 2001), available at: [webapps.dfait-maeci.gc.ca/minpub/Publication.asp?publication\\_id=378890&Language=E](http://webapps.dfait-maeci.gc.ca/minpub/Publication.asp?publication_id=378890&Language=E); report available at: <http://www.dfait-maeci.gc.ca/resolution1373-e.asp>.

<sup>22</sup> See: Financial Action Task Force on Money Laundering, *FATF Self Assessment Exercise for the Eight Special Recommendations on Terrorist Financing Responses from Jurisdictions* (September 16, 2003), available at: [www.fintrac.gc.ca/publications/pub\\_e.asp#1](http://www.fintrac.gc.ca/publications/pub_e.asp#1).

<sup>23</sup> *Supra*, note 20, S.C. 2001, c.41, Part II.1; s.83.01; see note 7, *supra*, for a listing of the referenced U.N. conventions.

<sup>24</sup> *Id.*, s.4, enacting *Criminal Code*, s.83.02.

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<sup>25</sup> *Id.*, enacting *Criminal Code*, ss.8.08-83-17.

<sup>26</sup> Post 9-11 Act, *supra* note 2, s.52.

<sup>27</sup> Post 9-11 Act, *supra* note 2. s. 56.

<sup>28</sup> *Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations*, S.O.R./2003-102, s.3, s.4.

<sup>29</sup> See: Federation of Law Societies of Canada, *Money Laundering Chronology of Events* (July 2003), available at: [www.flsc.ca](http://www.flsc.ca).

<sup>30</sup> Canada's constitutional structure does not confirm its treaty obligations, once entered into and binding as a matter of international law, as equally binding in domestic law. For arguments that they should, see: H. Scott Fairley, "External Affairs in the Constitution at Canada", in *Selected Papers in International Law: Contributions of the Canadian Council on International Law 1972-1997*, pp. 79-91 (1999).

<sup>31</sup> See: FINTRAC, *Annual Report 2003*, available at: [www.fintrac.gc.ca/publications/pub\\_e.asp#1](http://www.fintrac.gc.ca/publications/pub_e.asp#1).