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Title

THE CRIME OF MONEY LAUNDERING AND INITIATIVES TAKEN TO COMBAT IT-
AMERICAN, BRITISH, CANADIAN, AUSTRALIAN AND MALAYSIAN PERSPECTIVE

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PREFACE

The laundering of proceeds from criminal activity have been in existence for quite sometime. Yet, until recently, this criminal threat was not of grave concern in the struggle against crime. There were no legislations which criminalize money laundering and there were no general criminal law power specifically intended to deprive offender of the proceeds of their crime. Very few books have been written on the crime of money laundering; no law schools offer courses or include money laundering in their criminal law syllabus, and few legal experts exist in this area. In most countries, only a handful of law enforcement officers, legal and judicial officers, banking officers and citizens are even aware of the concept of money laundering.

Nonetheless, over the last decade, the global heightened awareness and concern over the threat emanating from drug problems led legislatures to reconsider the position. The growing concern of organised crime notably drug dealings thriving as an international business and the extent to which organised crime in general encouraged and thrived on official corruption and the political effect of illicit money-making, inter alia, are factors which drive legislatures to address these problems. The ease at which proceeds particularly from drug origin have been transferred across international borders as a means of concealing or disguising the source of origin of their illicit gains have led to an awareness of the importance of international co-operation in combatting this threat.

Although comprehensive national and international initiatives have been taken to combat money laundering in the form of reactive measures, concentrating on the prosecution of the launderer and pro-active effort, concentrating on the prevention of the use of the financial sector by launderers, nonetheless, the threat remains to be of grave concern as launderers continue to devise sophisticated updated money laundering techniques to circumvent and to frustrate the initiatives taken by national and international community.

The threat from money laundering is not only of serious concern to government officials of respective countries, but its impact have been felt by legitimate law abiding businessmen and professionals. Due to the complexity of well-designed laundering schemes, law enforcement agencies are beset with the onerous task of detecting the crime and gathering sufficient evidence to enable successful prosecution of offenders. For the legitimate sector, the utilisation of their organisation by money launderers, besides undermining the business morality, have also brought about unnecessary burden to them in the form of costly compliance to the stringent legislative and regulatory control of their business operation. There is now, not only a duty for them to report substantial cash transactions as well as suspicious or dubious transactions, but also they are compelled to devise

comprehensive systems, procedures and staff training so as to ensure that launderers do not utilise their business.

Due to the seriousness of this threat, the war against this profitable crime has come under the aegis of the United Nations and a multitude of international bodies and organisations which have been very active in their initiatives at combatting this profitable crime. There is a necessity to foster and strengthen this close international co-operation in thwarting the effort by international money launderers.

It is an attempt to provide an insight and understanding of the conceptual nature, the various sophisticated techniques of money laundering, the threat it poses and the initiatives taken to combat it nationally and internationally that this dissertation is written. However, in view of the wide scope of the subject, this dissertation has been confined to examining the threat of this crime and initiatives taken to combat it from the American, British, Canadian, Australian and Malaysian perspective. The author have tried his best to deal with every aspect of the initiatives undertaken by the respective countries. Nonetheless, it is possible that the initiatives spelt out in this dissertation may not be comprehensive due to the limited knowledge of the author as well as new developments that have taken place in the respective countries.

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ABSTRACT

This dissertation generally looks into the conceptual nature and techniques of the crime of money laundering, the threat it poses and initiatives taken by the United States, the United Kingdom, Canada, Australia, Malaysia as well as internationally.

The study of this dissertation is divided into six chapters including the introduction and conclusion.

Chapter 1 introduces the concept, the problems of defining the offence and the various stages of money laundering.

Chapter 2 examines the various techniques of money laundering by launderers utilising the traditional and non-traditional financial institutions as well as other sophisticated techniques devised to conceal or disguise the illicit origin of their proceeds.

Chapter 3 deals with the evils of money laundering and the threat it poses to the five respective countries under study.

Chapter 4 analyses the various prohibitive measures that can be taken to counter the threat of money laundering and initiatives taken by the five respective countries to combat it.

Chapter 5 examines the numerous international initiatives taken to combat money laundering globally under the aegis of international bodies or organisations.

The final chapter is devoted to a comparative appraisal of the subject with suggestions for effective action.

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18 U.S.C. Section 1957.

21 U.S.C. Section 853.

31 U.S.C. Section 5312.

31 U.S.C. Section 5313.

31 U.S.C. Section 5222.

31 U.S.C. Section 5324.

Canada

Bill C - 61 (referred to as Proceed of Crime).

Bill C - 9 (referred to as Proceeds of Crime) (Money Laundering Act).

United Kingdom

Drug Trafficking Offences Act 1986.

Criminal Justice (International Co-operation) Act 1990.

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CHAPTER 1

INTRODUCTION TO MONEY LAUNDERING.

A. INTRODUCTION

1 Every legal system would accept as axiomatic that offender should not enjoy the profits of his criminal activities. Proceeds of crime represent an advantage accruing to an offender that not only denied the law abiding citizen, but is directly derived from that citizen to his detriment. The offender is unjustly enriched and it is only right, therefore, that such enrichment be returned to the society from whence it came, for only then it is the status quo restored.¹ The concept of confiscation or forfeiture of proceeds of crime offer the solution as the offender can be denied their enjoyment. However, today, proceeds of crime are more commonly represented by cash or choses in action, and subjected to sophisticated "money-laundering" techniques. The professional money launderer, by using many and various identities throughout the world and the international services provided by financial and credit institutions of a multiplicity of countries, not to mentioned the services of lawyers, accountants, and the like, and converting the tainted money into various forms several times over, weaves an intricate

1. A.R. Mitchell, M.G. Hinton, S.M.E. Taylor, Confiscation, p. 217 (1992).

web of deceit thereby masking the origins of the money concerned before facilitating its repatriation into the traffickers. Technological advances have made it possible for such proceeds to take on many varied guises and be situated to all the far flung corners of the world. There may lie the proceeds of crime, consequential either to an offender's inadvertent investment or his purposive effort to thwart detection of his criminality and to cloak in legitimacy his new found wealth. It is now recognised that money laundering is the most sophisticated element of organised criminal activity.

1.1 Recognising this fact, international initiatives determined to deprive persons engaged in ill-gotten gains of proceeds of their criminal activities and thereby eliminate their main incentive for doing so, has advocated to criminalize money laundering. This is a further weapon in the law enforcement armoury. It is an attempt to expound the concept, techniques of the crime of money laundering and initiatives taken to combat it that this dissertation is aimed at. Nonetheless, in view of the wide scope of the subject, this dissertation will only examined the crime of money laundering and initiatives taken to combat it from the American, British, Canadian, Australian and Malaysian perspective.

B. CONCEPT OF MONEY LAUNDERING

1.2 The term money laundering was first used in the 1920s and 1930s by law enforcement authorities in the United States

with reference to the use of laundromats by the Mafia for the purpose of providing a means by which illegally obtained money could be mixed with that legally obtained, thereby providing the Mafia, in turn, with apparent justification for the existence of the former.¹ The Mafia purchased 'legitimate' businesses with illicit profits from bootlegging, gambling and prostitution. Mafia investments in laundromats were popular because many were already owned by small-time Italian families. Dirty money was commingled with cash takings from laundry businesses and it was claimed that illicit cash was legitimate money. The Mafia bosses used the laundromat as a financial and tax alibi for illicit income.

1.3 Money laundering is the means by which one conceals the existence, illegal source, or illegal application of income, and then disguises that income to make it appear legitimate.² Laundering is aimed at dissociating that capital received as a direct consequence of criminality from its illicit origin, so as to ensure that detection by reason of possession of such capital is avoided, whilst simultaneously providing the offender with reason for being in possession of that capital. It involves a process whereby what was visibly tainted (ie. capital obtained

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1. D.A. Chaikin, "Money Laundering : An Investigatory Perspective." Criminal Law Forum, Vol. 2 No.3 p.467 (1991).
 2. Report of the President's Commission on Organised Crime, The Cash Connection : Organised Crime Financial Institutions, and Money Laundering, Washington D.C., p.7 (1985).

as a direct consequence of criminality) is cleansed (ie. that capital is freed of its association with crime). The criminal thus have to create the appearance that their money is clean before they can invest it in legitimate enterprises. Therefore, the core of money laundering is creating the illusion of cleanliness. It is a bit similar to normal laundry. A laundromat changes dirty clothes into clean clothes. A washing machine removes grime and dirt, making the clothes look clean and new. Nevertheless not all the dirt is really washed out from the fabric, rather, the remaining dirt is dyed white to make the clothes look clean. Similarly a money laundry turns dirty money into clean money by removing the stain associated with dirty money. Once the capital is successfully laundered, the offender is then free of all inhibition to re-invest and make use of his new found wealth.

C. PROBLEM OF DEFINING THE OFFENCE OF MONEY LAUNDERING

1.4 Although money laundering constitute a serious criminal threat, there are problems in defining the offence as well as listing the ingredients that need to be proved to a charge of money laundering. Unlike traditional criminal concept, the crime of money laundering is peculiar in the sense that it does not have an identifiable victim or complainant. Therefore, an investigation into the crime of money laundering is usually initiated through pro-active rather than reactive investigation. Significantly, money laundering statutes do not punish conduct in the same sense as other criminal offences do, but makes conduct,

which is otherwise lawful, criminal if done with illegal money and for an illegal purpose. Some differences appear in the scienter requirements, whereas most countries criminalize intentional money laundering, other countries also criminalize negligence leading to money laundering. For example, the heart of the United States legislations is the intent and knowledge possessed by the actor rather than the act itself. However, the Australian legislation is not confined to knowledge, intention or recklessness, but liability extends to an unreasonable failure to know that the money or property is derived or realised,¹ directly or indirectly, from some form of unlawful activity. In other words, it is sufficient to prove the defendant was negligent, in that he, knew or suspect.

1.5 In an attempt to harmonise money laundering statutes internationally, the United Nation Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (hereafter referred to as the Vienna Convention)² gives two definitions to the offence of money laundering, the second complementing the first. It avoids the term "money laundering" and define the offence as -

(a) "The conversion or transfer of property, knowing that [it is derived from a drug offence] for the purpose of concealing or disguising the illicit

1. See for example, Proceeds of Crime Act (Cth.) 1987, Section 81.

2. Infra at p.134.

origin of the property or of assisting any other person who is involved in the commission of [a drug offence] to evade the legal consequences of his actions."¹

(b) "The concealment or disguise of the true nature, source, location, disposition, movement or ownership of property, knowing that such property is derived from [such] an offence."²

1.6 This definition is insufficient as it only criminalize money laundering of proceeds from drug related offences. Besides, it has been argued that this provision may give rise to problems because a literal interpretation indicates that signatory parties will be obliged to establish an offence the conversion or transfer of property for the purpose of providing legal counsel and the defence to an alleged launderer. This is because Art. 3(1)(b)(i) criminalizes the transfer of money to assist a defendant to "evade the legal consequences of his action."³

1.7 The definition of money laundering adopted by the

1. Vienna Convention, Art. 3(1)(b)(i).
2. Ibid Art. 3(1)(b)(ii).
3. K.D. Magliveras, "Defeating the Money Launderer - The International and European Framework," in Journal of Business Law, p.163 (March 1992).

Council of European Community builds upon that stated in the Vienna Convention. Art. 1 of the European Community Directive¹ (hereinafter EC Directive) stated that, when committing intentionally the offence of money laundering is made out if -

"the conversion or transfer of property, knowing that such property is derived from criminal activity or from an act of participation in such activity, for the purpose of concealing or distinguishing the illicit origin of the property or of assisting any person who is involved in the commission of such activity to evade the legal consequences of his action, occurs, or if,

the concealment or disguise of the true nature source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from criminal activity or from an act of participation in such activity, occurs, or if,

the acquisition, possession or use of property knowing at the time of receipt, that such property was derived from criminal activity or from an act of participation in such activity occurs."

1.8 Though the definition appears to attach to any criminal

1. Infra at p.141.

offence and therefore provides a wider scope of the offence, the definition of "criminal activity" in Art. 1 of the EC Directive by way of reference to those offences created by Art. 3(1)(a) of the Vienna Convention has narrowed down the scope of the offence to drug related offences.

1.9 Perhaps the most important and comprehensive initiatives taken at defining money laundering offences is the Model Regulations Concerning Laundering Offences Connected to Illicit Drug Trafficking and Related Offences, adopted by the Organisation of American States (OAS) in March, 1992.¹ Art. 2 of the Model Regulations define laundering offences in the following words -

"A criminal offence is committed by any person who converts or transfers properties and knows, should have known, or is intentionally ignorant that such property is proceeds from illicit traffic or related offences."²

"A criminal offence is committed by any person who acquires, possesses or uses property and knows, should have known, or is intentionally ignorant that such property is proceeds from illicit traffic or related

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1. This Model Regulations were drafted by the Inter-American Drug Abuse Control Commission, and agency of the OAS.
 2. Model Regulations, Art. 2(1).

offences.¹"

"A criminal offence is committed by any person who conceals, disguises or impedes the establishment of the true nature, source, location, disposition, movement, rights and respect to, or ownership of property and knows, should have known, or is intentionally ignorant that such property is proceeds from illicit traffic or related offences."²

"A criminal offence is committed by any person who participates in, associates with, conspires to commit, aids and abets, facilitates and counsels, incites publicly or privately the commission of any of the offences established in accordance with this Article, or who assists any person participating in such an offence or offences to evade the legal consequences of his actions."³

"Knowledge, intent or purpose required as an element of any offence set forth in this Article may be inferred from objective, factual circumstances."⁴

"An offence defined in this Article shall be

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1. Ibid Art. 2(2).
 2. Ibid Art. 2(3).
 3. Ibid Art. 2(4).
 4. Ibid Art. 2(5).

investigated, tried, judged and sentenced by a court or other competent authority as an offence distinct from¹ other illicit traffic or related offences."

1.10 Although the regulations restrict the illicit money laundering to drug trafficking crimes, nevertheless, the Model Regulations are accompanied by a recommendation that, in applying and adopting the Model Regulations, the signatory countries - can expand the regulations to encompass other serious offences. Article 2(5) is of interest as the element of knowledge, intent or purpose may be inferred from objective, factual circumstances. There is thus, no necessity of actual knowledge, intention or purpose which facilitate easier prosecution of such offences. The wording is similar to Art.3(3) of the Vienna Convention. It is submitted that the drafter of the Vienna Convention as well as the Model Regulations foresaw the constraints that a subjective test of knowledge of the origin of the funds in the launderer's possession would have, hence the incision of those wordings.

D. STAGES OF MONEY LAUNDERING

1.11 Although it is recognised that there are many different money laundering techniques and that the method used may differ from country to country, it is useful to look at a generic model described in the various stages or "wash cycles" as provided by

1. Ibid Art. 2(6).

the United States Senate Committee on Foreign Relations by the United States Customs Service.¹ This model says that money laundering is carried out in three distinct stages, namely, the "placement", the "layering", and the "intergration" stages.

1.12 The "placement", the first type of money laundering stage, is the conversion of the cash directly obtained by illegal criminal activities into other assets, such as bank deposits, real estate or stocks. It is the physical disposal of cash proceeds derived from illegal activity. In short, the dirty money is taken out of the criminal activities cycle and put in the washing machine.

1.13 The second stage or the "layering" stage is the separation of illicit proceeds from their source by the creation of successive complex layers of financial transactions, designed to distinguish the audit trail and protected by different forms of anonymity and professional secrecy. In this stage, the money is removed from its dirty source, for example, it travels a roundabout path through legitimate channels. Here the washing machine is switched on. This makes it more difficult for law enforcement authorities to detect and identify money laundering channels. An exemplary case is the international transfer of funds aimed at taking advantage of differences of national regulations.

1. United States Senate, Subcommittee on Narcotics and Terrorism, Drug Money Laundering, Banks and Foreign Policy, Report to Foreign Relations Committee, p.8 (1989).

1.14 The third stage of operation, the "intergration" is a device to give an apparent legitimacy to the criminally derived wealth. If the layering process has succeeded, intergration schemes place the laundered proceeds back into the economy in such a way that they re-enter the financial system appearing to be normal business funds. At this stage the money appears to be clean and is invested into legitimate business. Thus, the laundry here, is used together with really clean items. This type of operation includes the case in which the funds deposited in a bank are used to back a loan to the beneficiary of the operation, who can as a result, prove the origin of the funds. Once intergrated, the funds can be managed by sophisticated investment managers.