CONFISCATING THE PROCEEDS OF CRIME: THE AMENDMENTS TO CANADA'S CRIMINAL CODE, THEIR FORCE AND EFFECT

by

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ABSTRACT

This thesis examines the amendments to Canada's Criminal Code which target the proceeds of crime by, inter alia, criminalizing money laundering and enabling the confiscation of assets. The amendments represent the central thrust of Canada's contribution in a global effort to stem the traffic in illicit drugs, Canada belatedly following the lead of the United States, Great Britain and Australia.

In the thesis, I argue that the amendments go much further than earlier crime control initiatives and represent a paradigmatic shift from the traditional, single transaction, individual-oriented structure of criminal law to one which is both property-driven and premised upon multiple-transactions perpetrated by criminal organizations. The amendments focus on the proceeds of crime, as opposed to the offender, individual or corporate, their avowed purpose being to neutralize criminal organizations rather than punish offenders.

The effectiveness of the amendments is inexorably tied to the speed by which criminal proceeds can be seized or restrained and thus they operate prospectively, in anticipation of a later conviction. In order to accomplish their objectives, the amendments draw upon concepts previously the preserve of the private law of contract and tort, introducing some which are foreign to the classic norms and traditions of criminal law and sentencing, both substantive and procedural.

The thesis examines the amendments from both a textual and a Charter perspective. In so doing, considerable emphasis is accorded the presumption of innocence, a strong legitimating force in criminal law. Integral to the presumption is the Crown's burden of proof - beyond a reasonable doubt. The legislation's adoption of the civil balance of probabilities test is, therefore, considered its weakest link. Other aspects of the legislation give rise to interpretive and Charter challenges.

The thesis also discusses the need for tracing mechanisms, mandatory financial transaction reporting, the development of a strike force approach to implementation and a sharing of proceeds by law enforcement agencies. Further, the thesis decries any use of the legislation as a tool for plea bargaining or to target petty criminals.

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CHAPTER ONE

CONFISCATING THE PROCEEDS OF CRIME - AN OVERVIEW

On January 1, 1989, Canada added its name to a growing list of countries intent on stemming the tide of illegal drug trafficking[1] through the use of statutory confiscation[2] schemes. On that day, Bill C-61, referred to as the proceeds of crime amendments,[3] came into force.[4] It amended various federal statutes, most notably the

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[1] The scope and extent of illicit drug trafficking in Canada is discussed later in this thesis. A persuasive and contemporary journalistic overview of the problem can be found however, in Victor Malarek, Merchants of Misery (Toronto: McClelland and Stewart, 1989).

[2] This thesis utilizes a distinction between confiscation and forfeiture developed by the Hodgson Committee in England, a committee of scholars funded by the Howard League for Penal Reform. It uses the term 'confiscation' to denote "the deprivation of an offender of the proceeds or the profits of crime" and 'forfeiture' to describe "the power of the Court to take property that is immediately connected with an offence" (Sir Derek Hodgson, Profits of Crime and Their Recovery (London: Heinemann Educational Books, 1984) at 5).

Others have implicitly differentiated between forfeiture and confiscation through use of the latter term (see, e.g., Bruce A. MacFarlane, "Confiscating the Fruits of Crime" (1984-85) 27 Crim. L. Q. 408 and H.R.S. Ryan, "Annotation" (1985) 46 C.R. (3d) 278).

[3] In this thesis, the amendments introduced by Bill C-61 are variously referred to as 'the amendments,' 'the proceeds of crime amendments,' 'the legislation' and 'the proceeds of crime legislation.'

[4] The legislative history surrounding this initiative spans five years. Bill C-19, the Criminal Law Reform Act, 1984, introduced on 7 Feb. 1984, envisioned wide-ranging powers of search, seizure and freezing of the proceeds of criminal offences (s. 107) as well as their confiscation (s. 206). The legislation met considerable objection outside

Criminal Code, the Narcotic Control Act[5] and the Food and Drugs Act,[6] providing the organs of law enforcement with sweeping new investigative tools which target the proceeds of crime[7] and by giving criminal courts the power to order confiscation of these proceeds.[8]

The amendments permit, inter alia, the pre-trial seizure and restraint of property derived from enterprise crime,[9] a genus of

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Parliament and died with the prorogation of Parliament (see generally Richard G. Mosley, "Seizing the Proceeds of Crime: The Origins and Main Features of Canada's Criminal Forfeiture Legislation," unpub. paper presented to the National Conference on Proceeds of Crime (hereafter NCPC), Ottawa, 29-31 Mar. 1989 at 13). A modified version, introduced on 19 Dec. 1984 as s. 75 of Bill C-18, the Criminal Law Amendment Act, 1985, did not reach third reading.

Bill C-61 received first reading on 29 May 1987, second reading on 14 Sept. 1987, third reading on 7 July 1988 and Royal Assent on 13 Sept. 1988. Proclamation took place on 31 Oct. 1988 and the amendments came into force on 1 Jan. 1989 as c. 51 of S.C. 1988. Inclusion as Part XII.2 (ss. 462.3 to 462.5) of the Criminal Code, R.S.C. 1985, c. C-46 (hereafter occasionally referred to as the Code), occurred by way of R.S.C. 1985 (4th Supp.), c. 42.

[5] R.S.C. 1985, c. N-1, as amended.

[6] R.S.C. 1985, c. F-27, as amended.

[7] The definition for 'proceeds of crime' is broad, including all "property, benefit or advantage, within or outside Canada, obtained directly or indirectly as a result of" an enterprise crime or a designated drug offence (Criminal Code, s. 462.3).

[8] In this thesis, the term 'proceeds of crime' is used in preference to 'profits of crime' as it is arguably broader in scope and in closer alignment with the intent of the amendments.

[9] Criminal Code, s. 462.3.

liberal definition, and from designated drug offences,[10] by means of special search warrants[11] and restraint orders.[12] When sought by the Crown, confiscation results after conviction for offences committed in relation to property which is the proceeds of crime[13] or, if a link is not established to the offence, made optional if the property is the proceeds of other criminal activity.[14] If, after conviction, in specie conveyance to the Crown is not possible, a fine of equivalent worth, with mandatory imprisonment in default, is substituted.[15]

The new offence of 'laundering proceeds of crime' is created,[16] as is possession of the proceeds of drug offences.[17] In rem confiscation may occur where a person dies or absconds.[18] The balance of probabilities test is imported to establish the taint on property[19] and a statutory inference is created to assist

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[10] Ibid.

[11] Ibid., s. 462.32.

[12] Ibid., s. 462.33.

[13] Ibid., s. 462.37(1).

[14] Ibid., s. 462.37(2).

[15] Ibid., ss. 462.37 (3) and 462.37(4).

[16] Ibid., s. 462.31. Similar provisions are included in the Food and Drugs Act as ss. 44.3 and 50.3 and in the Narcotic Control Act as s. 19.2.

[17] Food and Drugs Act, ss. 44.2 and 50.2 and Narcotic Control Act, s. 19.1.

[18] Criminal Code, s. 462.38(2).

[19] Ibid., s. 462.37(1).

with the determination of net worth.[20] The veil of secrecy which shrouds income tax records is drawn back to allow certain police enquiries[21] and a statutory defence to civil and criminal liability obtains for persons who disclose information related to the proceeds of crime.[22] The implications of the amendments are tremendous.[23]

This thesis argues that the amendments go much further than earlier crime control initiatives and represent a paradigmatic shift from the traditional single transaction, individual-oriented[24] structure of criminal law with which Canadians are familiar to one which is both property-driven and premised upon multiple-transactions perpetrated by criminal organizations. They focus upon the proceeds of crime, as opposed to the offender, individual or corporate;[25] their avowed purpose being to neutralize

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[20] Ibid., s. 462.39.

[21] Ibid., s. 462.48.

[22] Ibid., s. 462.47.

[23] A prominent Vancouver lawyer describes the amendments as "preposterous 'overkill.'" Kenneth Young adds that they "most radically affect (if not to say, undermine and/or utterly ignore) the rights of citizens, generally, and their counsel, particularly" ("Memorandum Re: Bill C-61," unpub. paper delivered to the Criminal Justice Section, B.C. Branch, C.B.A., Vancouver, 18 Jan. 1989 at 1).

[24] The words "single transactions committed by individual offenders" are used by Patricia Donald, in "A Commentary on the Provisions of C-61 Canada's New Proceeds of Crime Legislation (S.C. 1988, c. 51)," (1989) 47 The Advocate 423.

[25] The criminal culpability of corporations is the subject of a large body of legal literature. Although the proceeds of crime legislation may cause serious jeopardy to the well-being of corporations through the seizure or freezing of assets, it

criminal organizations rather than punish individual offenders. The effectiveness of the amendments is inexorably tied to the speed by which criminal proceeds can be seized or frozen and as a result, they operate prospectively, in anticipation of a conviction in later proceedings. In order to accomplish this purpose, the amendments draw upon concepts previously the preserve of the private law of contract and tort, introducing some which are foreign to the classic norms and traditions of criminal law and sentencing, both substantive and procedural.

The fundamental nature of this shift precludes the use of traditional theories and models when assessing its implications. Accordingly, those aspects which are foreign to the pre-existing state of Canadian criminal law are overviewed in the pages which follow, utilizing accepted norms and traditions as a counterpoint.

Exploring a new statutory initiative, despite its ancient precursors, is fraught with danger. Canadian courts are only now starting to deal with cases initiated under the legislation and it will be some time before pronouncements are received from senior appellate levels. Nevertheless, the topic is of such great importance to practitioners in the legal community,[26] law

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neither focuses upon nor changes accepted notions of corporate responsibility for criminal acts.

[26] The United States experience demonstrates that confiscation legislation can be financially destructive to both individuals and corporations, creating a significant liability for counsel who are oblivious to its implications. Recognizing the significance of the amendments, the Law Society of British Columbia recently sent an advisory to all its members, summarizing them and warning of their implications ("New Proceeds of Crime Legislation" [1989] 10

enforcement personnel, the judiciary and, not the least, the lay population,[27] that efforts to contextualize the amendments are hopefully worth the related risks.

This Chapter begins with an overview of the history of forfeiture in English common law and Canadian criminal law, admittedly skirting many centuries in a few short lines. Increased emphasis is accorded pre-1989 statutory and judicial attempts to

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Benchers' Bulletin 2).

The criminal defence bar, particularly in British Columbia and Ontario, continue to express vociferous objection to the amendments. Unfortunately the fear of taint to lawyers' retainers and trust accounts, however important it may be, dominates forums dealing with the amendments, to the exclusion of a wider scrutiny. It also prevents a consideration of the ethical problems posed by lawyers who operate in the shadowy world of money-changing. David J. Fried recently expressed a similar concern for the derisive effect of focussing on lawyer's fees when considering the expanded use of American confiscation legislation ("Rationalizing Criminal Forfeiture," (1988) J. Crim. L. & Crim. 328 at 330).

On the 'plus' side for the criminal defence bar, a Winnipeg lawyer recently termed the amendments "a lawyer's dream" because "[c]itizens are going to have to hire lawyers to explain Bill C-61 to them, to defend them against it and to challenge it on their behalf" ("Bill C-61: Proposal to seize crime proceeds called lawyer's dream," The National, n.d.). Furthermore, drug defence lawyers in the United States are overcoming the problems associated with tainted trust accounts by obtaining retainers from other than an accused (Steven Waldman and Mark Miller, "The Drug Lawyers," Newsweek, 13 Nov. 1989 at 41-2) and by the federal Justice Department's restrictive interpretation of laundering legislation, when considering cases involving lawyers.

[27] Kenneth Young captured the opinion of many members of the criminal defence bar when he commented: "Potentially (and the potential of the legislation for abuse is immense), its implementation is capable of elevating any citizen in possession of virtually any asset to the ranks of organized crime; and reducing any lawyer retained to represent him to those of his partner or accomplice (Young, supra, nt. 23; see also Larry Still, "Drug profits target of new law," The Vancouver Sun, 9 Nov. 1989 at A13).

confiscate the proceeds of crime in Canada. The amendments are then placed in the broader scope of international crime control initiatives, noting the obligations placed upon Canada by various protocols, followed by an overview of certain long-standing principles of Anglo-American criminal law; including the distinction between criminal and civil proceedings, the purpose of criminal law and certain fundamental norms and traditions, procedural and substantive.

In the chapters which follow, the amendments are reviewed in greater detail, with emphasis being placed on those aspects which contradict or call into question certain of the norms and traditions reviewed in this Chapter and which impact on the thesis statement. The all-important provisions of the Canadian Charter of Rights and Freedoms[28] play an important role in this consideration. In conclusion, comment is made of the various deficiencies noted in the amendments, errors of both omission and inclusion.

CRIMINAL LAW AND CONFISCATION AT COMMON LAW

Forfeiture of property by the state is not a novel concept. Its history, which legal historians trace to early biblical times,[29] is inextricably tied to that of both criminal law and the

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[28] Part I of the Constitution Act, 1982, Sch. B to the Canada Act, 1982 (U.K.), c. 11 (hereafter referred to as the Charter).

[29] Hodgson, supra, nt. 2 at 14.

law of negligence, of which it was a precursor. Through the years it served many functions and took many forms.

In feudal England the principle of attainder served to extinguish a person's "civil rights and capacities"[30] upon conviction for a felony resulting in a sentence of death. This included the automatic forfeiture of a felon's real and personal property.[31] The source of the property did not matter, nor did the fact that it, more often than not, was completely incidental and unconnected to the offence.[32] The disinheritance of a felon's family, or 'corruption of blood,'[33] which followed, the potential loss to creditors of the felon and the inability of a victim to obtain satisfaction of a civil judgment were unfortunate results of the system.[34] Eventually, the harshness of forfeiture resulted in its abolition in England.[35]

A peculiar yet parallel type of forfeiture found expression in

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[30] Henry C. Black, Black's Law Dictionary, rev. 4th ed. (St. Paul: West, 1968) at 162.

[31] Hodgson, supra, nt. 2 at 12. David Fried notes that "'forfeiture of estate,' a form of criminal forfeiture, was a mandatory incident of all common law and most statutory felony convictions. Forfeiture of estate was the taking by the Crown of all of the felon's real and personal property" (supra, nt. 26 at 329n).

[32] Supra, nt. 24 at 423.

[33] A legal fiction which viewed the felon's blood as corrupt. As a result, descendents of such persons lost their ability to inherit through the felon.

[34] Hodgson, supra, nt. 2 at 12 and 15.

[35] Forfeiture Act, 33 & 34 Vict., c. 23.

English civil law. Known as the deodand,[36] it called for the forfeiture to the Crown, and later to a victim or his family, of "any object which caused a person's death,"[37] whether or not its use was intentional.[38] An artifice, necessitated by the void existant where negligence law now stands, it focused attention upon an object, in rem, as opposed to the person who wielded, controlled or was responsible for its use. In this manner, a weapon, a cart or an animal could become the object of the law's attention.

By the early part of the nineteenth century, the deodand had evolved into an arbitrary pecuniary equivalent of the cost of an offending object.[39] Generally it failed to adequately compensate the victim as juries[40] normally assessed only that part of an object, such as the wheel of a cart, which came into contact with the deceased.[41] Nevertheless, it represented a thinly guised form of tortious recovery. The advent of the railroad spurred forward the development of negligence law and doomed the deodand. It became an anachronism, finally abolished in 1846[42] and largely

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[36] See Jacob J. Finkelstein, "The Goring Ox: Some Historical Perspectives on the Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty," (1973) 46 Temple L.Q. 169 for a comprehensive historical review of deodand.

[37] Hodgson, supra, nt. 2 at 14.

[38] Mosley, supra, nt. 4 at 2.

[39] Hodgson, supra, nt. 2 at 14.

[40] Usually a grand jury or a coroner's jury.

[41] Ibid.

[42] Deodands Abolition Act, 9 & 10 Vict., c. 62.

replaced by a statute designed to compensate the families of fatality victims.[43]

Despite the decline of common law forfeiture and the deodand, various statutory provisions which permitted the forfeiture of certain chattels to the Crown remained. To this day, these chattels can be divided into two broad categories, those used to commit an offence[44] and those which are per se illegal.[45] The former includes such items as a gun or knife used in the commission of an assault; the latter includes counterfeit money, prohibited firearms and illegal drugs.

Clearly, forfeiture historically described the effect of different legal mechanisms in English law. The escheat of a felon's possessions served a very different purpose from the seizure of an implement which resulted in a person's death or the seizure of evidence of a crime. The only common ingredient between forfeiture at common law, the deodand and statutory forfeiture was a person's dispossession of his or her property, or a portion thereof. Furthermore, except in a very tangential sense, none involved confiscation of the proceeds of crime.

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[43] Act for Compensating the Families of Persons Killed By Accidents, 9 & 10 Vict., c. 93.

[44] Variously referred to as tools or instruments of an offence.

[45] Variously referred to as contraband, or the res or subject matter of an offence.

CANADIAN STATUTORY AND JUDICIAL INITITATIVES PRE-1989

The criminal law of Canada at the time of Confederation was essentially that of England.[46] Although the forfeiture of a felon's assets continued thereafter, the Procedure in Criminal Cases Act of 1869 expressly prohibited deodand[47] and eliminated corruption of blood or disinheritance except for offences related to treason.[48] Canada's codification of criminal law in 1892 brought common law forfeiture to an end. It specifically prohibited "any attainder or corruption of blood, or any forfeiture or escheat."[49]

However, statutory forfeiture remained. Although undoubtedly resulting in pecuniary loss to an offender, such provisions are not so much a punishment[50] as they are evidentiary vehicles designed

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[46] See generally, Desmond H. Brown, The Genesis of the Canadian Criminal Code of 1892 (Toronto: Univ. of Toronto Press, 1989), ch's. 3 and 5.

[47] An Act respecting Procedure in Criminal Cases, and other matters relating to Criminal Law, S.C. 1869, c. 29, s. 54. This Act was one of a number passed during the years 1867-69 in an attempt to bring together the pre-existing criminal law of the colonies. See generally, Brown, supra, nt. 46, ch. 5 and A.W. Mewett, "The Criminal Law, 1867-1967" (1967) 45 Can. B. Rev. 726.

[48] An Act respecting Procedure in Criminal Cases and other matters relating to Criminal Law, s. 55 and s. 56.

[49] An Act respecting the Criminal Law, S.C. 1892, c. 29, s. 965.

[50] For a contrary view, see Rand J.'s judgment in Industrial Acceptance Corp. v. The Queen [1953] 2 S.C.R. 273 at 278, 107 C.C.C. 1 at 6, wherein he states, in relation to revenue laws, that "absolute forfeiture is an inseparable accompaniment of punitive action." See also MacFarlane,

either to assist with the proof of crime or to disposses an offender of illicit items. Federal statutes are replete with examples. The Criminal Code permits both in rem[51] and in personam forfeiture,[52] as do the Narcotic Control Act[53] and the Food and Drugs Act.[54] Also, a general forfeiture power is found in s. 490(9)(d) of the Code, allowing for the release to a person entitled to possession, or in the absence of such person, forfeiture to the Crown of property seized by a police officer pursuant to a federal statute.

The statutory forfeiture provisions do little, however, to relieve an offender of the proceeds of crime. Tales abound of criminals who transfer or deposit stolen or fraudulently obtained funds in legitimate businesses or financial institutions. Prior to January 1, 1989, the ability of law enforcement officials to recover any or all of such monies was extremely limited. In order to understand the dilemma which faced politicians, prosecutors and police, an overview of pre-1989 attempts to confiscate is instructive.[55]

"Confiscating the Fruits of Crime" Crim. L. Q. (supra nt. 2 at 408-09).

[51] For example, s. 102(3) (illegal possession of weapons), s. 164(4) (obscene publications) and s. 395(2) (precious metals).

[52] For example, s. 319(4) (hate propaganda), s. 394(2) (precious metals) and s. 492(2) (explosives).

[53] Section 16.

[54] Section 27.

[55] See generally, David G. Price, "Police Seizure of Bank Accounts Under Section 29, Criminal Law Amendment Act,

Section 314 [now 354] of the 1892 Code made it unlawful to receive or retain anything obtained by an indictable offence. The section remained in its original form until 1954 when the words "receives or retains" were eliminated, leaving the nexus of the offence to read: "has anything in his possession" knowing that it was obtained by an indictable offence.[56] The section clearly applied only to items which were a direct product of crime, generally stolen property, but not the proceeds of such criminal activity, for example, money obtained by fencing stolen property.

In 1976,[57] Parliament enlarged the section to read: "has in his possession any property or thing or any proceeds of any property or thing."[58] Hopes that the 1976 amendment allowed the seizure of monies on deposit in financial institutions[59] and elsewhere were dashed by a Quebec narcotics case. In Royal Bank of Canada v. Bourque, et al.,[60] the Quebec Superior Court reluctantly upheld the Royal Bank's refusal to honour a Criminal Code search warrant authorizing seizure of bank records and monies on account which were the known proceeds of drug offences. The Court distinguished between tangible deposits, such as money in a bank

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1975," (1976-77) 19 Crim. L. Q. 86.

[56] R.S.C. 1953-54, s. 296.

[57] S.C. 1974-75-76, c. 93, s. 29

[58] By definition, property included real and personal property as well as instruments representing property entitlements (s. 2).

[59] See, for example, Price (supra, nt. 55 at 89).

[60] [1984] 38 C.R. (3d) 363.

vault, and intangible deposits, such as monies in an account, the latter it considered a debt owed by the bank to its customer and not exigible. The Court of Appeal agreed, also with regret, noting that a bank account is a book entry which cannot be seized or brought before a justice of the peace.[61] It acknowledged that the 1976 amendment to s. 354 broadened that offence to include possession of intangible items, however, the failure to modernize the search and seizure provisions of the Code at the same time essentially neutralized its worth.[62] The Supreme Court of Canada refused leave to appeal.[63]

The most successful confiscation efforts occurred under the Narcotic Control Act, legislation focused on that area of criminal activity which has witnessed the greatest growth during the past two decades. Drug trafficking provides one of the fastest and easiest, though illegal, means by which to acquire substantial profits. Not surprisingly, therefore, the police often seize large quantities of money in the course of drug raids. Traditionally, the avowed purpose and authority for such seizures was the money's evidentiary worth.

The Act incorporates a scheme for restoration of seized property to the person lawfully entitled to possession.[64]

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[61] Attorney General of Quebec v. Royal Bank of Canada, et al. (1985) 18 C.C.C. (3d) 98, 44 C.R. (3d) 387.

[62] Ibid. at 101 C.C.C., 390 C.R.

[63] (1985) 18 C.C.C. (3d) 98.

[64] Section 15. Similar, though not identical provisions are found in the Food and Drugs Act, ss. 43, 44 and 51.

Restoration can occur when an item is not required for evidentiary purposes and the applicant satisfies the court, on a balance of probabilities, of his or her entitlement.[65] In the absence or denial of an application for restoration, the property is delivered to the Minister[66] while in the event of conviction,[67] it is forfeited to the federal Crown.[68]

Bruce MacFarlane notes that the prevailing view prior to 1981 was that the proceeds of crime could not be confiscated by this means unless they represented the actual payment for the substance which formed the subject matter of the charge.[69] The courts strictly construed both the legislation generally[70] and the

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[65] See generally, Bruce A. MacFarlane, Drug Offences in Canada (Aurora: Canada Law Book Inc., 1986), ch. 19, for an overview of restoration applications.

[66] Section 15(4). The Minister becomes the custodian of the property, thereby requiring the Federal Court to decide questions of title (Smith v. The Queen (1975) 27 C.C.C. (2d) 252 (F.C.T.D.), affd. by F.C.A. (unreported) on 8 Sept. 1976 (MacFarlane, supra, nt. 65 at 473)).

[67] Of any person charged, not necessarily the applicant (MacFarlane, supra, nt. 65 at 479).

[68] Section 16. MacFarlane points to an interesting distinction which the courts have drawn between the punitive nature of such forfeiture and its availability as a sentencing option. Although punitive (R. v. McGregor and McGregor (1956) 116 C.C.C. 55 (Man. Q.B.), it is not considered an alternative to or part of the sentence meted out to the accused but "a special remedy" (R. v. Smith (1978) 2 C.R. (3d) S-35 at S-36 (Nfld. C.A.)). The B.C.C.A. accepted this proposition in R. v. Pope (1980) 52 C.C.C. (2d) 538 (see also MacFarlane, supra, nt. 65 at 480-82).

[69] MacFarlane, supra, nt. 65 at 467.

[70] See Re Hicks and The Queen (1977) 36 C.C.C. (2d) 91 at 95 (Man. C.A.).

restoration provisions specifically.[71] In 1981, however, the Manitoba Court of Appeal reconsidered this approach in a case argued by MacFarlane, Re Aimonetti and The Queen.[72]

In Aimonetti, both cannabis resin and $24,000 were seized in a narcotics search. In refusing the accused's application for restoration, Huband, J.A. stated that "possession will not be allowed if the cash appears to be the fruits of illegal trade in narcotics. The scheme of the Act is to deny possession of such funds."[73] This expansive interpretation obtained support from the Alberta Queen's Bench in Re R. and Buxton[74] and the Ontario Court of Appeal in Re R. and Largie.[75] However, both went even further than Aimonetti. In Buxton, McFayden J. refused an application on public policy grounds and in Largie, the Court of Appeal noted that s. 312 makes illegal the possession of the proceeds of drug offences.[76] The Manitoba Court of Appeal also accepted the public policy argument, in R. v. Medd,[77] refusing restoration after hearing testimony from the accused that the monies seized were the

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[71] See R. v. Lewis (1979) 21 A.R. 236 (Alta. C.A.).

[72] (1981) 58 C.C.C. (2d) 164, 24 C.R. (3d) 13 (Man. C.A.). Leave to appeal to the S.C.C. refused on Apr. 27, 1981, loc. cit. at 164n.

[73] Ibid. at 172.

[74] (1981) 62 C.C.C. (2d) 278 (Alta Q.B.) at 281.

[75] (1981) 63 C.C.C. (2d) 508 (Ont. C.A.) at 511-12.

[76] MacFarlane notes that the authorities are mixed on the availability, after an acquittal, of restoration under s. 16 (supra, nt. 65 at 470-71).

[77] (1983) 7 C.C.C. (3d) 158 at 160 (Man. C.A.).

profits of unrelated, though predominantly illegal activity.[78]

In 1986, the Supreme Court of Canada dampened the enthusiasm building over the Aimonetti line of cases. In Fleming v. The Queen,[79] it considered a restoration application. Although concluding that s. 10(6) [now 16(1)] imports the maxim ex turpi causa non oritur actio for narcotics convictions, Wilson J., writing for the Court, added that the Crown must prove, beyond a reasonable doubt, a connection between the subject matter and the offence, either by way of a conviction for the predicate offence or a s. 312 offence, or by evidence in a confiscation hearing.[80]

In summary, attempts to utilize the pre-1989 provisions of federal statutes to confiscate the proceeds of crime were largely unsuccessful. What remained was the rather innovative application of common law and equitable doctrines. Again the results were not terribly successful except to identify the apparent inadequacy of existing statutory provisions.

Bona vacantia[81] was the common law doctrine of choice in R.

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[78] MacFarlane suggests that the foregoing and other cases which follow their reasoning have effectively imported the civil maxim ex turpi causa non oritur actio ("a right of action does not arise out of an evil cause" (Elizabeth A. Martin, ed., The Concise Dictionary of Law (Oxford: Univ. Press, 1983) at 172) into the criminal realm (MacFarlane, supra, nt. 65 at 473)).

[79] [1986] 1 S.C.R. 415, 25 C.C.C. (3d) 297.

[80] Ibid. at 319-20, per Wilson J.

[81] "Empty goods" in literal English (Martin, supra, nt. 78 at 38).

v. Smith and Smith.[82] During a s. 312 [now 354] sentencing hearing, the Crown sought confiscation of an automobile and rugs purchased with assets that Sinclair J. of the Alberta Queen's Bench determined were the product of drug trafficking. Acknowledging the absence of authority in the Code to confiscate these items, he invoked the doctrine at the urging of Crown counsel. Although unaware of any precedent, he relied upon the doctrine's public policy basis.[83] According to Prof. H.R.S. Ryan, the decision is of dubious worth. Ryan observes that bona vacantia is applicable only in the civil realm, to personal property devoid of an owner.[84]

Mareva injunctions were and continue to be used by the Crown to prevent the dissipation of the proceeds of crime, pending civil proceedings to determine their ownership.[85] Anton Piller orders provide a similar form of relief, allowing access to premises for purposes of inspection, detention and preservation of property.[86] Both Mareva injunctions and Anton Piller orders emanate from the

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[82] (1985) 46 C.R. (3d) 278 (Alta. Q.B.).

[83] Ibid. at 280.

[84] H.R.S. Ryan, supra, nt. 2. Furthermore, it is doubtful that the Crown demonstrated sufficient taint to bring the case within the ambit of the S.C.C.'s later decision in Fleming, supra, nt. 79.

[85] See West Mercia Constabulary v. Wagener and Others [1982] 1 W.L.R. 127 (Q.B.), Chief Constable of Kent v. V and another [1983] Q.B. 34, [1982] 3 W.L.R. 462, [1982] 3 All E.R. 36 (C.A.), Canadian Pacific Airlines Ltd. v. Hind (1981) 122 D.L.R. (3d) 498 (Ont. H.C.) and Her Majesty the Queen v. Shah, et al., 5 Dec. 1989, Victoria, 89/2488, unreported (B.C.S.C.).

[86] Anton Piller KG v. Manufacturing Processes Ltd. [1976] 1 All E.R. 779 (C.A.).

civil courts and, therefore, require the commencement of parallel civil proceedings. Unless a civil cause of action is readily apparent, their use is potentially an abuse of the court's process, an issue considered later in this Chapter.[87] Likely the most common method of disgorging convicted persons of the proceeds of crime is, however, through the imposition of heavy fines.[88]

It would be easy to conclude that the proceeds of crime amendments were inspired by the absence of effective confiscation provisions in criminal statutes, combined with an increased incidence of drug trafficking and money laundering[89] in Canada.[90]

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[87] For a discussion of the use of injunctions in relation to monies on deposit, see C.P. Walker, "Opening the Vaults - Police Powers and Bank Accounts," (1983) Cr. L. Rev. 723.

[88] See R. v. Jung (1976) 1 C.R. (3d) S-1 (B.C.C.A.), per McIntyre, J.A.; R. v. Dow (1976) 1 C.R. (3d) S-9 (B.C.C.A.); and MacFarlane, supra, nt. 65 at 686-87.

[89] 'Money Laundering' or 'money changing' refers generally to the process by which money obtained through illegal activity is introduced to legitimate banking or other financial intermediaries in order to conceal its illegal origin. Laundering is practiced by many persons, including organized crime figures, drug traffickers and those who wish to hide funds from tax and other government authorities. It becomes a necessary process for large sums of money because of the sheer weight and bulk of cash, the risk of detection and the danger to one's person created by carrying large sums of money. With the passage of Bill C-61, laundering acquired legal significance and definition in Canada (Criminal Code, s. 462.31(1)).

Numerous conduits can be used to facilitate the process, including banks and trust companies, real estate ventures, foreign exchange dealers and brokerage firms. Oftentimes money is exported through such a conduit and later repatriated by various means. Canada, for example, may act as the source of funds in the case of domestic criminals laundering monies or as a recipient for foreign criminals elements. In addition, considerable cash is laundered without leaving the country.

[90] The provinces of British Columbia and Ontario provided the initial domestic impetus for confiscation legislation. A 1980 study conducted for the provincial government in British Columbia recommended legislative amendments to the Criminal Code, akin to the Racketeer Influenced and Corrupt Organizations (RICO) provisions in United States federal and state law, in order to target the proceeds of organized or enterprise crime. It also recommended the inclusion of a reverse onus clause to deal with the problem of tracing illegal funds. As a guidepost, it suggested that confiscation be available for the same offences to which the electronic eavesdropping provisions of the Code applied and urged that the province enact parallel legislation to aid the public and private victims of the specified offences (Jill McIntyre and Alexander G. Henderson, The Business of Crime - An Evaluation of the American "Racketeer Influenced and Corrupt Organizations" Statute from a Canadian Perspective - Executive Summary and Draft Amendments to the "Criminal Code" (Ministry of Attorney-General, Criminal Justice Division, 1980) at 4-5).

The British Columbia proposal and a similar one from Ontario were presented to the 1981 Uniform Law Conference of Canada, Criminal Law Section meeting. Later in the same year, federal and provincial leaders agreed to form a joint study group, the Federal/Provincial Task Force on Enterprise Crime, composed of persons drawn from government, academia, private law practice and law enforcement.

The study group concluded its report in June 1983, acknowledging the prevalence of enterprise crime in Canada and the inability of present statutes to exert effective control, due principally to the absence of a confiscation mechanism for the proceeds of crime. It recommended the introduction of legislation similar to Bill C-61 (Dept. of Justice, Enterprise Crime Study Report, Ottawa, 10 June 1983). However, the study group did not achieve unanimity in its work. In a dissent which accepted the need for legislation but disputed the basis for certain of the report's recommendations, John Hogarth described the report as "a remarkable piece of advocacy. It starts with a conclusion (that powerful new legal tools are required to deal with "enterprise crime") and then goes on to mobilize "facts", legal analysis and arguments to support it" ("Enterprise Crime Study Report" - A Critique, Rome, 15 Dec. 1983 at 1). Hogarth expressed concern with a somewhat biased accumulation of supporting data and a less than adequate treatment of the critical due process component in Canada's post-1981 criminal law (ibid. at 2-3).

The domestic push also included law enforcement. Beginning in 1981, the R.C.M.P. established anti-drug profiteering units throughout Canada, allied to existing

However, despite the pronouncements of politicans[91] and law enforcement officials,[92] such a simplistic public policy rationale suffers from at least two problems. First, it fails to consider that the legislation applies to a wide panoply of offences,[93] drug offences being but the tip of the proverbial iceberg,[94] and second,

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drug sections. Enterprise crime units within commercial crime sections developed later. Due to the delay in passage and full implementation of the amendments, these units have yet to be fully exploited.

[91] Leading off the debate prior to second reading of Bill C-61, the federal Minister of Justice, Ray Hnatyshyn, expressed his opinion that the legislation would "go a long way toward making [ex turpi causa non oritur actio] a reality in our country" (House of Commons Debates (hereafter referred to as the Debates), 14 Sept. 1987 at 8890).

[92] It is described by some as a panacea. The argument continues that traditional methods of drug enforcement are inadequate. The media and enforcement agencies are awash with statistics intended to describe the extent of money laundering in Canada. For example, a recent magazine noted that "[s]enior law enforcement officials maintain that Vancouver serves as a relay station for roughly half of more than $2-billion in illegal drug profits funneled offshore and brought back into Canada disguised as legitimate investments" ("Big Time Crime," (Sept. 1989) 7 Equity 14 at 16). Due to the ubiquitous nature of the practice, it is difficult, if not impossible, to isolate accurate statistics.

[93] Included among enterprise crime offences are, inter alia, bribery, fraud, breach of trust, corrupting morals, keeping a bawdy house, procuring, murder, theft, robbery, extortion, forgery, arson, and making and possessing counterfeit money (Code, s. 462.3).

[94] The question which begs a response is whether or not an enterprise crime problem of sufficient severity exists in this country to justify extraordinary criminal remedies. The answer to this question becomes important from a legal perspective when considering s. 1 of the Charter.

Voices are emerging from the wilderness in the United States to suggest that the 'drug war' is more political hype than reality. Writing in Newsweek, Rufus King notes that heightened law enforcement, severe sanctions and political

it does not explain why the priority accorded traditional drug enforcement work has not increased appreciably during the past decade.[95] The true rationale may lie in the area of Canada's international commitments.

THE INTERNATIONAL LEGISLATIVE SCHEME

Justice Minister Doug Lewis alluded to these commitments when he led off the second reading debate on Bill C-61. According to Lewis:

> On an international level, this legislation is in compliance with the draft United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychoactive Substances. Similar legislation has either been passed or has been presented to the legislatures of Britain, Australia and the United States.[96]

He also expressed concern for the future:

> To prevent Canada from becoming a haven for the proceeds of crime, the legislation will forfeit assets on Canadian

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rhetoric did not cure the problem in the past, just as they did not adequately address the problems posed by prohibition earlier in this century. He compares 5,788 drug-related deaths in 27 cities to the much greater damage wrought by smoking and alcohol, recommending legalization as a more viable solution ("A Worthless Crusade," 1 Jan. 1990).

[95] Canadian police still lag far behind their American counterparts in terms of financial resources for specialized equipment, source handling and drug purchases. In addition, they are mired in jurisdictional discord, restricted in their activities overseas and largely dependant on United States law enforcement agencies for much of their intelligence information.

[96] Debates, 14 Sept. 1987 at 8888.

soil no matter where the criminal conduct has taken place.[97]

Within the world community, Canada is not alone in its legislative efforts to confiscate the proceeds of crime. In fact, similar moves are fast becoming the norm, a virtual necessity for any nation that wishes to express its abhorrence of international drug trafficking and money laundering. To ignore the drug wars being fought in many parts of the globe invites both discredit and a degree of isolation internationally and opens a nation to infiltration by drug cartels wishing to trans-ship narcotics or launder money.[98]

M. Cherif Bassiouni describes the evolution of an international narcotics control scheme as dependant "on the willful compliance and cooperation of member states of the world

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[97] Ibid. at 8890.

[98] The American 'war on drugs,' which began during the Reagan presidency and gathered momentum under the Bush administration, views international borders as temporary obstacles to be circumvented. In the producer countries, particularly of Central and South America, this is accomplished through massive eradication programs and investigations spearheaded by American drug agents, often assisted by components of the United States military. In the host countries, political and diplomatic pressure, as well as effective use of the international media, foster the aims of this unorthodox war.

In Canada's case, American law enforcement agents have even taken to joking about this country's approach to money laundering. A recent newsmagazine article noted that United States Drug Enforcement Administration (DEA) agents "laughingly refer to Canada as the 'Maytag' of the money-laundering industry" ("Hiding the Drug Money," Maclean's, 23 Oct. 1989 at 42).

community."[99] Between 1912 and 1972 twelve multilateral treaties, calling for both domestic enforcement and international cooperation to stem drug trafficking, were concluded.[100] Bassiouni notes that by 1986 the international effort included 110 nations.[101]

In 1988 the United Nations adopted the convention respecting illegal trafficking referred to by the Justice Minister, as a supplement to existing conventions.[102] Canada is party to the document which, inter alia, provides that signatories must prohibit

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[99] M. Cherif Bassiouni, "The International Narcotics Control Scheme," in Bassiouni, ed., International Criminal Law, Volume 1 - Crimes (Dobbs Ferry, N.Y.: Transnational, 1986) at 507. Volume 2 - Procedure provides a comprehensive overview of mutual assistance treaties and the procedural issues involved in obtaining evidence abroad.

[100] Ibid. at 508.

[101] Ibid. Whether the present extent of international cooperation warrants placing drug trafficking in the category of a substantive international criminal offence is not clear. Considerable authority exists for the proposition that aggression, war crimes, genocide and piracy, and possibly slavery, apartheid, torture and terrorism are such offences (Daniel H. Derby, "A Framework for International Criminal Law," in Bassiouni, Volume 1, supra, nt. 99 at 33-6). Depending on one's definition of an international crime, drug trafficking may have acquired such dubious status.

Allied closely to the concept of international criminal law is the doctrine of universal jurisdiction, which permits nations to ignore the jurisdictional frailties of their domestic law when prosecuting persons alleged to have committed international crimes (see generally Kenneth C. Randall, "Universal Jurisdiction Under International Law," (1988) 66 Texas L. Rev. 785).

[102] United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, adopted in Vienna on Dec. 19, 1988 and signed by Canada on the following day. See Paul Saint-Denis, "The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances," unpub. paper, NCPC.

the laundering[103] and permit the confiscation of proceeds from drug trafficking and further, must honour court orders of like kind from fellow signatories.[104] In addition, it requires that parties provide a wide range of assistance in the investigation and prosecution of such offences.[105]

Closely allied to the international conventions are complex networks of treaties between countries which attempt to interface national schemes. In 1983, John Hogarth described Canada as "one of the few developed nations that [had] not seen fit to enter in any bilateral or multilateral treaties for mutual assistance in criminal matters," leaving it dependant on "the inchoate doctrine in international law of comity or ride on the coat-tails of foreign police agencies."[106]

This isolationism is fast coming to an end. In response to Canada's participation in the 1988 United Nations Convention, Parliament passed Bill C-58, the Mutual Legal Assistance in Criminal Matters Act.[107] It complements the proceeds of crime legislation by paving the way for Canada's completion of mutual assistance treaties with other nations in the areas of prisoner and evidence transfers for court purposes, enforcing foreign fines and

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[103] United Nations Convention, supra, nt. 102, art. 3.

[104] Ibid., art. 5.

[105] Ibid., art. 7.

[106] Hogarth, supra, nt. 90 at 12.

[107] S.C. 1988, c. 37 received third reading moments before Bill C-61 on 7 July 1988. It obtained Royal Assent on 28 July 1988 and came into force on 1 Oct. 1988.

honouring foreign requests for searches, seizures and the production of witnesses. In addition, the treaties are not restricted to drug matters.[108]

Domestic confiscation legislation has a long history in those European nations which possess a civilian legal system. Such was not the case, until recently, in most countries which owe their legal heritage to the British common law. A surprising exception when one considers the history of its birth as a nation, is the United States, which long ago overcame its pubescent dislike for central government's power to tax and seize. Presently it leads the common law nations in both its confiscation legislation and its regulation of money laundering. Furthermore, it takes a back seat to no nation when it comes to urging and using forceful persuasion on others to follow suit.

The United States

America's forfeiture legislation can be traced as far back as the early nineteenth century. It demonstrates a ready willingness to permit forms of statutory forfeiture, particularly with respect to customs and revenue laws. Widely used during the civil war to disposses Confederate landowners, it found succour in the anti-

[108] Canada signed such treaties with the United States in 1985, Great Britain in 1988 and Mexico in 1990.

trust laws of the late nineteenth and early twentieth centuries.[109]

America's modern age of confiscation legislation can be traced to the federal government's awakened interest in organized crime, particularly the Cosa Nostra families, during the late 1960's.[110] President Nixon signed the Organized Crime Control Act of 1970 into law on October 15, 1970.[111] Contained within Title IX of the bill was the Racketeer Influenced and Corrupt Organizations Act (RICO),[112] criminal and civil[113] provisions which proscribe the

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[109] Hodgson, supra, nt. 2 at 30-1. A legacy of these early days is the continuing distinction which American statutes draw between criminal and civil forfeiture. David Fried describes it in the following terms:

> Criminal forfeiture, also known as in personam forfeiture, is the taking of property by the state as an incident of conviction for crime.... It is thus opposed to civil in rem forfeiture, the taking of property in some way connected with the commission of a crime regardless of the criminal guilt of its possessor or owner. In civil forfeitures, the owner of the property has the burden of proof once the government has shown probable cause to believe that the property is "guilty," in other words, connected with the prohibited activity. The standard of proof is a preponderance of the evidence (supra, nt. 26).

[110] 'Awakened' because the legendery head of the Federal Bureau of Investigation, J. Edgar Hoover, refused for years to admit the existence of organized crime. As a result of increased public concern, the United States developed various legislative initiatives during the 1960's which targetted organized crime and the quality of law enforcement.

[111] Pub. L. No. 91-452, (1970) 84 Stat. 922, as codified in (1982) 18 U.S.C. and 28 U.S.C. See Joseph C. Sweeney, "An Introduction to RICO," (1987) 12 Tul. Mar. Law J. 7 at 8.

[112] 18 U.S.C., ss. 1961-68 (1982 & Supp. IV 1986) created four new criminal offences and one civil offence. A wealth of judicial decisions and scholarly articles explore the federal and state RICO statutes, too numerous to enumerate in this thesis. Nevertheless, valuable references include a

acquisition and operation of enterprises engaged in interstate commerce through a pattern of rackettering activity.[114] In addition to standard punishments,[115] the legislation provides for the confiscation of the profits of crime and any interest in criminal organizations.[116] It also permits the pre-trial seizure and restraint of property.[117]

RICO received fresh life in the 1980's with the belated discovery of its civil forfeiture provisions by practitioners in many diverse areas of practice and later by the onslaught of the 'drug war' being waged both within and without the United States. Being of sufficient breadth to adapt well to the new challenge, RICO and related statutes now spearhead the American criminal

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study paper produced by the Secretariat of the Solicitor General of Canada, The RICO Statute: An Overview (n.p., June 1982) and a recent criticism of RICO by David Fried (supra, nt. 26).

[113] Sweeney notes that the civil provisions were intended "as a civil remedy for the criminal violations already provided for in s. 1962. Civil RICO is intended to assist in the reform of corrupted organizations" (supra, nt. 111 at 9).

[114] Ibid. at 8-9. By using the term 'enterprise,' RICO was intentionally not restricted to organized crime (Solicitor General of Canada, The RICO Statute: An Overview, supra, nt. 112 at 5). A parallel statute which targetted drug enterprises, the Continuing Criminal Enterprises Act (21 U.S.C., s. 848 (1982 and Supp. III 1985) was contained within Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970.

[115] Imprisonment and fines.

[116] Solicitor General of Canada, The RICO Statute - An Overview, supra, nt. 112 at 8.

[117] Ibid at 25.

justice system's confiscation drive. The legislation long ago withstood its most critical tests within the courts, obtaining not only sanction from the United States Supreme Court, but also a breadth not originally anticipated.[118]

In recent years, Congress passed other legislation intended to buttress RICO even further. The Comprehensive Forfeiture Act of 1984[119] increased the number of predicate RICO offences, including some which regulated money laundering and federal drug offences, and authorized the pre-trial restraint of property. The Money Laundering Control Act 1986 extended the reach of criminal law over money laundering.[120]

The American approach to the problem is of critical importance to Canada for two reasons: first, the principal thrust and many procedural and substantive aspects of Canada's proceeds of crime legislation are a product of the RICO experience and second, the absence of jurisprudence in the area of confiscation will inevitably force Canadian courts to seek guidance from United States judgments, particularly constitutional cases.

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[118] In Sedima, S.P.R.L. v. Imrex Co. (1985) 473 U.S. 479, the U.S.S.C. refused to limit the availability of RICO to only certain litigants, such as government (Sweeney, supra, nt. 111 at 8). This decision opened the gates and RICO became a powerful tool, possessing "something for everybody" (ibid. at 10).

[119] 18 U.S.C., s. 1963(a)(3) (Supp. III 1985).

[120] Subtitle H of Title I of the Anti-Drug Abuse Act 1986. See generally Fried, supra, nt. 26 at 329-30.

Britain

Britain was not as fortunate as the United States in terms of preparedness. Before 1986, it had virtually no legislation which effectively targetted the proceeds of crime. In many ways its situation mirrored that of Canada and most other Commonwealth countries.[121] Martin Wasik describes it as "a startling inability of the criminal courts to use their powers of forfeiture to deprive an offender of the profits of crime."[122] The Misuse of Drugs Act 1971,[123] akin to the restoration provisions of Canada's Narcotic Control Act, obtained a restrictive interpretation in the courts, preventing confiscation of most monies associated to drug offences. Similarly, specific statutory forfeiture provisions and the general forfeiture provision in the Powers of Criminal Courts Act 1973,[124] akin to Canada's s. 490(9)(d), applied only to evidence and contraband.

Acting in part on the recommendations of the Hodgson Committee, a blue ribbon panel of jurists, lawyers and academics,

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[121] Similar to Canada's Criminal Code, British statutes contained numerous specific forfeiture provisions and a general provision in s. 43 of the Powers of Criminal Courts Act 1973 (supra, nt. 2). None permitted the confiscation of the profits of crime, only evidence and contraband.

[122] Martin Wasik, "The Hodgson Committee Report on the Profits of Crime and Their Recovery," (1984) Crim. L. Rev. 708.

[123] 28 Stats. 500.

[124] 1973, c. 62.

Britain sought to remedy the situation during the past decade.[125] The Drug Trafficking Offences Act 1986[126] and the Criminal Justice Act 1988[127] now permit the confiscation of the proceeds of drug offences and other criminal offences, respectively.[128]

Australia

In recent years, the Commonwealth and state governments in Australia enacted a number of statutes aimed at confiscating the proceeds of crime. In a manner similar to Canada, the debut of the Commonwealth Proceeds of Crime Act 1987[129] was touted by the Attorney General of Australia "as providing some of the most effective weaponry against major crime ever introduced into Parliament."[130] The legislation is similar to the Canadian amendments, although it and related acts appear to go further in

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[125] An overview of the Hodgson Committee report is found in Wasik, supra, nt. 122.

[126] 1986, c. 32.

[127] 1988, c. 33.

[128] See Hodgson, supra, nt. 2 for a detailed overview of the development of confiscation and forfeiture legislation in Britain and James Morton, The Criminal Justice Acts 1987 and 1988 - A Commentary (London: Waterlow, 1988) at 129-33 for a review of the effect of the most recent statutory amendments.

[129] 1987, No. 87, as amended. Also, see the Proceeds of Crime (Miscellaneous) Act, 1987, No. 73.

[130] Arie Freiberg, "Ripples from the Bottom of the Harbour: Some Social Ramifications of Taxation Fraud," (1988) 12 Cr. L. J. 136 at 176.

the regulation of the banking industry and in the provision of a tracing mechanism.[131] As with Canada, its introduction coincided with legislation intended to create a framework for the ratification of mutual assistance treaties in criminal matters.[132]

In summary, while the United States opened the door to modern confiscation legislation, Britain and Australia currently provide the most popular models for common law nations.[133] In concert with the confiscation laws in civilian countries and the new found cooperation in criminal matters among many nations, increasingly treaty-based and less dependant on comity, it seems clear that illicit drug trafficking may soon, if it has not already, achieve the status of a de facto international crime.[134]

THE CLASSIC NORMS AND TRADITIONS OF CANADIAN CRIMINAL LAW

In the Anglo-American common law tradition, considerable emphasis is placed on the distinction, on both substantive and procedural levels, between criminal and civil law. The line of demarcation between the two is largely artificial, however. As Kenny observed many years ago:

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[131] Ibid.

[132] Ibid. at 175.

[133] See Bruce Zagaris and Marcus Bornheim, "Foreign and International Money Laundering Laws," in American Bar Assoc., Crim. Justice Sec., Manual on Money Laundering, 8 Mar. 1990.

[134] Randall, supra, nt. 101.

> Criminal wrongs and civil wrongs...are not sharply separated groups of acts; but are often one and the same act as viewed from different standpoints, the difference being one not of nature but only of relation. To ask concerning any occurrence, "Is this a crime or is it a tort?" is - to borrow Sir James Stephen's apt illustration - no wiser than it would be to ask concerning a man, "Is he a father or a son?"[135]

The criminal law-making power accorded the federal government by s. 91(27) of the Constitution Act 1867 gives Parliament the unfettered right to make certain behaviour the subject of both public prosecution and penal sanction, ergo, a crime.[136] Its discretion is broad; akin to Graham Parker's belief that "[a] crime can be defined as any form of human activity that the law defines as a crime."[137] Determining what conduct Parliament should criminalize is a more difficult, some might say bedeviling, question.[138]

Many years ago, Kenny noted that the criminalization of

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[135] Courtney S. Kenny, Outlines of Criminal Law, rev. G. Godfrey Phillips, 15th ed. (Cambridge: University Press, 1942) at 22.

[136] Constitution Act, 1867, U.K., 30 and 31 Vict., c. 3., s. 91(27).

[137] Graham Parker, An Introduction to Criminal Law, 3rd ed., (Toronto: Methuen, 1987) at 1.
In order to assist legislators in determining what conduct should be classed as criminal, Kenny adopts criteria suggested by Bentham: the wrong must be greater than the effects of criminal sanction and a last resort, sanctioned by the community, capable of precise definition and provable by convincing evidence (Kenny, supra, nt. 135 at 28-30).

[138] Stuart observes that modern criminologists are increasingly avoiding the search for an all-embracing answer. He notes Barbara Wootton's "contention that criminal behaviour covers too large a range of human behaviour to be classified and analyzed, a miscellaneous aggregate of quite different kinds of action" (Don Stuart, Canadian Criminal Law - A Treatise (Toronto: Carswell, 1987) at 47).

conduct is an ongoing process whereby particular wrongs "inspire the community with new apprehension, either on account of [their] unusual frequency or of some new discovery of [their] ill effects."[139] Jerome Hall observed that crime means different things to different people, a prime example being the appropriate classification for behaviour considered immoral by conventional standards.[140]

There are no easy answers. Once conduct becomes the subject of criminal sanction, however, certain considerations present themselves. First, citizens must be made aware of its illegal nature and second, the state must be able to punish those who choose to partake in such conduct. In the pages which follow, both these issues are explored.

The first issue invites consideration of the principle of legality, termed by at least one writer as "the keystone" of Canadian criminal law, the belief that criminal liability can only

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[139] Kenny, supra, nt. 135 at 26.

[140] Jerome Hall, Law, Social Science and Criminal Theory (Littleton, Colo.: Rothman, 1982) at 203. Hall notes the debate which continued for some time between H.L.A. Hart and Lord Devlin over the proper attribution of 'victimless' behaviour, including prostitution, drug addiction and various sexual practices (ibid. at 208). The Hart/Devlin debate resulted from the Wolfenden Report, which recommended a decriminalization of certain private acts. Devlin argued against the recommendations, believing that criminal law should reflect public standards of morality. Hart, on the other hand, divorced morality from criminal law, arguing in favour of an "objective social harm" test (Alan W. Mewett and Morris Manning, Criminal Law (Toronto: Butterworth, 1985) at 12).

flow from a defined offence.[141] Integral to the principle is the maxim nullum crimen sine lege, Nulla poena sine lege, which is to say "there must be no crime or punishment except in accordance with fixed, predetermined law."[142] Glanville Williams explains:

> Nullum crimen is an injunction to the legislature not to draw its statutes in such broad terms that almost anybody can be brought within them at the whim of the prosecuting authority and the judge.[143]

In his famous 1968 treatise on the limits of criminal law, Herbert Packer considered the principle of legality at length.[144] In his view, the principle, in its original form, was little more than an anachronism. No longer was criminal conduct an unwritten, amorphous collection of customary laws which required the substantive oversight which the principle once provided. Instead, he observed that the principle's "contemporary vitality" arose from the application of various doctrines which served to prevent the arbitrary application of criminal laws and other abuses by persons and institutions charged with administering public laws. In his opinion, "the void-for-vagueness doctrine and the doctrine requiring the strict construction of penal statutes" amply demonstrate this modern application of the principle. Not

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[141] Law Reform Commission of Canada, Criminal Law - The General Part: Liability and Defences, Working Paper No. 29 (Ottawa: Supply and Services Canada, 1982) at 12.

[142] Glanville Williams, Criminal Law - The General Part, 2nd ed. (London: Stevens and Sons, 1961) at 575.

[143] Ibid. at 578.

[144] Herbert Packer, The Limits of the Criminal Sanction (Stanford: Stanford Univ. Press, 1968) at 79-102.

surprisingly, both doctrines are particularly relevant to the proceeds of crime amendments.

To confuse the criminal and civil processes is to invite abuse. Once society agrees that certain conduct is criminal, a panoply of protections, common law, statutory and constitutional apply. To import rules of evidence from the civil sphere potentially abrogates those protections, based as they are on a quite different presumptive footing. Hogarth describes the problem in the following terms:

> Civil suits are designed to secure private rights and when they are violated, to compensate. The criminal law is designed to protect society as a whole through the application of punishment against those who knowingly violate its rules. The different procedures used reflect both differences in purpose and differences in consequences. Given the overwhelming power of the State and the punitive consequences to the accused upon conviction, the rules governing the criminal process are more proscribed and defined more precisely.[145]

The criminal law is replete with presumptions and burdens intended to ensure the effectiveness of the criminal justice system at the least possible expense to individual liberties. Many are of such long-standing that they can rightfully be termed norms, the abrogation of which is not easily countenanced. The presumption of innocence, since its development in England during the late eighteenth century, is virtually sacrosanct in criminal law, the very bedrock of the criminal justice system. Innocence is assumed prior to a finding of guilt.

Integral to the presumption of innocence is a burden of proof

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[145] Hogarth, supra, nt. 90.

which ensures that the presumption is not rendered nugatory. Proof beyond a reasonable doubt is the high threshold which the common law requires in order to sustain a criminal conviction.[146] Glanville Williams notes that "[t]he phrase is virtually indefinable"[147] and recommends that judges not attempt a definition when instructing juries. Those who have attempted are apt to use the phraseology of "moral certainty, an abiding conviction."[148]

The burden resting upon the Crown must be satisfied on all elements of an offence.[149] As noted by the House of Lords in Woolmington, the presumption of innocence and proof beyond a reasonable doubt are fundamental to English criminal law, save and except for the defence of insanity and statutory exceptions.[150] Similarly, civil procedures cannot be invoked in aid of the criminal process. In the absence of a presumption of innocence,

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[146] Woolmington v. Director of Public Prosecutions [1935] A.C. 462 at 481 (H.L.)

[147] Glanville Williams, Textbook of Criminal Law, 2nd ed., (London: Stevens, 1983) at 43.

[148] James B. Fay, "Basic Principles of Criminal Law," in Joel E. Pink and David Perrier, From CRIME to PUNISHMENT - An Introduction to the Criminal Law System (Toronto: Carswell, 1988) at 30. Numerous Canadian cases have considered the meaning of proof beyond a reasonable doubt. Significant among these are the following: R. v. Hayes [1923] 1 D.L.R. 459, 38 C.C.C. 348 (Alta. C.A.); R. v. Gordon (1983) 4 C.C.C. (3d) 492 (Ont. C.A.); Nadeau v. R. [1984] 2 S.C.R. 570; R. v. Lachance (1962) 39 C.R. 127 (Ont. C.A.); and R. v. Moreau (1986) 51 C.R. (3d) 209 (Ont. C.A.).

[149] R. v. Bourque [1969] 4 C.C.C. 358 (B.C.C.A.).

[150] Subject, in Canada, to the Charter.

the rules of evidence and procedure which apply to civil matters are offensive to criminal law.

On a different plane, however equally unique to criminal law, is the concept of sentencing. Most modern criminologists would agree with Kenny that the primary function of criminal law is the prevention of crime.[151] Thus the occurrence of crime represents the inability of law enforcement and the public to restrain persons from transgressing socially accepted norms of behaviour. Once called to account, society deals with such persons through the sentencing process wherein a quartet of generally accepted goals or principles apply: deterrence (general and specific), rehabilitation, retribution and incapacitation.[152]

The Code does not assign "relative weight and priority" to the principles or factors considered relevant at sentencing,[153] despite the widespread belief that certain are of greater importance than others. Although Parliament cannot be expected to assess with exactitude all relevant issues on sentencing, the complete absence of any guide other than maximum and minimum penalties is of interest. Ultimately it is the judge who must ensure fairness and equity in the unscientific delineation of an

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[151] Kenny, supra, nt. 135 at 32.

[152] Different names are occasionally used to describe these principles.

[153] Dept. of Justice, Sentencing (Ottawa: Supply and Services Canada, 1984) at 21. The Code does envision increased sentences for second and subsequent offences of the same type (see, for example, s. 255 as it relates to sentencing for impaired driving offences).

appropriate penalty.[154] The rationale for such a 'system' was outlined in a recent white paper on sentencing:

> The basis for [the wide discretion] has been the belief that Parliament cannot possibly foresee and make explicit statutory provision for the infinite variety of circumstances and cases that come before the courts for sentencing....[155]

Punishment of an offender is of secondary importance to the aims of the proceeds of crime legislation. Neutralizing the criminal organization is paramount. The effect of this deviation from the norm is interesting for it serves to accentuate a distinction often drawn between different models of the criminal justice system.

Criminologists are prone to dichotomize crime control initiatives[156] from what are considered their polar opposites,

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[154] The only check on the wide discretion afforded judges is provided by the appeal mechanism. If a sentence is not appealed, as most are not, it will never be reviewed. A former chief justice of British Columbia estimated that less than one per cent of provincial court decisions are reviewed by the Court of Appeal in that province (John L. Farris, "Sentencing," in (1975-76) 18 Crim. L. Q. 421 at 422).

See generally, John Hogarth, Sentencing as a Human Process (Toronto: Univ. of Toronto Press, 1971), for an examination of judicial attitudes to sentencing, specifically, chapter 1 for a discussion of the goals and processes of sentencing.

[155] Hogarth, supra, nt. 145 at 4. Hogarth expressed cautious concern over the difficulties encountered when the emphasis of sentencing becomes the fixing of punishment which will control future behaviour of an individual or community rather than sentencing which is retrospective, attempting to fit the punishment to the offence (ibid. at 4).

[156] James Inverarity notes that "the underlying assumption of the crime control model is that state power is not inherently evil" (James M. Inverarity, Pat Lauderdale and Barry C. Feld, Law and Society - Sociological Perspectives on Criminal Law (Boston: Little, Brown, 1983) at 248).

those which emphasize due process.[157] They suggest that the former permit more effective law enforcement at the expense of the latter, which seek to restrain the actions of police and others engaged in law enforcement.[158] The former rely heavily on the effect of punishment on both an offender and the community at large. The latter include both substantive and procedural protections.

Inevitably, legislative initiatives reflect a balancing of both the crime control and the due process models. A similar result occurs in the courts as judges seek to maximize the control of crime at the least possible sacrifice to liberty. The long reach of the proceeds of crime amendments demands strong counterweights to prevent the undue infringement of civil liberties. It remains to be seen, however, whether Parliament provided sufficient tools in the legislation to accomplish this high objective.

The amendments call into question many of the norms and traditions of criminal law. In the overview of the amendments which follows in Chapter Two, those aspects which offer the

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[157] Inverarity notes that this model "draws a sharp distinction between legal and factual guilt, between information and evidence" (ibid. at 247).

[158] See generally Herbert Packer, "Two Models of the Criminal Process" (1964) 113 U. Pa. L. Rev. 1 and The Limits of the Criminal Sanction, supra, nt. 144. Some criticize Packer's dichotomy as too simplistic and offer Weber's typology of decision-making as an alternative. Weber sought to analyze the contradictions in the legal system by analyzing the prevalence of the elements of rationality and formality (Inverarity, supra, nt. 156 at ch. 3 and 249-51).

greatest challenge are discussed at length and a counterpoint is drawn to Canada's pre-existing criminal law.

CHAPTER 2

THE AMENDMENTS AND THE CODE

The purpose of this thesis is not to attempt a comprehensive analysis of all aspects of the proceeds of crime amendments, many of which invite both extensive scrutiny and considerable argument, academic and judicial. Nevertheless, an appreciation of the full breadth and extent of the amendments is fundamental to an informed discussion of their impact on the traditional norms of Canadian criminal law. This Chapter overviews the legislative scheme which underlies the amendments, emphasizing those aspects which appear to contradict these norms. In so doing, the pre-existing state of criminal law in Canada is juxtaposed as a counterpoint to the new provisions.

The confiscation scheme envisaged by the amendments is premised on the reclassification of a number of existing Criminal Code offences and the inclusion of a new 'laundering' offence as "enterprise crimes." Similarly, a number of serious drug offences are labelled as designated drug offences and are subject to the discipline of the new scheme. The framers of the legislation presumably intended to isolate those offences which occasioned a strong potential for profit and which inexorably make crime attractive. Once classified as either an enterprise crime or a designated drug offence, various extraordinary investigative methods and sentencing options become available. Among these are

certain innovative features which arguably transpose aspects of civil law into the Criminal Code.

By using the existing structural framework of the Code, the Narcotic Control Act and the Food and Drugs Act, the amendments follow a pattern established by the electronic eavesdropping amendments of 1973-74,[1] that being to categorize offences and accord them special attributes. The following discussion centers upon the amendments contained within Bill C-61 which relate to the Criminal Code. Those to the Narcotic Control Act and the Food and Drugs Act essentially mimic the Code amendments and are the subject of adjoining notes.

ENTERPRISE CRIME AND DESIGNATED DRUG OFFENCES

Enterprise crimes and designated drug offences are not offences per se but categories of offences.[2] Without specific definition, one is left to speculate on the intended meaning of

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[1] The Protection of Privacy Act, S.C. 1973-74, c. 50, in force on June 30, 1974 and incorporated in the Criminal Code as Part VI. In this paper, they are occasionally referred to as the 'wiretap' amendments, allowing that their frame of reference also includes electronic eavesdropping accomplished by other means.

[2] In this thesis, reference to 'enterprise crimes' and 'enterprise crime offences' is intended to also include designated drug offences, except where indicated. By operation of s. 19.3 of the Narcotic Control Act, and sections 44.4, 50.1 and 51 of the Food and Drugs Act, the newly created search, restraint and forfeiture provisions of Part XII.2 apply mutatis mutandis to the designated drug offences.

'enterprise crimes' and the rationale for not opting for a neutral term, for example, 'designated criminal offences,' as in the case of drug offences. Considering that the avowed purpose of the amendments is to neutralize large-scale drug trafficking and money laundering operations, one might assume that the term is intended to include those offences committed by organized drug syndicates. It is curious, therefore, that among the twenty-four predicate enterprise crime offences in s. 462.3 are many which may, but generally are not connected with such activity; for example, murder, theft, robbery, forgery, uttering, fraud and arson.

Despite the political rhetoric, enterprise crimes are intended to include those illegal forms of behaviour which may be utilized by organized crime, in the broadest sense of that term, not simply by drug traffickers and money launderers.[3] The lack of clear purpose is compounded when one considers Patricia Donald's observation that although the predicate offences are "generally

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[3] Criminal Code, s. 462.3. The complete list of offences in s. 462.3(a) and s. 463(b) are as follows: s. 119 (bribery of judicial officers, etc.), s. 120 (bribery of officers), s. 121 (frauds upon the government), s. 122 (breach of trust by public officer), s. 163 (corrupting morals), s. 201(1) (keeping gaming or betting house), s. 202 (betting, pool-selling, book-making, etc.), s. 210 (Keeping common bawdy-house), s. 212 (procuring), s. 235 (punishment for murder), s. 334 (punishment for theft), s. 344 (punishment for robbery), s. 346 (extortion), s. 367 (punishment for forgery), s. 368 (uttering forged document), s. 380 (fraud), s. 382 (fraudulent manipulation of stock exchange transactions), s. 426 (secret commissions), s. 433 (arson), s. 449 (making counterfeit money), s. 450 (possession, etc., of counterfeit money), s. 452 (uttering, etc., counterfeit money), s. 462.31 (laundering proceeds of crime) and s. 354 (possession of property obtained by crime).

economically motivated," certain offences of a similar character are omitted;[4] for example, charging a criminal rate of interest,[5] break and enter,[6] mail fraud[7] and publishing a false prospectus.[8]

Included among the predicate offences is s. 354, possession of property obtained by crime, the focus of earlier attempts to use the Code to capture the proceeds of crime. Interestingly, however, it is not every offence against s. 354 which qualifies, rather only those in which the "property, thing or proceeds" was obtained by or derived, not from the commission of any indictable offence as is normally the case, but by the commission of another predicate enterprise crime or designated drug offence.[9] In effect, s. 462.3

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[4] The Enterprise Crime Study Working Group recommended that the predicate enterprise crime offences be drawn from those for which a wiretap authorization is available (Dept. of Justice, Enterprise Crime Study Report, Ottawa, 10 June 1983) at 181.

[5] Criminal Code, s. 305.1 [now 347]. Donald notes that s. 305.1 is, however, a predicate wiretap offence (Minutes of Meeting, Criminal Justice Section, Vancouver, unpub., 18 Jan. 1989 at 4). The predicate offences in Part VI are certainly greater in number than in the definition of an enterprise crime offence, the difference generally explainable by the emphasis in the latter on economic crime. The absence of s. 305.1 is an unexplained exception.

[6] Criminal Code, s. 306 [now s.348].

[7] Ibid. s. 339 [now s. 381].

[8] Ibid., s. 358 [now s. 400]. Supra, nt. 5 at 4.

[9] Criminal Code, s. 462.3, "enterprise crime offence," (b). The definition also includes "an act or omission anywhere that, if it had occurred in Canada, would have constituted" an enterprise crime or a designated drug offence.

limits the breadth of s. 354 for purposes of Part XII.2.[10]

Designated drug offences[11] include trafficking or possession for that purpose of controlled drugs,[12] restricted drugs[13] and narcotics;[14] importing and exporting a narcotic;[15] cultivating opium poppy or marihuana;[16] possession of property obtained by the foregoing offences[17] and laundering their proceeds.[18]

Those inchoate acts which constitute a conspiracy,[19] attempt[20] or counselling,[21] as well as accessories after the fact,[22] if acting in furtherance of or in relation to a predicate

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[10] Alan Gold criticizes the reference to enterprise crime and designated drug offences in the restricted definition of s. 354. He notes the circularity of definition which results, adding that it "exemplifies the lack of craftsmanship that went into the drafting of the legislation" (Alan D. Gold, Proceeds of Crime - A Manual with Commentary on Bill C-61 (Toronto: Carswell, 1989) at 21).

[11] Criminal Code, s. 462.3.

[12] Food and Drugs Act, s. 39.

[13] Ibid., s. 48.

[14] Narcotic Control Act, s. 4.

[15] Ibid., s. 5.

[16] Ibid., s. 6.

[17] Ibid, s. 19.1; Food and Drugs Act, s. 44.2 and s. 50.2.

[18] Narcotic Control Act, s. 19.2; Food and Drugs Act, s. 44.3 and s. 50.3.

[19] Criminal Code, s. 465.

[20] Ibid, s. 24.

[21] Ibid., s. 22.

[22] Ibid., s. 23.

offence, are included within the definition of an enterprise crime or designated drug offence.[23] As well, by operation of s. 21 of the Code, a person who aids or abets the commission of a predicate offence attracts a degree of culpability equal to that of the actual perpetrator.

Although the amendments classify offences, the newly-created umbrella categories do not constitute offences in and of themselves. In this regard, the approach taken by the drafters is quite different from that of the RICO statutes, which criminalize a pattern of racketeering represented by the commission of two or more predicate federal or state offences. However, it is similar to the British and Australian approaches.

LAUNDERING PROCEEDS OF CRIME

The breadth of the amendments is exemplified by the inclusion of s. 462.31, the offence of laundering proceeds of crime.[24]

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[23] Ibid., s. 462.3, "enterprise crime offence," (c). MacFarlane observes that the inclusion of inchoate offences remedies the "disability" noted in R. v. Cuthbertson, [1981] A.C. 470 (H.L.). (Bruce MacFarlane, "Legal Vehicles Leading to Forfeiture Under Part X.1 of the Criminal Code," unpub. paper, NCPC at 1). Cuthbertson had determined that existing British law did not permit the forfeiture of proceeds of a conspiracy, which the Court found was not an offence for purposes of the Misuse of Drugs Act 1971 (28 Statutes 500).

[24] Hereafter referred to as 'laundering.' The offence is also a predicate 'enterprise crime offence' (s. 462.3). Similar offences are created in the Narcotic Control Act (s. 19.2) and the Food and Drugs Act (s. 43.3 (controlled drugs) and s. 50.3 (restricted drugs)), presumably in order to

Being one of two new Code offences,[25] and certainly the most important created by the legislation, the section introduces to Canada a concept which, in the United States forms the subject matter of an entire statute.[26] It vastly increases the reach of criminal confiscation to include a broad range of conduct, not previously considered criminal.[27] The definition of laundering is a convoluted 118 word sentence[28] which includes within its grasp virtually all persons who deal with "any property or any proceeds of any property... obtained or derived directly or indirectly as a

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facilitate prosecutions by either the federal or provincial Crown. The Enterprise Crime Study Group recommended creation of a laundering offence (supra, nt. 4 at 177).

[25] The other newly created offence is the breach of, or non-compliance with a restraint order, s. 462.33(11).

[26] The Money Laundering Control Act 1986, Subtitle H of Title I of the Anti-Drug Abuse Act of 1986, P.L. 99-570 (27 Oct. 1986), as amended by P.L. 100-690 (18 Nov. 1988).

[27] Even one of the framers of the legislation, Richard G. Mosley, notes that "[t]he conduct encompassed by the offence is described in very broad terms to cover virtually any dealing with the property." He adds that liability is limited by the mens rea requirements ("Seizing the Proceeds of Crime: The Origins and Main Features of Canada's Criminal Forfeiture Legislation," unpub. paper, NCPC at 16).

[28] Alan Gold suggests that the offence could just as correctly be worded as follows:

> Every one commits an offence who deals, in any manner and by any means, with proceeds of crime (or property which is partly such) within Canada, knowing that the property was proceeds of crime within Canada, with intent to conceal or convert that property or those proceeds (supra, nt. 10 at 28).

result of" an enterprise crime or designated drug offence.[29] A dual procedure offence, it requires the specific intent "to conceal or convert" tainted property or proceeds in addition to knowledge of their illegal origin.

George Goyer observes that the specific intent of converting property or proceeds:

> ...seems to relate back to all of the manners in which the property might be dealt with, disposed of, etc. If an individual had knowledge that property or proceeds were obtained as a result of crime, any dealings would seem to come within this broad definition as long as those dealings resulted in either the concealment or conversion of the property or proceeds.[30]

In addition, the knowledge requirements may well be satisfied by an

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[29] Section 462.31, in its entirety, reads as follows:

(1) Every one commits an offence who uses, transfers the possession of, sends or delivers to any person or place, transports, transmits, alters, disposes of or otherwise deals with, in any manner and by any means, any property or any proceeds of any property with intent to conceal or convert that property or those proceeds and knowing that all or a part of that property or of those proceeds was obtained or derived directly or indirectly as a result of

(a) the commission in Canada of an enterprise crime offence or a designated drug offence; or

(b) an act or omission anywhere that, if it had occurred in Canada, would have constituted an enterprise crime offence or a designated drug offence.

(2) Every one who commits an offence under subsection (1)

(a) is guilty of an indictable offence and is liable to imprisonment for a term not exceeding ten years; or

(b) is guilty of an offence punishable on summary conviction.

[30] Proceeds of Crime (Vancouver: Continuing Legal Education Society of B.C., 1990) at 3.1.03.

accused person choosing to remain wilfully blind to the source of funds, "knowledge presumed" as opposed to "knowledge certain."[31]

Curiously, although the term is defined in s. 462.3, the offence does not include the words "proceeds of crime." The omission, presumably intentional, is not easily explained. Alan Gold identifies three differences between the subject matter of the laundering offence and the definition for proceeds of crime. Firstly, he refers to the "insignificant difference" whereby the former uses the words "property or any proceeds of any property," while the latter refers to "property, benefit or advantage."[32] He adds that the definition for 'proceeds of crime' does not use the word 'proceeds,' while the laundering offence does, citing this as

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[31] Kenneth Young, "Proceeds of Crime," in The Drug Case (Vancouver: Continuing Legal Education Society of B.C., Mar. 1990) at 2.1.04. Young (at 2.1.05) quotes from the S.C.C. decision in R. v. Sansregret (1985) 45 C.R. (3d) 193:

> ...willful blindness arises where a person who has become aware of the need for some inquiry declines to make the inquiry because he does not wish to know the truth. He would prefer to remain ignorant. The culpability (in willful blindness)...is justified by the accused's fault in deliberately failing to inquire when he knows that there is reason for inquiry.

The Law Society of British Columbia is clear in its warning to members of the profession:

> ...a lawyer who accepts money or property from a client knowing or being wilfully [sic] blind to the fact that it is the proceeds of crime, may be charged with the offences of possession or "laundering" ("New Proceeds of Crime Legislation," [1989] 10 Benchers' Bulletin 2).

[32] Supra, nt. 10 at 27. The difference may not be as insignificant as he suggests. Can a benefit or an advantage be laundered? Does "property, benefit or advantage" include the proceeds of property?

"an example of the rather sloppy drafting of the statute." Secondly, he notes that the laundering offence does not apply to property outside Canada. Thirdly, the offence need only apply to property or proceeds which are in part the product of an enterprise crime or designated drug offence.[33]

Gold warns of the implications of the new offence:

> ...the provisions...are expressed in language so broad that anyone dealing with any form of property or proceeds thereof, from anywhere in the world, that may be viewed as derived from acts that would arguably be criminal under Canadian law with knowledge or even merely suspicions concerning these suspect origins is a potential accused for violation of the provisions. Accountants, bankers, brokers and lawyers ignore these new provisions at their peril[34].

Certainly his concerns have been mirrored by the criminal defence bar, which expressed considerable dismay at passage of the legislation. Kenneth Young summarizes the view:

> ...the extraordinary sweep of the legislation is such that it must necessarily affect how we, as lawyers, relate to our clients; what inquiries we make as to the origin/source of our clients [sic] funds and property; what transactions we will or will not undertake on behalf of our clients; and how, in context, we will...come to handle funds and property entrusted to us as counsel.[35]

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[33] Supra, nt. 10 at 27-8.

[34] Ibid. at 2-3.

[35] Supra, nt. 31 at 2.1.04. Although the legislation places the retainers of criminal defence counsel in considerable jeopardy, a much greater concern to the legal profession must be the impact of the legislation on lawyers' undertakings. For example, monies held in trust pending completion of a real estate transaction may be captured by a restraint order. The effect of such a seizure on a lawyer's undertaking to disburse funds on closing is unclear, although somewhat analogous situations can be found in the law respecting garnishing orders and seizures by a sheriff. In British Columbia, the Law Society is actively examining the matter (supra, nt. 31).

Although the offence has the potential of capturing many persons and transactions under its umbrella, in practice the majority of laundering cases will likely be dealt with under s. 354, possession of the proceeds of crime. As a predicate offence when committed in relation to enterprise crime or designated drug offences, s. 354 can now form the basis of special search warrant and restraint order applications and can give rise to confiscation orders. In cases where an accused is found in possession of proceeds of crime, it will certainly be easier to prove a s. 354 offence than a laundering offence, the latter containing the complex mens rea component noted above.[36] Only in cases where investigators seek to retrace the flow of laundered money and charge those who took part in the cleansing process will it be necessary to lay laundering charges.

Nevertheless, the question must be asked: does the criminalization of money laundering in s. 462.31 offend the accepted norms of Canada's criminal law? In light of the discussion in Chapter One of this thesis, it seems clear that Parliament possesses the ability to criminalize virtually any conduct, fettered only by constitutional limitations.[37] Nevertheless, it is essential when drafting new criminal offences that Parliament respect the principle of legality and specifically

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[36] Section 354 arguably includes a wider subject matter than s. 462.31: "any property or thing or any proceeds of any property or thing," versus "any property or any proceeds of any property."

[37] A topic considered in Chapter Three.

the maxim, '*nullum crimen*.'

Can it be said that s. 462.31 sufficiently defines the offence of laundering proceeds of crime to ensure compliance with this maxim? Or, utilizing the test described by Glanville Williams, is the offence drawn in such broad terms that almost anybody can be brought within its grasp at the whim of the Crown or the court? Gold and Young would apparently agree with the latter and a literal interpretation appears to support their view. On the other hand, the complex knowledge requirement needed for a conviction may well offset what could otherwise be an overly inclusive definition. The judicial response to the quandary will likely be to strictly construe the offence in such a way that its parameters are clearly delineated, thereby ensuring that it will only capture those who possess clear knowledge or are wilfully blind to the source of monies over which they exercise dominion. Arriving at a fair meaning will likely mitigate the potential reach of the offence and allay the worst fears of many, particularly those in the defence bar.

PROCEEDS OF CRIME

Although the offence of laundering does not incorporate the words 'proceeds of crime,' one cannot ignore the importance

attached to that term, as it recurs throughout the legislation.[38] As noted in the discussion above, the clause, "any property, benefit or advantage, within or outside Canada" found in the definition for proceeds of crime differs markedly from the term "any property or any proceeds of any property," contained within the offence of laundering. It is difficult to say which is broader. On one hand, laundering is apparently restricted to property situated within Canada,[39] while 'proceeds of crime' includes a benefit or advantage and contemplates no territorial restraint. On the other hand, the term "proceeds of any property" in the offence of laundering contemplates derivative property, something not considered in the definition for 'proceeds of

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[38] Section 462.3 of the Code defines 'proceeds of crime' as follows:

> ...any property, benefit or advantage, within or outside Canada, obtained or derived directly or indirectly as a result of
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> (a) the commission in Canada of an enterprise crime offence or a designated drug offence, or
>
> (b) an act or omission anywhere that, if it had occurred in Canada, would have constituted an enterprise crime offence or a designated drug offence.

[39] Although the property, benefit or advantage must be situate in Canada, it may have derived from an act or omission committed elsewhere which, "if it had occurred in Canada, would have constituted an enterprise crime offence or a designated drug offence." The absence of a "double criminality" test, requiring proof of an offence under both Canadian and foreign law, is thereby avoided (see supra, nt. 10 at 21-2 and supra, nt. 23 at 4). The definitions of laundering proceeds of crime (s. 462.31) and possession of the proceeds of crime (s. 354) contain a similar provision.

crime.'[40]

Making the legislative intent even more ambiguous, the laundering offence is termed "laundering proceeds of crime." Do the words 'proceeds of crime' in this descriptive title necessarily attract their defined meaning? In the unlikely event that they do, one might infer that the term "property or any proceeds of any property" should properly read 'property or any proceeds of crime,' affording a globally-inclusive definition of laundering in both the jurisdictional and definitional sense.

SEARCH, SEIZURE AND RESTRAINT

Essential to the enforcement of the amendments are the provisions dealing with the search for and restraint of property.[41] Application for either a special search warrant or a restraint order may be made in writing by the Attorney General,[42] based on

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[40] Quaere whether there can be proceeds of the proceeds of crime?

[41] Kenneth Young draws a parallel between applications for special search warrants and applications for wiretaps. Only partly in jest, he surmises that most applications for the former will be granted: "by reference to the Protection of Privacy Act, what judge has yet proved to be 'unsatisfied' by the affidavit of a uniformed policeman accompanied by Crown Counsel" (supra, nt. 31 at 2.1.02).

[42] References to the Attorney General are found throughout the legislation. Although some observers opine that this may require personal involvement by the Attorney General, the prevailing view suggests that Crown counsel can act in his or her place. A review of the amendments in their entirety lends credence to a broad interpretation. For

reasonable grounds as deposed in a Form 1 information, ex parte or otherwise, to a superior court judge.[43] The operative provision for searches, s. 462.32, permits the judge to authorize a person[44] to search "any building, receptacle or place" for "any property in respect of which an order of forfeiture may be made" and "to seize that property and any other property in respect of which that person or peace officer believes, on reasonable grounds, that an order of forfeiture may be made."[45]

Prior to issuing the warrant, the judge must be satisfied that reasonable grounds exist to believe both that proceeds of crime will be found within the location to be searched and that an

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example, the review provisions in s. 462.34 refer in sub-paragraph (5) to the holding of an in camera hearing, without the Attorney General being present. It would be absurd to suggest that Crown counsel could attend, but not the Attorney General.

It should also be noted that the definition for Attorney General in s. 2 includes the Attorney General's "lawful deputy," the latter term being undefined.

[43] "Judge" is defined in s. 462.3, which in turn requires reference to s. 2 and s. 552. In British Columbia the word means a member of the Supreme Court or the Court of Appeal. Brian Purdy notes that in some jurisdictions, judges are being specifically designated to deal with applications under the legislation ("Special Search Warrants and Restraint Orders," unpub. paper, NCPC at 1).

[44] Kenneth Young assumes that the reference to "person" opens the door to investigators from the Ministry of National Revenue (supra, nt. 31 at 2.1.02). Nevertheless, use of the word 'person' is consistent with pre-existing Criminal Code search provisions (see s. 487).

[45] No reference is made to the search and seizure of either 'proceeds of property' or 'proceeds of crime,' but instead to property forfeitable under either s. 462.37(1) or s. 462.38(2), both of which incorporate the term 'proceeds of crime.'

enterprise crime offence has been committed in relation to those proceeds.[46] The judge may require that notice and a hearing be provided to anyone who, in the judge's opinion, appears to have a valid interest in the property.[47] "Valid interest" is not defined, although it presumably includes legal and equitable interests.[48] How the court will obtain both the names of such persons and a description of their interests is not dealt with, although at least one observer suggests that the onus must fall upon the affiant when applying for an order.[49]

If, in the judge's opinion, providing notice or affording an opportunity to be heard may result in the "disappearance, dissipation or reduction in value of the property or otherwise affect the property so that all or a part thereof could not be

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[46] Nevertheless, the Attorney General is not restricted to seizing only the property which he believed to be forfeitable at the time of application, but may also seize anything else discovered in the course of the search which gives rise to the same belief.

Kenneth Young provides a colourful, if extreme example:

> ...this 'person' can scan the contents of a Surrey townhouse and take away not only the cash 'proceeds of crime' of which the uniformed affiant was, at minimum, likely suspicious; but, as well, the pictures on the wall, the carpets on the floor and whatever else he may find in the place which, in his view, constitute 'proceeds of crime' as defined by the provisions of s. 462.3 (supra, nt. 31 at 2.1.02).

[47] Goyer asks how a judge is to become aware of persons with such an interest (supra, nt. 30 at 3.1.04).

[48] Brian Weddell, "Bill C-61 - Proposed Criminal Code Amendments - Proceeds of Crime," unpub. paper, Canadian Bar Assoc., Criminal Justice Subsection Kamloops, 1989 at 7.

[49] Ibid. at 7.

seized," the judge may dispense with either requirement.[50] As is often the case, this exception may well become the rule, it being difficult to imagine many situations in which the caveat could not apply.[51]

If not the most controversial, certainly that portion of the search and seizure provisions causing the greatest present concern to the Crown, is s. 462.32(6), which requires the Attorney General to provide "such undertakings as the judge considers appropriate with respect to the payment of damages or costs, or both, in relation to the issuance and execution of the warrant."[52] The concept of a Crown undertaking with respect to financial liability is new to Canadian criminal law. Such an instrument is not mentioned elsewhere in the Criminal Code,[53] its nearest equivalent being the undertakings which are commonplace in various aspects of civil law. Goyer compares it to those which generally follow the granting of injunctions, noting that the inclusion of this

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[50] Criminal Code, s. 462.32(5).

[51] A possible scenario might be the seizure of property belonging to a person known to be out of the jurisdiction and unable to deal with it; for example, while resident in a foreign prison.

[52] Paul Saint-Denis notes that the amendments are silent respecting entitlement to the damages and costs and the process for determining entitlement ("Rights of the Accused, Third Party Rights, and Due Process," unpub. paper, NCPC at 3).

[53] The Code does allow for undertakings on the part of an accused as a form of interim release (s. 816(1) and s. 831) and by a prosecutor at the hearing of a summary conviction appeal (s. 817 and s. 831). Neither scenario contemplates financial liability, however.

provision came during "final debate" and has caused trepidation among various provincial attorneys general and law enforcement agencies, to the point that some are not prepared to operate under the legislation until their potential civil exposure is better understood.[54]

Use of the words "such undertakings as the judge considers appropriate" has resulted in at least one application to dispense with an undertaking.[55] In my opinion, such a view offends both the intent and a fair meaning of the provision. The greater problem will be determining an appropriate dollar figure. Brian Weddell suggests that somebody will "have to calculate the possible financial consequences" in advance of an application.[56] Again, the responsibility for doing so likely resides with the Crown.

The very nature of the undertaking is unclear. Is it correct to draw a comparison, as Goyer does, to civil undertakings? Weddell notes that a legal undertaking is both "a highly technical [and a] personal term," which can "only be given and enforced against the individual giving it."[57] Does the term retain its

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[54] For example, what standard of care is expected of the Crown with respect to the upkeep of property, such as houses and cars; in the investment of monies and securities, such as stocks and bonds; and for the loss of opportunities to profit (see supra, nt. 43 at 8-9 and nt. 30 at 3.1.04). Purdy notes that the Attorney General of Ontario has apparently decided not to utilize the legislation due to the liability created by the undertakings (supra, nt. 43 at 8).

[55] Supra, nt. 43 at 3.

[56] Supra, nt. 48 at 5.

[57] Ibid.

personal nature in the legislation, thereby requiring the Attorney General to give a personal undertaking or will the undertaking of a Crown prosecutor suffice?[58] How can either give an undertaking when, in many cases, neither will have direct control or custody over the seized or restrained property?[59] These and other questions continue to perplex those whose job it is to administer the legislation.[60]

After executing a s. 462.32 warrant, the seized property must be detained, taking reasonable care to preserve its condition. A report must be filed within seven days and a copy provided, if requested, to the person from whom the property was seized and to anyone else who, in the judge's opinion, appears to have a valid interest in the property.[61]

Although a number of Criminal Code sections already provide for search warrants, the differences between traditional warrants and the special search warrants are striking. For example, the general Criminal Code warrants provided for in s. 487: a) do not

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[58] Interestingly, in the other Code provisions dealing with undertakings by a Crown official, specific reference is made to an undertaking by the "prosecutor" (see s. 817 and s. 831).

[59] Supra, nt. 48 at 5-6.

[60] Some answers will likely be provided by the courts in Australia and Great Britain. Paul Saint-Denis notes that Australia's Proceeds of Crime Act, 1987 contains an undertaking provision almost identical to Canada's. In Great Britain, the Drug Trafficking Offences Act, 1986 permits compensation of persons acquitted of charges under the legislation, who can demonstrate serious loss or default (supra, nt. 52 at 3).

[61] Criminal Code, s. 462.32(5).

require application by the Attorney General, b) need only be granted by a justice[62] and c) permit the search for and seizure of evidence.

Complementing the provisions dealing with special search warrants is s. 462.33, which allows for restraint orders that prohibit or restrict a person's ability to deal with property. They may be utilized in addition to or in place of the warrants.[63] Here also, a judge must be persuaded that reasonable grounds exist to believe that the property targeted is forfeitable.[64] The pre-conditions are the same as for a special search warrant: a written application by the Attorney General[65] to a high court judge, with affidavit in support.[66]

The ensuing order may appoint a custodian of the property[67] and contain such other "reasonable conditions as the judge thinks fit."[68] Similar to the special search warrants, s. 462.33 contains a notice provision[69] and requires the Attorney General's

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[62] Another exception to this rule is telewarrrants which are granted by designated provincial court judges (s. 487.1).

[63] The Enterprise Crime Study Working Group recommended the creation of restraint orders to freeze the proceeds of enterprise crime (supra, nt. 4 at 177).

[64] Criminal Code, s. 462.33(3).

[65] Ibid., s. 462.33(1) and s. 462.33(6).

[66] Ibid., s. 462.33(1) and s. 462.33(2).

[67] Ibid., s. 462.33(3)(b)(i).

[68] Ibid., s. 462.33(4).

[69] Ibid., s. 462.33(5).

undertaking.[70] Service of a copy of the order on the person named is required,[71] as is registration against any property affected by the order.[72]

The seizure or restraint of property remains valid for a period of six months from the time of seizure or the making of the restraint order, unless a renewal is obtained prior to expiry.[73] In order to obtain a renewal, the Attorney General must satisfy a judge that the property may yet become the subject of confiscation proceedings or is[74] required as either part of an investigation or as evidence.[75] Interestingly, the renewal is for an indefinite period of time. As well, mention of the investigative and evidentiary use of the property is made despite the absence of reference to either as a basis for the original seizure or restraint order.

There are no other provisions in the Criminal Code which

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[70] Ibid., s. 462.33(7).

[71] Ibid., s. 462.33(11). Disobeying the order after being served with a copy constitutes an offence, one of two Criminal Code offences created by the amendments (the other being laundering proceeds of crime). A hybrid offence, it is also one for which a wiretap authorization is available.

[72] Ibid., s. 462.33(9). Reference to registration "against any property" obviously contemplates more than land registration. It necessarily involves any statutory provincial registry scheme involving real or personal property.

[73] Ibid., s. 462.35.

[74] 'Is' could be interpreted to mean 'may be' depending on whether the applicable clause is read conjunctively or disjunctively.

[75] Criminal Code, s. 462.35.

parallel the restraint orders envisioned by s. 462.33. They are a device adopted directly from the civil law of injunctions. By their introduction, Parliament chose to step outside the traditional boundaries of criminal law in the hope of adapting a civil investigative tool to the more demanding requirements of criminal law. As with the new warrants, however, it recognized the need for a more rigorous scrutiny of applications than in the case of traditional search warrants. A police officer appearing at the residence of a lay justice of the peace with an Information to Obtain and an unsigned order would not suffice.

The need for stricter judicial scrutiny is reinforced by the very purpose for the new warrants and orders, not to gather evidence or assist with investigations, but to make either post-conviction or in rem confiscation meaningful. Accordingly, an assessment of the likelihood of conviction becomes of equal importance to the need for a reasonable belief that property of interest will be located in a search.

Despite all good intentions, the increased 'safeguards' may, however, prove to be counter productive. Inevitably comparisons will be drawn to the authorization procedure for wiretaps. There, the onus upon the Crown to produce an exhaustive application has increased markedly over the past number of years.[76] The affidavits in support are generally extremely lengthy, time-consuming to prepare and subject to intense scrutiny by defence counsel should

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[76] See Wilson v. The Queen [1983] 2 S.C.R. 594, 9 C.C.C. (3d) 87.

a 'package' be opened. Unavoidably, some would say properly, this has discouraged applications. Assuming that the intent of the proceeds of crime legislation is to encourage the confiscation of illegal proceeds, a similar result would not be desirable.[77]

Further, despite the detailed application procedure required for wiretap authorizations, Kenneth Young's acerbic comment that most applications are essentially rubber stamped by judges[78] suggests either that members of the judiciary are disposed to grant the applications with little scrutiny or that those presented are of very high quality. By analogy, if special search warrant applications are rubber stamped, the rationale for a procedure which differs from 'normal' search warrants is obviated, unless it serves to ensure that only quality material is placed before a judge.

IN PERSONAM CONFISCATION

The aims of the legislation are largely satisfied upon seizure or restraint of the offending property or proceeds of crime. Without the pecuniary means to continue an illegal enterprise, most

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[77] Already a draft protocol for Crown counsel in British Columbia requires that all applications for either special search warrants or restraint orders be referred to Regional Crown Counsel "for approval and instructions" ("Draft for Discussion - Protocol for Crown Counsel - Bill C-61 - Proceeds of Crime - S.C. 1988 c. 51," unpub. paper, 15 Dec. 1988).

[78] Supra, nt. 31.

criminal organizations will presumably be neutralized or, at least, crippled. Unless the property seized or restrained is confiscated however, the possibility remains that its return will permit the organization, assuming a malevolent nature, to resume its illegal activities. For this reason, confiscation remains of considerable, although secondary, importance to the aims of the legislation.[79]

The amendments use the word 'forfeiture' throughout, although in reality both forfeiture and confiscation are envisaged. In sentencing a person convicted or discharged[80] of an enterprise crime offence, s. 462.37(1) requires that the court order the confiscation of proceeds of crime if certain conditions are met. There must be an application by the Crown which satisfies[81] a judge on a balance of probabilities[82] that the property "is proceeds of crime and that the enterprise crime was committed in relation to that property."

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[79] The Enterprise Crime Study Working Group recommended creation of a legislative scheme permitting confiscation of the proceeds of enterprise crime (supra nt. 4 at 177).

[80] The legislation uses the term "offender," which is defined in s. 2 as including persons who either plead guilty or are found guilty. It therefore includes persons who obtain an absolute or conditional discharge pursuant to s. 736.

[81] The words "satisfied" and "satisfaction" are used throughout the legislation to express the standard of persuasion required before a judge or court can make certain orders. It implies a burden of proof less than the criminal standard, though not necessarily akin to the civil test, to which specific reference is also made in the legislation. Neil McCrank presumes, however, that it will be interpreted to mean a balance of probabilities ("Forfeiture Provisions of Bill C-61," unpub. paper, NCPC at 6).

[82] My emphasis, here and elsewhere in this chapter.

In the event that the property, or a part or interest in it is not exigible, the court may order a fine in lieu.[83] Situations in which this can occur include where the property, part or interest cannot be located despite diligent attempts to do so,[84] has been transferred to a third party,[85] is outside Canada,[86] has witnessed a substantial decrease in value[87] or has been commingled to the point where separation becomes difficult.[88] The fine must equal the offender's monetary interest in the property, although the method of valuation is not specified[89] and will likely be quite complex in the case of missing, diminished or comingled property. If the court opts for a fine, it shall impose a mandatory term in default of payment which coincides with a schedule in s. 462.38(4). The default time, to a maximum of 10 years, is consecutive to any other term, including one already being served.[90]

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[83] Mosley suggests that the fine alternative is "comparable to the U.K. 'confiscation orders' and Australian 'pecuniary penalty orders' (supra, nt. 27 at 19).

[84] Criminal Code, s. 462.37(3)(a). R. v. Sault St. Marie (1978) 40 C.C.C. (2d) 353 (S.C.C.) made the term "due diligence" a part of Canada's legal lexicon (supra, nt. 81 at 7).

[85] Criminal Code, s. 462.37(3)(b). McCrank asks whether use of the term "third party" implies a person at arm's length from the transferor (supra, nt. 81 at 7).

[86] Criminal Code, s. 462.37(3)(c).

[87] Ibid., s. 462.37(3)(d).

[88] Ibid., s. 462.37(3)(e).

[89] Supra, MacFarlane, nt. 23 at 11-12.

[90] Criminal Code, s. 462.37(4)(b).

If the Crown cannot connect the property with the instant offence, but is able to prove beyond a reasonable doubt that it is the "proceeds of crime," that is, derived from an enterprise crime or designated drug offence, a judge may order confiscation. This provision codifies the judicial activism evidenced by the Manitoba Court of Appeal when it overturned the restoration order in R. v. Medd,[91] despite the monies in question not having flowed from the predicate or another drug offence.[92]

By introducing the balance of probabilities test, Parliament imported, from civil law, a standard of proof that has not survived court challenges whenever introduced in the past.[93] The specific in personam forfeiture provisions elsewhere in the Code permit the forfeiture of items immediately connected to an offence, generally exhibits at trial, such as contraband or the instruments of crime. Such forfeiture follows upon conviction as an integral part of the sentencing process.

The amendments represent Parliament's attempt to treat the confiscation of proceeds of crime in like fashion,[94] with the

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[91] (1983) 7 C.C.C. (3d) 158.

[92] See MacFarlane's comments respecting R. v. Medd (supra, nt. 23 at 6).

[93] See, for example, R. v. Oakes [1986] 1 S.C.R. 103, 24 C.C.C. (3d) 321.

[94] For example, the in personam forfeiture of precious metals (s. 394(2)) reads, in part, as follows:

> Where a person is convicted of an offence under this section, the court may order anything by means of or in relation to which the offence was committed, on such conviction, to be forfeited...

exception that the nexus between the predicate offence and the proceeds may be proven on a balance of probabilities rather than beyond a reasonable doubt. The reduced burden aside, it is questionable whether in personam confiscation can even be compared to the specific in personam forfeiture provisions elsewhere in the Code.

Assume, for example, that a business venture is the proceeds of crime and that the enterprise crime offence charged is 'fraud.' Assume further that the proceeds were traced from the fraud offence, through a myriad of companies, domestic and offshore, as well as various bank accounts, into the pool of money used to purchase the business. Can it be said that the fraud offence was committed in relation to the business venture? The answer is less important than recognizing the very great difference between such a relationship and one linking contraband, for example a keg of bootleg whisky, to an excise offence; or an instrument of crime, for example a 'smoking' gun, to a violent crime. Only the final results are alike.

MacFarlane views the inclusion of the balance of probabilities

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Juxtapose the foregoing with the following from s. 462.37(1):

...where an offender is convicted...of an enterprise crime offence and the court...is satisfied...that any property is proceeds of crime and that the enterprise crime offence was committed in relation to that property, the court shall order that the property be forfeited...

test as a statutory reversal of R. v. Gardiner,[95] in which the Supreme Court of Canada held that a sentencing hearing is integral to a trial and governed by the same standard of proof.[96] Richard Mosley counters that Gardiner was decided in the absence of contrary statutory provisions "and to resolve differences of opinion on the issue in the courts below." He adds that the U.S.S.C., in McMillan v. Penn.,[97] allowed that a lower standard of proof does not violate the due process requirement of the Fourth Amendment.[98]

Mosley suggests that the lesser burden arose from a concern for "the inherent difficulties in tracing and identifying the origins of assets which, by their very nature, are subject to concealment and conversion." The fact remains, however, that the importation of the balance of probabilities test represents a radical innovation, particularly when one considers that a person's liberty may hang in the balance as a result of the mandatory default provisions. To justify its inclusion as a counterweight to

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[95] (1982) 68 C.C.C. (2d) 477. See William F. Ehrcke, "Letting the Punishment Fit the Crime" (1990) 48 The Advocate 545 at 552, for a timely discussion of Gardiner.

[96] Supra, MacFarlane, nt. 23 at 4. It remains to be seen whether or not a sentencing hearing can be compared to a confiscation hearing.

[97] (1986) 91 L. Ed. 67. McMillan dealt with sentencing guidelines and is of limited assistance. However, Mosley also cites U.S. v. Sandini (1987) 816 F. (2d) 869 at 879 (3rd Cir.), the leading American case in support of the proposition that a forfeiture proceeding "brought after [the] guilt phase of [a] criminal trial, does not violate due process" (supra, nt. 27 at 18).

[98] Supra, nt. 27 at 18.

the absence of a tracing mechanism is less than satisfactory.

Inclusion of the civil test not only appears to contradict a fundamental norm of Canadian criminal law but it also seems to blunt the Supreme Court's decision in Gardiner. Challenges to this departure will likely find succour in the Charter, a subject discussed in Chapter Three. Suffice to say for the present that it represents an extremely vulnerable aspect of this legislation.

Although s. 462.37(1) has to date received greater attention because of its inclusion of the civil test, s. 462.37(2) poses an interesting, yet quite different problem. It permits the confiscation of property which may not be connected to either the accused or the predicate offence, provided that the property is beyond a reasonable doubt, the proceeds of crime. Patricia Donald asks how property can be the proceeds of crime if it remains possible for the person from whom it is seized to later be found innocent.[99] Donald's query focuses on the rather curious interrelationship contemplated in this sub-section between an offender and the property. The former becomes a mere conduit by which the matter and the property are brought before a court. The criminal process is but a vehicle for a confiscation process which seeks not to convict but to divest, arguably an abuse of process grounded on a dubious statutory basis. A quite similar situation exists with respect to in rem confiscation.

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[99] Supra, nt. 5 at 7.

IN REM CONFISCATION

Should a person charged with an enterprise crime or a designated drug offence abscond or die prior to disposition of the matter, s. 462.38[100] provides that a judge shall order confiscation of property upon application by the Crown and being satisfied beyond a reasonable doubt that it is the proceeds of crime, that proceedings relating to the property are outstanding against the accused and that he has died or absconded.[101]

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[100] Incorporated in the Food and Drugs Act by s. 44.4 (controlled drugs) and s. 51 (restricted drugs) and in the Narcotic Control Act by s. 19.3.

[101] Section 462.38 reads as follows:

(1) Where an information has been laid in respect of an enterprise crime offence, the Attorney General may make an application to a judge for an order of forfeiture under subsection (2) in respect of any property.

(2) Subject to sections 462.39 to 462.41, where an application is made to a judge under subsection (1), the judge shall, if the judge is satisfied that

(a) any property is, beyond a reasonable doubt, proceeds of crime,

(b) proceedings in respect of an enterprise crime offence committed in relation to that property were commenced, and

(c) the accused charged with the offence referred to in paragraph (b) had died or absconded,

order that the property be forfeited to Her Majesty to be disposed of as the Attorney General directs or otherwise dealt with in accordance with the law.

(3) For the purposes of this section a person shall be deemed to have absconded in connection with an enterprise crime offence if

(a) an information has been laid alleging the commission of

A person is deemed to have absconded if a) charged with an enterprise crime offence,[102] b) a warrant for the person's arrest is issued in relation to the information[103] and c) the warrant remains outstanding for six months despite reasonable attempts to apprehend the accused.[104] The accused need not be the owner or person in possession of the property, provided that it is found to be the proceeds of crime and that the enterprise crime offence was "committed in relation to that property."[105] Furthermore, there is no requirement that the person abscond either before or after

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the offence by the person,

(b) a warrant for the arrest of the person has been issued in relation to that information, and

(c) reasonable attempts to arrest the person pursuant to the warrant have been unsuccessful during the period of six months commencing on the day the warrant was issued,

and the person shall be deemed to have so absconded on the last day of that period of six months.

[102] Criminal Code, s. 462.38(3)(a). MacFarlane explains the rationale for requiring that an Information be extant:

> Whereas without the commencement of the criminal process such legislation could be considered an invasion of provincial jurisdiction in relation to "property and civil rights in the Province", the initiation of a criminal action demonstrates that this legislative scheme was intended to form a part of the punitive action of the criminal courts: Industrial Acceptance Corp. v. The Queen, [1953] 2 S.C.R. 273, hence falling within the criminal law power of Parliament under head 27 of Section 91 of The Constitution Act, 1867 (supra, MacFarlane, nt. 23 at 13).

[103] Criminal Code, s. 462.38(3)(b).

[104] Ibid., s. 462.38(3)(c).

[105] Supra, MacFarlane, nt. 23 at 13.

the laying of the information, thereby contemplating both scenarios.[106]

MacFarlane cautions that law enforcement agencies must conduct "a reasonably thorough search" for the accused, not only in order to obtain a confiscation order, but also to protect against an accused who appears at some later point in time and challenges the confiscation order on the basis that reasonable attempts were not made to locate and arrest him.[107]

Although in rem confiscation may at first blush appear to law enforcement officials as something of a panacea, upon examining individual cases one's enthusiasm quickly wanes. A situation already encountered by investigators is that of a person who absconds from Canada and is arrested and imprisoned in a foreign country on an unrelated charge. Assuming for the sake of argument that property connected to that person has been seized or restrained in Canada and that the individual faces a lengthy period of incarceration abroad, what can be done? Must the Crown act as landlord, manager, conservator or agent until the accused returns to face the charges which await him or can in rem proceedings be invoked?

Is it possible that incarceration abroad satisfies the requirement for "reasonable attempts to arrest the person?" Admittedly the section will adequately address various situations

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[106] Ibid. at 14. There remains the possibility that courts will equate the word 'abscond' with the latter situation only.

[107] Ibid. at 14.

in which an accused is beyond the jurisdictional reach of Canadian law enforcement. For example, the person who refuses to voluntarily return from a Caribbean island with which Canada does not possess an extradition treaty is potentially caught by the deeming provision. But can the same be said for someone who wishes to return but cannot because he is incarcerated abroad and is not eligible for either extradition or a prisoner exchange? Logic says no, although law enforcement will understandably plead otherwise. The answer, like so many problems posed by the amendments, will depend upon a combination of statutory and Charter interpretation.

In passing, it should be noted that the amendments do not require that property confiscated be under the court's custody or control at the time that a confiscation order is made. It may have been seized under the authority of a 'regular' search warrant or obtained, by consent, without a warrant. In other words, neither a special search warrant nor a restraint order is a prerequisite for confiscation. Any exigible property which qualifies as the proceeds of crime will suffice, regardless of how or when it was obtained.[108] Once confiscated, property escheats to the Crown. This is similar to the various pre-existing forfeiture provisions in the Code, however is different from those in the Narcotic Control Act and the Food and Drugs Act.[109]

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[108] Ibid. at 5. This presumably includes property obtained by the authorities after the making of a confiscation order.

[109] See Ch. 1.

THE NET WORTH INFERENCE

In the absence of a tracing mechanism, the legislation seeks to assist authorities with the difficult task of proving the illegal source of property by creating, in s. 462.39,[110] a statutory inference of net worth.[111] If it can be demonstrated that an accused person's net worth after commission of an offence exceeds that before commission, after taking into account income from sources unrelated to enterprise crime or designated drug offences, the court may infer that the difference is the proceeds of crime.[112]

MacFarlane questions the need for the statutory inference in its present form, suggesting that it could "logically be drawn upon proof of the necessary facts in any event."[113] Certainly net

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[110] Section 43.4 and s. 51 for designated drug offences under the Food and Drugs Act and s. 19.3 for comparable offences under the Narcotic Control Act.

[111] In its entirety, s. 462.39 reads as follows:

> For the purpose of subsection 462.37(1) or 462.38(2), the court may infer that property was obtained or derived as a result of the commission of an enterprise crime offence where evidence establishes that the value, after the commission of that of offence, of all property of the person alleged to have committed the offence exceeds the value of all the property of that person before the commission of that offence and the court is satisfied that the income of that person from sources unrelated to enterprise crime offences or designated drug offences committed by that person cannot reasonably account for such an increase in value.

[112] Criminal Code, s. 462.39.

[113] Supra, MacFarlane, nt. 23 at 15.

worthing is not new to forensic accountants or courts trying 'white collar' cases. However, an important caveat must be added. As MacFarlane notes, confiscation requires either proof on a balance of probabilities that property is the proceeds of crime and that the enterprise crime offence was committed in relation to that property or proof beyond a reasonable doubt that the property is the proceeds of crime. This differs from the nature of the inference which a court is entitled to draw under s. 462.39: "that property was obtained or derived as a result of the commission of an enterprise crime offence," causing MacFarlane to suggest that the inference is evidentiary in nature and not intended to displace the Crown's normal burden of proof:

> Presumably...the court will still expect other evidence to support the Crown's case for forfeiture, particularly where the higher burden of proof is to be imposed - including such "conventional" evidence as surveillance, seizures, documents, accomplice evidence, intercepted private communications and other forms forms of circumstantial evidence tending to show that the property is the proceeds of crime.[114]

The difficulties to be encountered with the inference will likely revolve less around its legal effect than its practical application, particularly the mechanics of compilation.[115]

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[114] Ibid. at 17.

[115] A person largely responsible for the modern use of the net worth concept by law enforcement personnel, Richard A. Nossen, cautions that the concept itself is not without inherent limitations:

> ...the net worth computation is not a wholly accurate computation. On the contrary, it would be literally impossible to identify all expenditures made by anyone over a period of years due to a lack of records and an inability of witnesses to remember a series of events concerning financial transactions entered into with a

Valuation of one's net worth is not a simple undertaking in the best of situations. Considering that many, if not most, circumstances giving rise to the use of these provisions will involve extra-jurisdictional holdings, and bank accounts, the task is magnified. It is further compounded by the need to extrapolate back to a date before the commission of an offence for an initial assessment and to a date after the offence for a second assessment. To make matters worse, there is every likelihood that the authorities will encounter a disguised, if not obliterated or partially obliterated paper trail. At the present time, investigators are faced with situations for which the inference is poorly suited, situations in which the commencement date of an offence is unclear or a series of illegal transactions occur at irregular intervals over a protracted period of time.

MacFarlane observes that the section "leaves undefined what amount of the defendant's property can be inferred as having been derived from illegal activity."[116] He adds that the inference now makes relevant an accused person's income, thereby lending strength

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target over a period of years. At best, the net worth computation is a reconstruction of financial events that occurred over a period of years; that is being presented by the government not to initially prove the financial crime committed by the target, but to corroborate other evidence that the target did, in fact, commit financial crime (The Detection, Investigation and Prosecution of Financial Crimes (White Collar, Political Corruption and Racketeering (Richmond, Va.: Nossen & Assocs., 1982).

[116] Supra, MacFarlane, nt. 23 at 16.

to Crown efforts to enter income tax returns in evidence.[117] Purdy suggests "that...income tax returns should normally be relied upon as the primary indication of legitimate income." He notes that any "additional legitimate income...may be disclosed at a subsequent hearing by the subject,"[118] presumably the confiscation hearing itself. The fact that some income need not be reported to tax authorities[119] compounds the likelihood that an accused must rise to explain the source of his income. Therefore, despite its evidentiary nature, the ability of the net worth inference to force an offender to the stand invites comparison with the reverse onus clauses which today face challenge under provisions of the Charter, in particular, the s. 11(d) presumption of innocence, a topic pursued in the following Chapter.

THE PROTECTION OF PERSONS AFFECTED BY THE LEGISLATION

The framers of the amendments made a concentrated effort to provide relief for persons potentially victimized by the effects of the legislation, through the inclusion of various restorative and remedial provisions. Richard Mosley suggests that "[w]herever the interests of a third party respecting the property may be

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[117] Ibid.

[118] Supra, nt. 43 at 8.

[119] For example: gambling and lottery winnings, inheritances and foreign savings brought into Canada (ibid).

prejudiced by a seizure warrant, restraining order or forfeiture order, the Act provides opportunities for judicial review of the decision, exemptions and recovery to the extent of the third party interest."[120] This apparent ability of the legislation to counter its own intrusive nature has yet to be tested.

In addition to the Attorney General's undertakings,[121] the optional notice provisions,[122] and the automatic expiry of both special search warrants and restraint orders,[123] is s. 462.34, which permits the review of warrants and orders. It allows that "any person who has an interest in property" affected by either instrument may apply to a superior court judge,[124] at any time, for permission to examine the property[125] or for orders directing the return of seized property, or a part of it; revoking or varying a restraint order; or imposing "reasonable conditions" on a restraint order.[126] So far so good, however from this point forward the section becomes an interpretative nightmare. The judge may only make such an order if the applicant can come within one of

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[120] Supra, nt. 27 at 21.

[121] Criminal Code, s. 462.32(6) and s. 462.32(7).

[122] Ibid., s. 462.32(5) and s. 462.33(5).

[123] Ibid., s. 462.35.

[124] The legislation does not require that it be the same judge who issued the warrant or order, nevertheless Goyer suggests that this will likely be the case (supra, nt. 30 at 3.1.05).

[125] Criminal Code, s. 462.34(1)(b) and s. 462.34(3).

[126] Ibid., s. 462.34(1)(a) and s. 462.34(4).

the following four categories.

First, if the applicant enters into a recognizance, with or without sureties or deposit, in the discretion of the judge.[127] Patricia Donald suggests that all successful applicants under s. 462.34 will likely be required to enter into such a recognizance.[128]

Second, if the applicant is either a person charged with an enterprise crime or a designated drug offence or has acquired title or a right to possession of the property from such a person under circumstances which give rise to a reasonable inference that the transfer was effected in order to avoid confiscation[129] and the applicant can satisfy the judge firstly, that the warrant or restraint order should not have been issued or made and secondly, that the property affords no further investigative or evidentiary purpose.[130]

Third, an applicant can succeed if he is other than a person to which the foregoing paragraph applies and can satisfy the judge firstly, that he lawfully owns or possesses the property "and appears innocent of any complicity in...or any collusion in relation to" an enterprise crime or designated drug offence and secondly, that the property affords no further investigative or

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[127] Ibid., s. 462.34(4)(a).

[128] Supra, nt. 5 at 8.

[129] Though the recipient may be unaware of this ulterior purpose.

[130] Criminal Code, s. 462.34(4)(b) and s. 462.34(6)(a).

evidentiary purpose.[131] Patricia Donald, who describes s. 462.34 as convoluted, criticizes this third precondition for apparently requiring a determination of guilt or innocence before trial. It fails to define the term "appears innocent" or provide instruction respecting either the burden of proof or the procedure to be followed by the judge.[132]

Fourth, an order may be granted to meet "the reasonable living expenses" and the "reasonable business and legal expenses" of either the person in possession of the property seized or restrained or anyone else who appears to have a valid interest in the property and that person's dependants.[133] Similarly, the property may be used in order to satisfy the requirements of a Part XVI recognizance.[134]

By providing for legal fees, the legislative drafters clearly intended to deflect anticipated criticism from the criminal defence bar which would, and did, understandably express shock at the breadth of the new laundering offence and the threat it posed to lawyers and their trust accounts.[135] As a means of facilitating

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[131] Ibid., s. 462.34(4)(b) and s. 462.34(6)(b).

[132] Supra, nt. 5 at 6 and 12.

[133] Criminal Code, s. 462.34(4)(c)(i) and s. 462.34(4)(c)(ii).

[134] Criminal Code, s. 462.34(4)(c)(iii). Apparently "any person" can make application for use of the property in this manner, not simply a person charged with an enterprise crime or designated drug offence or, for that matter, with any offence.

[135] Supra, nt. 31.

a determination of entitlement to legal fees while preserving the sanctity of a lawyer-client relationship and an accused's defence, s. 462.34(5) requires that the hearing be conducted in camera and in the absence of the Attorney General. The curious result of this precaution is, however, that the judge must arrive at a decision based on material provided by the accused and his counsel or which is on the court file.

The judge is faced with two very basic problems. First, determining the reasonableness of legal expenses without requiring an accused to disclose his defence[136] and second, the possibility that such fees will be paid out of monies which are the proceeds of crime, or worse yet, the property of identified, identifiable or non-identifiable victims, forcing a victim to subsidize an accused person's legal expenses. This view is mitigated to a certain extent by the requirement in s. 462.34(2)(b) that the judge may require that notice "be given to and may hear any person who, in the opinion of the judge, appears to have a valid interest in the property."[137] In the absence of an investigative staff, however,

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[136] Kenneth Young asks whether criminal defence counsel are now "bound to disclose, informally, testimonially or by affidavit, the nature and extent of our investigations and, in the process, so undermine the privilege and confidentiality of our relationship with our client" (ibid. at 2.1.04). Patricia Donald takes the concern one step further by asking whether the courts will become links in the very laundering chain which they seek to eliminate (supra, nt. 5 at 11).

[137] Curiously, despite the fact that the Attorney General can neither appear nor intervene, s. 462.34(2)(a) requires either two clear days written notice to the Attorney General or the Attorney General's consent before an application can

the judge is forced to decide to whom notice should be given on the basis of the material filed in support of the application or the court file. Any land title, company office or lien searches would have to be conducted by the applicant, at the request of the judge or in anticipation of such a request. Furthermore, the vexing question of what constitutes a "valid interest" awaits definition.

Although the Crown likely has a positive obligation to bring the names of interested parties to the attention of the judge in respect of most applications, it can hardly do so on applications for legal expenses when it has no standing. Furthermore, it is doubtful that a parallel obligation could be imposed on the accused without impairing his ability to make full answer and defence.

Finally, it should be noted that third party interests are also considered during and after the confiscation hearing. Notice to persons who the court opines have a valid interest in property is required by s. 462.41. Rather than see proceeds of crime escheat to the Crown, the court may order the return of property to persons innocent of complicity or collusion in the enterprise crime or designated drug offence and who are either the lawful owners or lawfully entitled to possession of the property.[138] Section 462.42 provides for relief from confiscation where an application is made within thirty days and s. 462.43 gives the court a residual authority to dispose of property seized or restrained. Appeals are permitted under s. 462.44 and confiscation is suspended during the

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be heard.

[138] Criminal Code, s. 462.41(3).

appeal period.[139]

SUMMARY

The proceeds of crime amendments introduce a wide range of innovative concepts to Canada's criminal law. Potentially, the laundering offence has a tremendous reach. Combined with new tools in the form of special search warrants and restraint orders, law enforcement agencies may now pursue investigations which had hitherto stymied them due to an absence of statutory muscle. The harsh reality of confiscation, both _in personam_ and _in rem_, has the potential of divesting persons of vast sums of money and other property. The success of Parliament's attempt to counter the intrusive nature of the search, seizure and confiscation provisions by the creation of various checks and balances remains to be seen. Critics of the legislation already abound; however its principal problem is not from without but from within - its own lack of clarity. Many of its provisions will require years of litigation in order to define their breadth and extent and much of that litigation will revolve around _Charter_ challenges, a subject considered in the following Chapter.

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[139] _Ibid._, s. 462.45.

CHAPTER 3

THE AMENDMENTS AND THE CHARTER

Despite being in force for almost two years, the proceeds of crime amendments have yet to be tested in the superior courts of the provinces, let alone the Supreme Court of Canada. The paucity of judicial decisions is probably the combined result of several factors: a lack of will on the part of political leaders to make use of the legislation, a tendency for governments to employ extra-judicial remedies and arrangements, trepidation on the part of governments faced with financial undertakings and a degree of reluctance on the part of many law enforcement officials and Crown prosecutors to pursue new investigative and evidentiary procedures.[1] With time, however, cases will inevitably wind their way up the judicial ladder and obtain careful scrutiny, much of which will centre on the compatibility of the amendments with the Charter of Rights and Freedoms.

Proclamation of the Charter in 1982 was the beginning of a new era for Canadian criminal law. Suddenly, many common law principles and rights obtained a form of protection previously unattainable. At the same time, other principles, either borrowed from the American example or truly new, found expression and begged interpretation.

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[1] These factors are considered at greater length in Chapter Four.

Today, one cannot speak of the norms and traditions of criminal law without including those enshrined in the Charter. The purpose of this Chapter is, therefore, to examine the proceeds of crime amendments from the perspective of the Charter. As the legislation clearly invites challenge in a number of areas, only those which are essential to the effective implementation of the legislative scheme are overviewed. Sections 8[2] and 11(d)[3] are reviewed in considerable detail, followed by a brief overview of s. 7[4] and the legislative objective test for s. 1.[5] Integral to the discussion which follows is an assessment of the implications of these sections on the viability of the amendments.

Although confiscation is not dependant on seizure or restraint in the fashion contemplated by the amendments,[6] most proceeds of crime cases will likely be initiated by the use of special search warrants and restraint orders, a seemingly logical place to begin this analysis.

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[2] Search and seizure.

[3] Presumption of innocence.

[4] Life, liberty and security of the person.

[5] Reasonable limits on rights and freedoms.

[6] Property seized pursuant to 'normal' search warrants and consent searches, or which is not even under seizure, is also arguably open to confiscation (see Criminal Code, s. 462.37).

The amendments create a mechanism for obtaining either a special search warrant or a restraint order which mimics the procedure used to obtain a wiretap authorization. As described in Chapter Two, s. 462.32 allows a judge to issue a special search warrant, entitling the named person to search "any building, receptacle or place" for "any property in respect of which an order of forfeiture may be made" and to "seize that property and any other property in respect of which that person or peace officer believes, on reasonable grounds, that an order of forfeiture may be made."

Similarly, a restraint order is available under s. 462.33 if a judge is "satisfied that there are reasonable grounds to believe that there exists any property in respect of which an order of forfeiture may be made."[7] The order may prohibit or restrict a person's ability to deal with property, appoint a custodian of the property, require that the property be delivered to the custodian and, or any other conditions deemed reasonable by the judge.[8]

The future of special search warrants and, to a lesser degree, restraint orders, depends on their ability to survive a challenge based on s. 8 of the Charter, which provides that "[e]veryone has

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[7] Ibid., s. 462.33(3).

[8] Ibid., s. 462.33(3)(b) and s. 462.33(4).

the right to be secure against unreasonable search or seizure."[9] Its succinct phraseology belies both the complexities in interpretation and the abundance of jurisprudence which already swirl around this important legal right.[10]

The essence of s. 8 is the word 'unreasonable.' Everything else is secondary. The leading post-Charter decision regarding searches is the Supreme Court of Canada decision in Hunter v. Southam Inc.[11] Dickson J. (as he then was), writing for the Court, described the guarantee as "vague and open,"[12] expressing the need for "a broad, purposive" approach to interpreting it and other specific legal rights in the Charter.[13] The purpose of s. 8, he wrote, is to guarantee "a broad and general right to be secure from

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[9] Although more concise, the section bears striking resemblance to the Fourth Amendment to the United States Constitution, which reads:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, particularly describing the place to be searched and the person or things to be seized [my emphasis].

Not surprisingly, the S.C.C. has already made considerable use of American jurisprudence in its interpretation of s. 8.

[10] Mr. Justice David McDonald notes that "no other section in the legal rights part of the Charter...has received more comprehensive scrutiny and interpretative guidance from the Supreme Court of Canada than has s. 8" (Legal Rights in the Canadian Charter of Rights and Freedoms, 2nd ed. (Toronto: Carswell, 1989) at 227).

[11] [1984] 2 S.C.R. 145, 14 C.C.C. (3d) 97.

[12] Ibid. at 154 S.C.R., 105 C.C.C.

[13] Ibid. at 156 S.C.R., 106 C.C.C.

unreasonable search and seizure."[14] He called for a balancing between the public's interest in privacy and government's ability to intrude on that privacy in the interest of law enforcement.[15] To assist in this determination, Dickson J. established a three-fold test. First, "prior authorization" must be obtained where "feasible."[16] Second, the authorization process must be conducted in a "neutral and impartial manner" by a person acting judicially and who is sufficiently informed of the circumstances.[17] Third, the minimum acceptable standard is a sworn belief, on reasonable grounds, "that an offence has been committed and that there is evidence to be found at the place of the search."[18]

Applying s. 8 to the proceeds of crime amendments is an interesting task. Alan Gold suggests that the description of the warrant in s. 462.32(1) "is rather peculiar and seems to be an attempt by the draftsman to circumvent" the Supreme Court of Canada's decision in Hunter.[19] He refers to that portion of the sub-section which purports to allow a person to seize "any other property in respect of which that person or peace officer believes, on reasonable grounds, that an order of forfeiture may be made."

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[14] Ibid. at 158 S.C.R., 107 C.C.C.

[15] Ibid. at 159 S.C.R., 108 C.C.C.

[16] Ibid. at 160-61 S.C.R., 109 C.C.C.

[17] Ibid. at 162 S.C.R., 110 C.C.C.

[18] Ibid. at 168 S.C.R., 115 C.C.C.

[19] Alan D. Gold, Proceeds of Crime - A Manual with Commentary on Bill C-61 (Toronto: Carswell, 1989) at 35.

He opines that "[t]he draftsman was trying to disguise what is essentially a power to seize without warrant and shelter it under the apparent authority of the warrant."[20]

Is Gold correct to suggest that s. 462.32(1) offends the Hunter decision and, if so, does it necessarily follow that the section is inconsistent with s. 8 of the Charter? To begin, neither the facts nor the statutory provisions in Hunter are on all fours with the problem posed by s. 462.32(1). The search in Hunter was authorized by other than a judicial official and in a manner which failed to meet the standard prescribed by Dickson. In the case of the amendments, the first two tests in Hunter are clearly satisfied by the need for prior authorization from a superior court judge. The bedeviling question, however, is whether the section meets the third test.

In that test, Dickson J. did not specifically link the offence suspected with the evidence located, however it seems difficult to reach any other rational conclusion. Allowing investigators to obtain a warrant based on information respecting a specific offence and thereafter cause a general search to be made for "any other property in respect of which...an order of forfeiture may be made"[21] seems to defeat the entire rationale for prior authorization. Arguably, the door would be open to pretext searches. On the other hand, it is undeniable that in the course

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[20] Ibid. at 37. Gold quotes Martin J.A.'s judgment in R. v. Noble (1984) 42 C.R. (3d) 209 (Ont. C.A.), in which Martin compares writs of assistance to "general warrants."

[21] Criminal Code, s. 462.32(1).

of a search, be it for narcotics, stolen property or money, investigators may well stumble upon items not specified in the warrant which they reasonably believe are evidence of criminal activity.

The vires of s. 462.32(1) can be tested by examining how items not named in a 'normal' s. 487 search warrant are lawfully seized in similar circumstances. There are two possibilities, that they either fit within the parameters of either s. 489 of the Code or the 'plain view' doctrine.[22]

Section 489 reads as follows:

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[22] This doctrine must be distinguished from that of 'abandonment.' When a suspected offender abandons items which may prove to be evidence of crime, interesting questions arise respecting the ability of police to seize the items. American courts view their discard as an abandonment of a privacy interest and therefore the police seizure is not a search in terms of the Fourth Amendment (see Hester v. U.S. (1924) 265 U.S. 57 (U.S.S.C.) and U.S. v. Manning (1971) 440 F. 2d 1105 (U.S.C.A., 5th Cir.)). Garbage, for example, has long been a valuable source of evidence for police investigators, particularly in 'document cases.' California v. Greenwood (1988) 56 U.S.L.W. 4409 approved warrantless searches of garbage and adopted the 'reasonable expectation of privacy test' annunciated for abandoned articles in City of St. Paul v. Vaughn (1975) 237 N.W. 2d 365 (S.C. Minn.). McDonald notes that there are no Canadian decisions "dealing directly with the effect of abandonment," however suggests that it is "reasonably clear that Canadian courts would reach the same decisions as American courts" (supra., nt. 10 at 275). He adds that LaForest J. used the reasonable expectation of privacy test when distinguishing the 'finding' of blood from the 'taking' of blood in R v. Dyment (1988) 66 C.R. (3d) 348, 45 C.C.C. (3d) 244 (S.C.C.). In the celebrated 'Squamish Five'case in British Columbia, Toy J. (as he then was) considered the seizure of garbage from in front of the suspects' residence. He concluded: "I am unable to characterize the removal of garbage apparently abandoned for delivery to the garbage disposal area as an unreasonable seizure" (R v. Taylor, 26 Jan. 1984, unreported, B.C.S.C. at 13).

> Every person who executes a warrant issued under section 462.32, 487 or 487.1 may seize, in addition to the things mentioned in the warrant, anything that the person believes on reasonable grounds has been obtained by or has been used in the commission of an offence.

Incorporation of s. 462.32 in s. 489 coincided with the proclamation of the amendments. It broadened the scope of s. 462.32, which already encompassed the seizure of items named in a special search warrant and items not named but for which a confiscation order may be made, to include the seizure of contraband and the instruments of an offence. However, section 489 does not permit the seizure of items which cannot be included within these categories, regardless of their evidentiary or other worth.[23]

One might suggest that s. 489 makes the residual portion of s. 462.32 redundant. There is a real difference though between "things...obtained by...the commission of an offence" in s. 489 and the "proceeds of crime," which are integral to a confiscation order under either s. 462.37(1) or 462.38(2). Section 462.3 defines the latter as "any property, benefit or advantage, within or outside Canada, obtained or derived directly or indirectly as a result of [an enterprise crime or a designated drug offence]" The very purpose of the amendments was to overcome the inability of existing provisions of the Code to deal with the profits of crime, the courts having restricted existing search and seizure provisions to

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[23] This invites the question - why do s. 462.32 and s. 489 not permit the seizure of evidence? Must investigators intent on seizing both the proceeds of crime and evidence in support of a charge obtain both a s. 462.32 and a s. 487 warrant?

tangible and exigible items. Furthermore, as noted above, s. 489 does not permit the seizure of evidence. The plain view doctrine is of greater assistance.

Much of the jurisprudence respecting this doctrine, long-standing in the law of search and seizure, deals with warrantless searches, either of persons or property. In the case of lawful searches pursuant to the authority of a warrant, the Federal Court of Appeal recently stated the following in Solvent Petroleum Extraction Inc. v. M.N.R.:[24]

> The common law rule with regard to the "plain view" doctrine is that where, during the course of executing a legal warrant, an officer locates anything which he reasonably believes is evidence of the commission of a crime, he has power to seize it.[25]

A classic restatement of the doctrine is found in Coolidge v. New Hampshire, a decision of the United States Supreme Court.[26] In Coolidge, Stewart J.[27] acknowledged the applicability of the doctrine to searches conducted pursuant to a warrant and concluded:

> What the "plain view" cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused. The doctrine serves to supplement the prior justification...and permits the warrantless seizure.[28]

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[24] (1989) 50 C.C.C. (3d) 182, 99 N.R. 22.

[25] Ibid. at 188 C.C.C., 27 N.R.

[26] (1971) 29 L. Ed. (2d) 564.

[27] Although Stewart J. delivered the Court's opinion, he was joined by only Douglas, Brennan and Marshall, JJ. with respect to this aspect.

[28] Supra, nt. 26 at 583.

Nevertheless, Stewart J. noted that the doctrine can only apply to the "inadvertent" discovery of evidence[29] which is "immediately apparent to the police."[30] The reasoning in Coolidge was accepted by four members of the same Court in Texas v. Brown,[31] a case noted by the Court of Appeal in Solvent Petroleum. There, the constitutionality of s. 231.3 of the Income Tax Act[32] was in issue. It was argued that the plain view doctrine could not apply to the seizure of documents which necessarily required an examination before a person realized their significance. In the course of his judgment, Desjardins J.A., writing for the Court, considered whether the search offended either s. 7 or s. 8 of the Charter. He rejected both arguments, concluding:

> ...the context in which the search for and seizure of "plain view" documents appears in the Act, i.e., in the course of searching for and seizing business documents under a warrant which would obviously involve examination of documents by the searcher in order to determine whether the seizure is authorized by that warrant, suggests that the authority to seize other business documents not covered by the warrant meets the test of reasonableness and therefore of validity. In addition, the provision as drafted meets the constitutional test of reasonableness since it contains two important safeguards: namely, that the executing officer believes on reasonable grounds that the document or thing seized affords

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[29] Ibid. at 585. The foregoing was accepted by Steele J. in R. v. Shea, (1982) 38 O.R. (2d) 582 (H.C.), as correctly stating the law in Canada, both pre and post-Charter . See also R. v. Longtin (1983) 41 O.R. (2d) 545 (Ont. C.A.) and Roderick M. McLeod et al., The Canadian Charter of Rights - The Prosecution and Defence of Criminal and other Statutory Offences, vol. 2 (Toronto: Carswell, 1983) at 6-110.12 to 6-114.1.

[30] Supra, nt. 26 at 583.

[31] (1983) 75 L. Ed. (2d) 502.

[32] S.C. 1970-71-72, c. 63, as amended.

> evidence of the commission of an offence under the Act and that, as soon as practicable, he bring the seized matter before a judge for judicial control.[33]

It is interesting to note that despite Desjardins's footnote reference to the Coolidge and Brown requirement that an item be "immediately apparent," he did not discuss it in the body of the decision. As a result, the only, rather unsatisfactory conclusion which can be drawn is that in Canada "immediately apparent" should be taken to mean 'immediately apparent upon examination.' Leave to appeal Solvent Petroleum was unfortunately refused by the Supreme Court,[34] forcing one to speculate on the highest court's views.

Section 231.3(5) of the Income Tax Act is remarkably similar to the portion of s. 462.32(1) under consideration. It reads:

> Any person who executes a warrant under subsection (1) may seize, in addition to the document or thing referred to in subsection (1), any other document or thing that he believes on reasonable grounds affords evidence of the commission of an offence under this Act and shall as soon as practicable bring the document or thing before, or make a report in respect thereof to, the judge who issued the warrant...[my emphasis].

The power is broad, both in terms of what additional items may be seized, "thing[s]," and in terms of the offence, "an offence under this Act." As a result, the Federal Court's decision is of tremendous importance to the future of s. 462.32(1). Parallels to the constitutional safeguards noted by the Court of Appeal in Solvent Petroleum can also be found in s. 462.32, where the seizure of unnamed property requires a belief on reasonable grounds that a confiscation order may be made and that a report be prepared for

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[33] Supra, nt. 24 at 189 C.C.C., 28 N.R.

[34] S.C.C., 21556, 23 Nov. 1989.

the court.[35]

In summary, it may well be that Gold's concern with s. 462.32 is unwarranted.[36] Although at first blush it appears constitutionally offensive, a closer examination reveals strong support from the Solvent Petroleum decision. Even if the Supreme Court of Canada were to distinguish or overrule the Court of Appeal's findings, the special search warrants are not necessarily doomed. The Supreme Court could always consider 'reading down'[37] the legislation by eliminating the offensive portion of s. 462.32.

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[35] Criminal Code, s. 462.32(4).

[36] Solvent Petroleum may not have been decided prior to Gold's comments going to print.

[37] Carol Rogerson notes that reading down is "a means of avoiding a constitutional issue.... a technique of interpretation whereby a statute is narrowly construed so as to preclude unconstitutional applications" ("The Judicial Search for Appropriate Remedies Under the Charter: The Examples of Overbreadth and Vagueness," in Robert J. Sharpe, ed., Charter Litigation (Toronto: Butterworths, 1987) 233-306 at 247). In Hunter, Dickson J. considered whether to read down the impugned combines legislation, central to that case. He had little difficulty rejecting such a notion due to the "overt inconsistency" between the legislation and s. 8 (supra, nt. 11 at 168 S.C.R., 115 C.C.C.), however added that:

> ...it is the legislature's responsibility to enact legislation that embodies appropriate safeguards to comply with the Constitution's requirements. It should not fall to the courts to fill in the details that will render legislative lacunae constitutional. Without appropriate safeguards legislation authorizing search and seizure is inconsistent with s. 8 of the Charter. As I have said, any law inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect (ibid. at 169 S.C.R., 115-16 C.C.C.).

The interrelationship between s. 8 and s. 1 of the Charter remains to be considered. In Hunter, an argument was not advanced that the impugned legislation could be justified under s. 1. Dickson, J. noted:

> I leave to another day the difficult question of the relationship between these two sections and, more particularly, what further balancing of interests, if any, may be contemplated by s. 1, beyond that envisaged by s. 8.[38]

That day has yet to arrive. Stuart Whitley notes the "inherent contradiction" of a search being unreasonable in terms of s. 8, yet a "reasonable limit" under s. 1. At a minimum, he suggests that the illegality of a search "ought to raise a prima facie presumption against its reasonableness."[39] Jerome Atrens observes, however, that the Supreme Court of Canada's decision in R. v. Morgentaler,[40] which considered the interrelationship of a s. 7 violation and s. 1, "inferentially" rejected any suggestion of a contradiction by refusing to restrict s. 1's application to a right or freedom which did not possess an internal limitation or qualification.[41]

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[38] Supra, nt. 11 at 169-70 S.C.R., 116 C.C.C.

[39] Stuart J. Whitley, Criminal Justice and the Constitution (Toronto: Carswell, 1989) at 191, n.21 and 201.

[40] (1988) 62 C.R. (3d) 1, 37 C.C.C. (3d) 449.

[41] Jerome Atrens, The Charter and Criminal Procedure (Toronto: Butterworths, 1989) at 1-34.

CONFISCATION AND THE PRESUMPTION OF INNOCENCE - SECTION 11(d)

As noted in Chapter Two, the aims of the legislation are largely satisfied upon seizure or restraint of the offending property or proceeds of crime. Nevertheless, confiscation remains a crucial final element in the process and the means by which an offender is foreclosed absolutely of his ill-gotten gains. In order to appreciate the significance of the Charter's potential impact on the confiscation provisions, a review of the presumption of innocence, entrenched by s. 11(d) of the Charter, is essential.

There are few, if any, aspects of our criminal law which possess greater sanctity than the presumption of innocence. Viscount Sankey L.C. in Woolmington v. D.P.P., described it as the "golden thread" running "[t]hroughout the web of the English Criminal Law."[42] Section 11(d) of the Charter makes it an integral part of Canada's Constitution, a legal right enjoyed by all persons "charged with an offence...to be presumed innocent until proven guilty according to law..."

The presumption is central to the legal rights contained within the Charter:

> The Canadian courts have in the case of this "legal right", perhaps more so than in the case of any other, seized the opportunity afforded by the enactment of the Charter to restore a higher level of principle to the interpretation of the right, after decades of ad hoc tinkering with the presumption of innocence by Parliament and the provincial legislatures.[43]

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[42] [1935] A.C. 462 at 481, 25 Cr. App. R. 72 at 95 (H.L.).

[43] Supra, nt. 10 at 470.

As with s. 8, s. 11(d) has strong American ties. Both the Fifth and the Fourteenth Amendments to the Constitution provide for "due process," a term deemed to include the presumption of innocence and the need in criminal cases for proof beyond a reasonable doubt of a person's guilt.[44] The burden of proof is integral to the presumption of innocence. In R. v. Oakes,[45] Dickson C.J.C., writing for the majority, established a three-point test to analyze situations for compliance with s. 11(d). First, to sustain a criminal conviction there must be proof beyond a reasonable doubt. Second, the burden of establishing guilt is on the Crown and third, the court must proceed in a lawful and fair manner.[46]

He went on:

> In general one must, I think, conclude that a provision which requires an accused to disprove on a balance of probabilities the existence of a presumed fact, which is an important element of the offence in question, violates the presumption of innocence...[47]

Most of the pre-Charter "tinkering" by Parliament with the presumption of innocence involved the creation of an imbroglio of complexities, variously referred to as reverse onus clauses, inferences and presumptions. They are to be found everywhere[48] and

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[44] Ibid. at 467.

[45] [1986] 1 S.C.R. 103, 24 C.C.C. (3d) 321.

[46] Ibid. at 121 S.C.R., 334-35 C.C.C.

[47] Ibid. at 132 S.C.R., 343 C.C.C.

[48] Writing in 1986, Byron Sheldrick counted in excess of 90 reverse onus clauses ("Shifting Burdens and Required Inferences: The Constitutionality of Reverse Onus Clauses"

their importance to a successful prosecution extends along a continuum from minimal to critical.

McDonald defines a reverse onus clause as "one which places the legal burden of proof upon the accused as to some fact which is an ingredient of the offence."[49] He treats the words inference and presumption as synonymous, however differentiates among reverse onus clauses by the nature of the burden placed on an accused.

In Oakes, Dickson C.J.C. grappled with the reverse onus clause found in s. 8 of the Narcotic Control Act, one requiring an accused charged under that section to disprove possession for the purpose of trafficking once shown to have been in possession of a narcotic. In laying the groundwork for his decision, the Chief Justice categorized presumptions as those "without basic facts" and those "with":

> A presumption without a basic fact is simply a conclusion which is to be drawn until the contrary is proved. A presumption with a basic fact entails a conclusion to be drawn upon proof of the basic fact...[50]

The latter he subdivided into permissive and mandatory presumptions, the former making the drawing of an inference optional, the latter not.[51] He also noted that presumptions can "be either rebuttable or irrebuttable." To rebut the former, one must either raise a reasonable doubt, adducing evidence which

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(1986) 44 U. of Toronto Fac. L. Rev. 179-208 at 179).

[49] Supra, nt. 10 at 471.

[50] Supra, nt. 45 at 115 S.C.R., 330 C.C.C.

[51] Ibid. at 115-16 S.C.R., 330 C.C.C.

questions the truth of the presumed fact, or adduce sufficient evidence to satisfy the civil burden. In addition, presumptions can be of law or of fact.[52]

Applying the foregoing, Dickson concluded that the impugned portion of s. 8 constituted a mandatory presumption of law resulting from the proof of a basic fact, possession, which could be rebutted by evidence sufficient to satisfy the balance of probabilities test.[53] He distinguished earlier decisions which viewed s. 8 as merely shifting an evidentiary or secondary burden onto the accused, observing that the phrase "to establish," used in s. 8, is the equivalent of "to prove."[54]

Applying Chief Justice Dickson's test in Oakes to the net worth inference in s. 462.39 invites the conclusion that it is a 'basic fact presumption' which relies upon proof of an unexplained increase in net worth. The fact that the court is given the option of inferring that this increase is the proceeds of crime clearly indicates that it is a permissive, not a mandatory presumption, as in Oakes. Furthermore, its permissive nature implies that it is also rebuttable, presumably by the accused adducing sufficient evidence to question the veracity of the presumed fact. Determining whether it is a presumption of fact or law is resolved by reference to "Cross on Evidence," a text to which Dickson referred in Oakes. Cross writes that "[p]resumptions of fact are

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[52] Ibid. at 116 S.C.R., 330-31 C.C.C.

[53] Ibid. at 116 S.C.R., 331 C.C.C.

[54] Ibid. at 117 S.C.R., 332 C.C.C.

merely frequently recurring examples of circumstantial evidence.... inferences which may be drawn by the tribunal of fact."[55]

In summary, the net worth inference is a permissive presumption of fact, rebuttable by calling into question the presumed fact. This is in accord with the present United States position regarding a similar provision in its drug confiscation legislation. In U.S. v. Sandini,[56] the Federal Court of Appeals noted that:

> If the prosecution shows that a defendant acquired property during the relevant period and that it likely came from no other source, the fact finder may infer that the drug trafficking funded the purchase. The presumption, to be sure, is a rebuttable one and therefore is constitutional. Nevertheless the, the right of rebuttal may be illusory when made contingent on waiving the privilege not to testify during the trial.[57]

Can the net worth inference survive a Charter challenge? In Oakes, the Chief Justice concluded "that a provision which requires an accused to disprove on a balance of probabilities the existence of a presumed fact, which is an important element of the offence in question, violates the presumption of innocence in s. 11(d)."[58] He rejected the notion that a rational connection between an inferred fact and a proved fact necessarily assured that proof was

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[55] Rupert Cross, Evidence, 5th ed. (London: Butterworths, 1979) at 124.

[56] (1987) 816 F. (2d) 869 (U.S.C.A., 3rd Cir.).

[57] Ibid. at 874. One undesirable result of reverse onus clauses is the pressure placed upon an accused to take the stand in his own defence. For this reason, the right against self-crimination, s. 13 of the Charter, is also generally relied upon in the challenge of a reverse onus clause.

[58] Supra, nt. 45 at 132 S.C.R., 343 C.C.C.

established beyond a reasonable doubt and that a provision did not thereby offend s. 11(d).[59]

The permissive and evidentiary nature of the net worth inference, the fact that it does not relate to an element of an offence and the possibility of rebutting it on a standard less than a balance of probabilities, make it highly unlikely that the inference will fail a s. 11(d) Charter challenge. As noted in Chapter Two, the greatest problem with the inference will likely be the mechanics of compilation. Although the constitutionality of the net worth inference may be of little concern, such is not the case with other aspects of the confiscation scheme.

Introduction of the balance of probabilities test in s. 462.37 seems, at first blush, to contradict the requirement of proof beyond a reasonable doubt which forms the cornerstone of the presumption of innocence and s. 11(d). The issue is complicated, however, because it does not involve a question of individual guilt but of taint attached to property, much as the deodand of ancient times. It is further complicated by s. 462.37(3), which allows a court to substitute a fine of equivalent worth for property which is not exigible and 462.37(4), which requires a mandatory period of imprisonment in default.

Certain observations can be made. The Supreme Court of Canada, in R v. Gardiner,[60] clearly stated that a sentencing

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[59] Ibid. at 133-34 S.C.R., 344 C.C.C. He did allow that the "rational connection test" could usefully be applied at the s. 1 stage.

[60] [1982] 2 S.C.R. 368, 68 C.C.C. (2d) 477.

proceeding is an integral part of the trial process. The Saskatchewan Court of Appeal agreed in R. v. Protz,[61] noting that sentencing does not fall within the definition of "other proceeding[s]" in s. 13 of the Charter.[62] As a result, a sentencing hearing requires that the onus of proof, at least with respect to all contested issues, rests with the Crown, which must satisfy a burden that is beyond a reasonable doubt.[63] Does it follow though that a confiscation hearing is the equivalent of a sentencing hearing?

With a long history of confiscation legislation and related jurisprudence, American courts can help with the resolution of this issue, mindful always of Dickson J.'s admonition in Gardiner, a pre-Charter case, that:

> Due process bears a very different meaning in Canada than that which has been accorded the phrase in the United States, and consequently American jurisprudence with respect to the proper quantum of proof on sentencing is an inappropriate model for Canadian emulation. The controversy surrounding the applicability of the due process clause to sentencing hearings has served to accentuate, in the United States, the division in the trial process before and after conviction.[64]

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[61] (1984) 13 C.C.C. (2d) 107.

[62] Ibid. at 112.

[63] See William F. Ehrcke, "Letting the Punishment Fit the Crime," (1990) 48 The Advocate 545 at 551-52.
There is no requirement that the court consider only fresh evidence in a confiscation hearing. As a result, it may wish to consider evidence received during the 'guilt' phase.

[64] Supra, nt. 60 at 412-13 S.C.R., 513 C.C.C. It will be interesting to observe whether the Charter, with its strong similarity to the American Constitution, causes a change in this thinking.

Regardless, the parallels between American confiscation legislation and the amendments are striking and cannot be ignored. In Sandini,[65] the Court of Appeals acknowledged the desirability of merging the confiscation process with the trial proper, warning however of "the potential for clashes between competing constitutional rights." The Court adopted a bifurcated procedure in which "the verdict in the guilt phase must be based on adequate evidence and a standard of proof beyond a reasonable doubt."[66] The Court observed that a similar burden in the confiscation phase "confuses culpability with consequences."[67] It reviewed other statutes which reduced the burden to the civil test in cases of "enhanced penalties" and concluded:

> The legislative history makes clear that Congress sought to make the government's burden of proof in criminal forfeitures the same as that in the civil realm. Such a provision is valid to the extent that the forfeiture proceeding occurs only after a conviction based on the constitutional standard....we conclude that use of the preponderance standard only to establish the extent of the penalty withstands constitutional scrutiny.[68]

In Gardiner, Dickson J. noted that the controversy over due process in the United States accentuated an undesirable rift between the guilt and sentencing phases of a trial, leaving one to speculate whether a bifurcated process, such as that contemplated by the amendments, will find favour in Canada.

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[65] Supra, nt. 56.

[66] Ibid. at 874.

[67] Ibid. at 875.

[68] Ibid. at 876.

Section 11(d) could also assist with challenges to the viability of s. 462.37(2), which permits the confiscation of proceeds of crime unconnected to a predicate offence. There the criminal burden of proof remains, however, the lack of a nexus raises interesting problems.[69] In addition, the s. 462.37(4) requirement that a court impose a period of imprisonment in default, ranging up to 10 years, invites challenge under both s. 11(d) and other Charter provisions.[70] In rem confiscation under s. 462.38 can be added to the list of unknowns. The implications of confiscating a person's property in the absence of a conviction and, quite possibly without any notice, are tremendous. Although potentially s. 11(d) issues, challenges to any of s. 462.37(2), s. 462.37(4) and s. 462.38(2) could potentially obtain even greater success if framed around s. 7 of the Charter.

FUNDAMENTAL JUSTICE - SECTION 7

Section 7, commonly referred to as the fundamental justice provision of the Charter, is closely related to the presumption of innocence. As noted by the Chief Justice in Oakes:

> ...the presumption of innocence is referable and integral to the general protection of life, liberty and security of the

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[69] For example, is a criminal courtroom the proper forum for a proceeding unrelated to the offence charged? Should there not be a civil forfeiture scheme established by statute?

[70] For example, s. 7 (fundamental justice), s. 9 (arbitrary detention) and s. 12 (cruel and unusual punishment).

person contained in s. 7 of the Charter.[71]

Section 7 of the Charter is to criminal law what a wild card is to an inveterate card player. The courts treat it with heady respect and legal academics and practitioners are left to speculate on its potential. Although relatively concise, every word in the section is significant:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Jerome Atrens describes the s. 7's present and potential effect on Canada's criminal justice system in the following terms:

> The wording of the section invites broad, creative interpretations. The courts have only begun the task of exploring the meaning and potential of s. 7, but its pre-eminence among the legal rights has already been established.[72]

In Ref. re s. 94(2) of the **Motor Vehicle Act** (B.C.),[73] Lamer J. (as he then was), writing for the majority of the Supreme Court, explained that the section contains two distinct yet complementary parts, separated by a disjunctive 'and.' The former evidences "the interests protected," while the latter "sets out limits or acceptable qualifications of this right." What is interesting, however, is his conclusion that s. 7 can provide relief from both substantive and procedural injustices, not simply the former, as in

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[71] Supra, nt. 45 at 119 S.C.R., 333 C.C.C.

[72] Supra, nt. 41 at 8-1.

[73] (1985) 23 C.C.C. (3d) 289.

the case of the American due process clauses.[74] Jamie Cameron takes aim at his reasoning, lambasting it for glossing over two hundred years of extensive American jurisprudence. He concludes that as a result of Lamer's analysis, "the Supreme Court of Canada committed itself to an expansive interpretation of section 7, without explaining or appearing to realize the ramifications of such a decision."[75]

Accepting that the Supreme Court has taken the broad wording of s. 7 to heart, the next question must be to determine what criteria courts will utlize in order to determine whether or not a s. 7 violation has occurred. Lamer J.'s reasons in the **Motor Vehicle Act** (B.C.) reference are again instructive. The principles of fundamental justice, he writes, "are to be found in the basic tenets of our legal system." These tenets include the enumerated rights and freedoms found within sections 8 to 14 but also certain presumptions in the common law and principles annunciated by international conventions of human rights.[76] The potential for the section is immense.

One amendment which may prove fertile territory for a s. 7 challenge is the new offence of 'laundering proceeds of crime.' Is the offence delineated in s. 462.31 overly broad, to the point of being too vague to support a finding of criminal conduct? In R. v.

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[74] Jamie Cameron, "The Motor Vehicle Reference and the Relevance of American Doctrine in Charter Adjudication," Sharpe, supra, nt. 37, 69-96 at 70.

[75] Ibid. at 89.

[76] Supra, nt. 73 at 302 and Atrens, supra, nt. 41 at 8-24.

Rowley,[77] the British Columbia Court of Appeal turned to American jurisprudence for a test to determine when a statutory provision is void for vagueness, concluding that a challenge could only succeed "if the enactment is impermissibly vague in all of its applications." Can it be said that s. 462.31 is impermissibly vague in all its applications?

Carol Rogerson describes "overbroad" laws as those "which are too broadly drafted and which, if applied literally, have the potential to catch more conduct than the government is constitutionally permitted in the pursuit of its legitimate goals."[78] Overbroad laws are often also plagued by 'vagueness,' which Rogerson describes as "the problem of imprecision and uncertainty."[79] The common test for vagueneness is whether "a law is so uncertain that a 'well-intentioned' citizen of common intelligence must necessarily guess at its meaning."[80] Vagueness offends the principle of legality, which provides notice to the public of the content of law. Rogerson notes that vague laws may now possess constitutional significance:

> ...to the extent that they constitute a denial of fair notice a penal context, they may violate the s. 7 guarantee of fundamental justice; they may be potentially overbroad (and hence "unreasonable" within the context of s. 1); or, they may violate the requirement in s. 1 that limitations on rights be

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[77] (1986) 43 M.V.R. 290.

[78] Rogerson, supra, nt. 37 at 241.

[79] Ibid. at 242.

[80] Ibid.

prescribed by law.[81]

Rogerson notes that the remedies for vague and overbroad laws including striking the entire law, reading down and severance.[82]

As much remains to be known of the full breadth and extent of the rights protected by s. 7, it is difficult to predict its impact on criminal law and, specifically, its ability to assist challenges based primarily on other enumerated rights. In addition, the availability of recourse to s. 1 from s. 7 violations, which is contemplated by the majority in Morgentaler, clearly demonstrates a complex interrelationship between the principles of fundamental justice and the reasonable limits to be placed on rights and freedoms.

THE FINAL HURDLE - SECTION 1

Assuming, for the sake of argument, the violation of a legal right by operation of one or more of the proceeds of crime amendments, the court must next examine the infringement in terms of s. 1,[83] which provides the ultimate balancing of individual

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[81] Ibid. at 244-45.

[82] Ibid. at 245.

[83] R. v. Big M Drug Mart Ltd. [1985] 1 S.C.R. 295 is authority for this two-stage process which Kerans J.A. describes as "a dichotomy between limits on rights that spring from their nature and purpose, what we might call definitional limit, and limits on rights that flow from the recognition of competing claims, the assessment of which seems to be the office of s. 1" (infra, nt. 84 at 569).

rights with majoritarian or communitarian interests. It states:

> The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.[84]

In Oakes, Chief Justice Dickson delineated two criteria which must be satisfied in order for a challenge to succeed under s. 1. Quoting from Big M, the first criterion requires that the objective of the legislation be "of sufficient importance to warrant overriding a constitutionally protected freedom."[85] At a minimum, the objective must be "pressing and substantial in a free and democratic society." The second requires "that the means chosen are reasonable and demonstrably justified." Again adopting dicta from Big M, he notes that this "involves 'a form of proportionality test.'"[86] In turn the proportionality test incorporates three sub-tests. First, there must be a rational connection between the measures and the objective. Second, the means "should impair 'as little as possible' the right or freedom in question"[87] and third, the effects of the measures must be proportional to the objective, "[t]he more severe the deleterious effects of a measure, the more important the objective must be."[88]

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[84] For a frank discussion of s. 1 and its future implications by a leading Canadian jurist, see Roger P. Kerans, "The Future of Section One of the Charter," (1989) 23 U.B.C. Law Rev. 567-77.

[85] Supra, nt. 45 at 138 S.C.R.

[86] Ibid. at 139.

[87] Ibid.

[88] Ibid. at 140.

The first criterion explores the public purpose of the impugned legislation. Oakes provides the best and a surprisingly relevant example. There, Dickson had little difficulty finding a legitimate purpose. Implicitly acknowledging the Crown's contention that "s. 8 of the Narcotic Control Act is aimed at curbing drug trafficking by facilitating the conviction of drug traffickers [Dickson's words]," he observed that "Parliament's concern that drug trafficking be decreased can be characterized as substantial and pressing."[89] He cited two reports,[90] various international treaties[91] and foreign domestic legislation[92] aimed at the drug problem, concluding that:

> The objective of protecting our society from the grave ills associated with drug trafficking, is,...one of sufficient importance to warrant overriding a constitutionally protected right or freedom in certain cases. Moreover, the degree of seriousness of drug trafficking makes its acknowledgement as a sufficiently important objective for the purposes of s. 1, to a large extent, self-evident.[93]

The absence of any current analysis of the state of drug trafficking in Canada is a surprising omission from Dickson's

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[89] Ibid.

[90] A special Senate committee report from 1955 and the Final Report of the Commission of Inquiry into the Non-Medical Use of Drugs (the 'LeDain Commission' report) of 1973. Interestingly, the author of the LeDain Commission report, Gerald LeDain, sat on the Oakes case in his capacity as a puisne justice of the S.C.C. and concurred with Dickson's judgment.

[91] All pre-1965.

[92] A New Zealand statute of 1975 and a U.K. statute of 1971.

[93] Supra, nt. 45 at 141 S.C.R., 350 C.C.C.

judgment. Furthermore, with the exception of the 1973 LeDain Commission report, there is no reference to hard statistics on drug abuse. Clearly, to the Supreme Court, which was unanimous in this aspect of the judgment, the evils of drug trafficking required little elaboration. Will the same apply to money laundering and asset confiscation?

Having accepted the ends of the legislation, the Chief Justice turned to the means. He began his analysis with the first prong of the proportionality test - the rational relationship to the objective. Expounding on the nature of the sub-test, he noted the need for an internal rationality between what had been proven by the Crown and what it sought to prove through the assistance of s. 8's reverse onus clause. He concluded that the clause could not survive this "rational connection test":

> ...it would be irrational to infer that that a person had an intent to traffic on the basis of his or her possession of a small quantity of narcotics. The presumption...is overinclusive and could lead to results in certain cases which would defy both rationality and fairness.[94]

The severity of punishment which potentially flows from a conviction under s. 8 added to the strength of his commitment.[95]

Since Oakes, the Supreme Court has had the opportunity of considering the proportionality test in other cases, among them R. v. Smith[96] and R. v. Morgentaler. In the former, the seven year minimum sentence for drug importation failed the second prong of

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[94] Ibid. at 142 S.C.R., 350 C.C.C.

[95] Ibid.

[96] (1987) 34 C.C.C. (3d) 97.

the test and in the latter, Dickson C.J.C. determined that the impugned abortion legislation failed to satisfy any of its elements.[97]

Applying Oakes to the proceeds of crime amendments will not be a one-time effort. In recent months and years, money laundering and the profits of the illicit drug trade have captured headlines in newspapers and magazines throughout Canada and the United States. Statistics abound concerning the extent of both in North America, their prevalence in certain population centres and the desirability of neutralizing drug cartels by attacking their profits.

In view of the Supreme Court's willingness to accept that drug trafficking is an evil, it will hardly be a quantum leap for it to similarly acknowledge the evils of laundering drug monies and of drug profiteering generally. However, this assumes that the Court accepts the political rationale for the amendments at face value. In the event that the Court looks behind the rhetoric and observes that the legislation can be used to fight other than drug trafficking and organized crime, will it be quite so willing to accept its intrusive nature? Following Chief Justice Dickson's reasoning in Oakes, the Court must examine the objectives of the legislation in toto, not merely as they relate to drug trafficking. In all likelihood, the s. 1 ends test will require a much stronger evidentiary basis and lengthier consideration by the Court than was the case with s. 8 of the Narcotic Control Act.

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[97] See generally, Atrens, supra, nt. 41 at 1-39.

The means tests examine specific legislative provisions which are found to violate one or more legal rights. In the case of the amendments, the results of these tests will differ depending on the enumerated rights or freedoms in question. For example, if inclusion of the civil burden of proof in s. 462.37(1) is found to violate the presumption of innocence (s. 11(d)), the court must first ask whether a rational connection exists between the inclusion of the balance of probabilities test and the objective of divorcing an offender from the proceeds of crime. Assuming such a connection, the court must next ask whether inclusion of the reduced burden impairs the presumption of innocence to the least possible degree. This will likely be a critical junction. The historic importance of the criminal burden of proof to the presumption of innocence militates against any reduction of the onus resting with the Crown. For the sake of argument however, assuming that the second prong of the test is met, the third presents itself: is the objective of the legislation sufficiently important to justify the confiscation of a person's assets, regardless of their derivation? In all likelihood, yes.

SUMMARY

The proceeds of crime amendments present a seemingly endless array of Charter issues. Assuming that the Crown pursues charges and confiscation proceedings under the legislation, the challenges

will be many and protracted. By introducing a new concept of punishment to the Criminal Code which arguably represents a paradigmatic shift in Canada's approach to criminal law, Canada will inevitably move closer to the United States in terms of both criminal confiscation and the prevention of money laundering.

America's history of confiscation legislation dates back over a century while its modern manifestation, primarily state and federal anti-racketeering laws, is approximately 20 years old. This modern legislation took almost a decade to mature, weather constitutional challenges and become ingrained in the criminal justice system. It is probably unlikely to expect a faster result in Canada. Nevertheless, the process of maturation itself will present a multitude of interesting and thought provoking legal arguments which undoubtedly will contribute to a better understanding of the amendments and the Charter itself.

CHAPTER 4

CRIMINAL CONFISCATION IN CANADA - ITS FUTURE

The last decade of the twentieth century will likely place increased pressure on all aspects of Canada's criminal justice system, including law enforcement. Inevitably police departments will face ever-increasing financial constraints, imposed on them by federal, provincial and municipal governments intent on reducing spiralling deficits. The very existence of some forces will be threatened by efforts to consolidate or contract out for services. Operationally, officers will continue, grudgingly, to adjust to both the Charter and a heightened level of public oversight. Society's increased emphasis on individual liberties virtually guarantees a period of continued adaptation in which officers will be forced to reassess their methods of operation, persuading many to adopt an excessively cautious approach to the investigation of crime. Human nature being what it is, the fear of criticism in the absence of reward does not bode well for the fight against crime.

Today, Canada is a haven for criminal organizations of varied and sundry kinds. Some have become highly specialized and 'professional' in their activities. Nevertheless, the innate complacency which appears to grace the collective Canadian conscience places little emphasis on organized crime. Keeping murderers and sexual offenders off the streets, robbers and burglars out of businesses and homes and the traffic flowing into

and out of cities seem of much greater concern.

The increased sophistication of criminals and criminal organizations is reflected by the many who have taken the concept of a global village to heart, learning and manipulating to their advantage the languages of modern banking, trade, computers and the law. Many questions present themselves. What chance is there for society to ensure that criminal behaviour remains the choice of only a fringe group? What will the impact be on Canada should America's war on drugs prove to be even a moderate success? Will Canada become the conduit of choice for narcotics, replacing south Florida and Mexico?[1] Who will Canada receive, along with many innocent persons, during the expected mass exodus from Hong Kong in 1997 and Macao in 1999? Will Triad members be among those who seek shelter?[2] Can Canadian law enforcement counter the potential danger posed by international banks setting up branch offices in order to act as safe havens for overseas money? Few law enforcement officials will venture an answer to any of the

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[1] In 1989, Canadian Press disclosed portions of a confidential R.C.M.P. - U.S. Drug Enforcement Administration report, dated June 1988, which estimated that hundreds of millions of dollars of illegal drug proceeds regularly pass untouched across the Canada-United States border ("Drug money 'crosses border,'" The Province, 30 Oct. 1989 at 13).

[2] A compelling account of the criminal web which Asian Triads have spun around the world is found in Gerald L. Posner, Warlords of Crime - Chinese Secret Societies: The New Mafia (New York: Penguin, 1990). The prognosis for Canada is not good. Before 1997, Posner forecasts an exodus of criminals from Hong Kong, the heart of Triad operations, to the United States and Canada. He notes that a "Triad alert" was broadcast by law enforcement agencies in Canada and elsewhere as far back as 1986 (at 259).

foregoing, let alone answers which give comfort.

It is at this point in Canada's journey through history that the proceeds of crime amendments find their place in the Criminal Code. The product of a decade of discussion, the amendments are neither perfect nor comprehensive. However, by seeking to interrupt the trail of laundered money and confiscating the proceeds of crime, they are not only crucial to combatting crime during the 1990's but will inevitably pave the way for the transformation of criminal law into a vehicle quite unlike that to which Canadians have become accustomed.

Having examined the amendments in the preceding chapters, both from a textual and a Charter perspective, this Chapter explores the broader environment in which they must operate as well as their inability to achieve desired objectives, due to errors of both omission and inclusion. In the category of omission, the Chapter overviews the absence of the following: a tracing mechanism, mandatory financial reporting requirements, a task force approach to investigation and prosecution and revenue sharing arrangements. In the category of inclusion, it reviews those aspects of the legislation, discussed earlier, which face potential hardship in the courts and the undesirable resort to plea bargaining and other extra-judicial arrangements.

TRACING THE PROCEEDS OF CRIME

Asset tracing and money laundering investigations are encumbered today by the speed with which financial transactions take place. Computerized banking and international data transmission facilities have revolutionized the financial world. The instantaneous transmission of monies from accounts in Canada to accounts in Caribbean or European countries, for transfer to other accounts and countries, makes the task of tracing incredibly difficult.

Various systems are presently available for the international transmission of large amounts of money, the best known being The Society of Worldwide Interbank Financial Telecommunication (SWIFT).[3] Headquartered in Belgium, SWIFT provides the facility for message flow between member institutions around the world. It eliminates the need for paper-intensive telephone and telex transfers and, as a byproduct, makes the document trail much more difficult to follow.

In addition to SWIFT, which counts over 100 member organizations, numerous worldwide private banking networks exist, including American, British, Swiss, Japanese and German. The results are staggering. During 1988, $1 trillion was transferred

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[3] International money transfers are considered in the following works: Dimitris N. Chorafas, Electronic Funds Transfer (London: Butterworths, 1988) at 110-15 and Carl Felsenfeld, Legal Aspects of Electronic Funds Transfers (Stoneham, Mass.: Butterworths, 1988) at ch. 3.

electronically in Canada[4] by legitimate financial institutions. To this must be added the unknown number of transactions conducted by underground banking systems, principally of Asian origin, which also operate on a global basis.[5]

Not only must police agencies become adept at the methodology of such systems but be willing to undertake the ponderous task of sorting through the data generated in the hope of finding evidence to support a charge. The chore is not easy in the best of situations. In the absence of a tracing regime within the amendments, it becomes even harder.

Asset tracing has long been integral to the civil law of restitution. Legal rules exist in both the common law and in equity to trace and identify assets, such as currency. However, the common law refuses to trace assets which become commingled. If not in their original form, they must be clearly substituted by other items. Equity is of greater assistance. Peter Birks notes that rules of equity assist once common law rules are defeated, continuing to trace money after it becomes commingled. For example, the pari passu rule provides that a fund depreciates "in the same proportions as it was originally constituted." The rules are many and complex. Unfortunately none found their way into the

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[4] Holger Jensen, "Hiding the Drug Money," Maclean's, 23 Oct. 1989 at 46.

[5] For example, the Chinese underground banking system is a conduit of long-standing. It relies on a high degree of trust, family ties, secrecy and an absence of documentation. According to Posner: "No white man has even seen inside the system. It is impenetrable" (supra, nt. 2 at 234).

proceeds of crime amendments.[6]

In the United States, the federal Department of Justice recommends the use of equitable tracing rules in confiscation cases, thereby placing the government in a similar position to that of a claimant under, for example, a constructive trust or an equitable lien.[7] By drawing a distinction between 'civil' and 'criminal' confiscation, a fiction is also created in American law which permits the use of different procedures. The law respecting civil confiscation in the United States affords its law enforcement agencies various investigative and evidence-gathering mechanisms which do not exist in Canada. For example, American law enforcement agencies pursuing civil confiscation cases can obtain much broader pre-trial disclosure, including discoveries, depositions and documents. Civil confiscation is determined on a preponderance of evidence and an adverse finding is possible if a person claims protection under the Fifth Amendment during a confiscation hearing.[8]

In order to provide a tracing mechanism for the proposed confiscation and money laundering legislation in Canada, the Enterprise Crime Task Force recommended examining the possibility

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[6] Peter Birks, An Introduction to the Law of Restitution (Oxford: Clarendon, 1989), ch. 11.

[7] Solicitor General of Canada, The RICO Statute: An Overview (Ottawa: n.p., June 1982) at 27.

[8] See Michael Goldsmith, Asset Forfeiture - Civil Forfeiture: Tracing the Proceeds of Narcotics Trafficking (Washington: Dept. of Justice, Nov. 1988).

of imposing mandatory currency reporting requirements.[9] It was not to be. Parliament's failure to heed its recommendation or to introduce any tracing rules whatsoever is a major deficiency of the amendments, requiring early corrective action.[10]

MANDATORY FINANCIAL REPORTING REQUIREMENTS

Most 'dirty money' cannot be laundered except with the aid, witting or otherwise, of financial institutions. Tough American legislation and enforcement have resulted in criminal convictions against various banks, including the conviction this year of Luxembourg's Bank of Credit and Commerce International. The bank, placed on probation for five years, was ordered to forfeit in excess of $US 15 million and agreed to cooperate in the prosecution of others involved in a money laundering scheme, allegedly connected to Panama's Manuel Noriega.[11] The previous year, the Banco de Occidente of Panama paid a $5 million fine in Atlanta, Georgia as the result of a criminal conviction related to money

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[9] Enterprise Crime Study Report (Ottawa: Dept. of Justice, June 10, 1983) at 114.

[10] A New Democrat Member of Parliament described the failure to include reporting requirements in the proceeds of crime amendments as the equivalent of loading a gun with blanks (Victor Malarek, Merchants of Misery (Toronto: McClelland and Stewart, 1989) at 164).

[11] "Bank guilty on drug money," The Province, 5 Feb. 1990.

laundering[12] and the Ponce Federal Bank of Puerto Rico received a $3 million criminal fine for failing to file currency transaction reports.[13]

The authority for currency reporting, the nucleus of America's financial reporting system, is contained in Titles 26 and 31 of the United States Code. Title 31 requires that financial institutions, a term of liberal definition, file a Currency Transaction Report (CTR) on most currency transactions which exceed $10,000.[14] Arranging deposits in such a way as to evade the reporting threshold, such as by deposits of $9,900 in five different institutions, constitutes the offence of structuring.[15] Transporting over $10,000 into or out of the United States requires the filing of a Report of International Transportation of Currency or Monetary Instrument (CMIR)[16] and, in order to tighten the net even further, Title 26 requires that a form be completed by

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[12] "Lawyers decry presumption of guilt," Globe and Mail, 23 Aug. 1989.

[13] "San Juan bank fined $3 million for laundering," The Gazette, 15 Feb. 1989.

[14] 31 U.S.C., ss. 5313. During the early 1980's, banks were sometimes relatively lax in filing CTRs. This changed after the Bank of Boston received a $500,000 penalty.

[15] Ibid., s. 5324. A violation of either s. 5313 or s. 5324 may give rise to the confiscation of any real or personal property involved in the transaction, whether attempted or complete, or any property traceable to such property (18 U.S.C. 981(a)(1)(A)).

[16] 31 U.S.C., s. 5316. Failure to file or filing a report with material misstatements or omissions may result in the confiscation of the monetary instrument and any interest in property traceable to that instrument (s. 5317(c)).

business persons and trades people for every currency transaction involving $10,000.[17] The quantity of reports generated is staggering - seven million CTR's a year.[18]

The data obtained from CTR's and CMIR's is entered into a computerized data base operated by the Treasury Department.[19] From there, federal, state and municipal agencies can access the stored information, providing valuable investigative aids:

> By obtaining information about an individual's possession of cash, the person possibly can be linked to large and unexplained accumulations of wealth. That in turn can lead to development of both direct and circumstantial evidence of income that cannot be explained by legitimate sources of funds. The inference often follows, that if the money was not obtained through legitimate means, it probably originated from illegal activity.[20]

Not only have the mandatory reporting requirements precipitated many significant investigations,[21] they have also had a sobering effect on America's financial institutions. Criminal

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[17] 26 U.S.C., s. 6050I.

[18] Mario Possamai, "The stubborn stain of laundered money," Times-Colonist, 22 Oct. 1989 at A8.

[19] The Internal Revenue Service (IRS) inputs the data in Detroit. The IRS data base is tied to the Financial Crimes Enforcement Network (FINCEN), which employs approximately 200 persons, including representatives from numerous investigative agencies. Operating on a 24-hour a day basis, it links together numerous law enforcement data bases relevant to financial investigations.

[20] William Lenck, Asset Forfeiture - Tracking Drug Proceeds: Bank Secrecy Act Reports (Washington: Bureau of Justice Assistance, Sept. 1989) at 13.

[21] Supra, nt. 10 at 166. Among the successful investigations directly attributable to the reporting requirements was Operation Polar Cap in 1989, involving over $1 billion of money laundered by a Columbian cocaine cartel.

convictions of such institutions shake public confidence and serve as an invitation to closer regulatory scrutiny. Whitney Adams, a criminal lawyer specializing in the defence of major financial institutions writes:

> Most financial institutions today are highly motivated to ensure compliance and cooperate with law enforcement due to the fear of adverse policy alone. The other severe potential collateral consequences and broad scope of corporate criminal liability have motivated most financial institutions today to adopt reasonably stringent compliance programs which include strict policies, internal controls, and procedures for making criminal referrals.[22]

Australia recently enacted financial reporting legislation which strongly resembles the American. The Cash Transactions Reports Act 1988 requires mandatory reporting by a broad panoply of organizations, including banks, of currency transactions involving $10,000 or more. It also imposes strict record keeping standards for financial institutions, a failure to comply giving rise to the blocking of an account and possible confiscation. The legislation also requires that the institutions advise the authorities of any information which they may obtain concerning suspicious transactions, in effect deputizing the institutions.[23] However, to avoid unduly interfering with the flow of legitimate money, the Act excludes numerous routine financial transactions from its reporting requirement.

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[22] Whitney Adams, "Practical Problems in Money Laundering Prosecutions Involving Financial Institutions: A Defense Attorney's Perspective," National Institute on Economic Crime Money Laundering Enforcement Conference, 17 May 1990 at 9.

[23] See Alan L. Tyree, Banking Law in Australia (Sydney: Butterworths, 1990) at 9-13.

Canadian banks and other financial institutions, a number of which maintain branch offices in tax haven countries, have often been unwitting conduits for laundered money. During the mid-1980's, one Vancouver bank reportedly accepted several cardboard boxes, bulging with $US 800,000.[24] Similarly, Toronto currency exchanges served as the medium of choice for the majority of $100 million in drug profits laundered by one gang.[25] During the late 1970's and early 1980's, the Bank of Nova Scotia's Bahamian branch serviced $11 million used by the Medellin cocaine cartel of Columbia to create an island base of operations.[26] These are but the tip of the iceberg.

It is estimated that between $10 and $13 million in proceeds from Canada's own illegal drug consumption pass through Canadian financial institutions each year.[27] In the words of a former senior R.C.M.P. official, "Simple arithmetic tells you it's getting into the banking system."[28]

During September 1989, a year old, joint R.C.M.P. - United States Drug Enforcement Administration report leaked to the public. It noted that hundreds of millions of dollars in drug proceeds flowed yearly into Canadian banks to avoid American financial reporting

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[24] Mario Possamai, "How much drug money is laundered in Canada?" Times-Colonist, 22 Oct. 1989.

[25] Ibid.

[26] Ibid.

[27] Ibid.

[28] A/Comm'r. Rod Stamler (ret'd.), quoted by Jensen, supra, nt. 4 at 43.

requirements and predicted an increase in money laundering with the advent of free trade between both countries.[29] Victor Malarek observes that Canada has acquired a reputation within "criminal circles throughout North America as an important first link in international money laundering."[30]

To date, Canadian banks, trust companies and other financial intermediaries have successfully resisted all attempts to impose reporting requirements on monies which pass through their corporate hands. Generally they point to the positive effect of the proceeds of crime amendments and their own intensified security procedures as a rationale for maintaining the status quo. For example, Ken Johnston, head of corporate security for the Royal Bank and chairman of the Canadian Bankers' Association committee on money laundering recently suggested that the "holes have been plugged."[31] The amendments have obviously had a sobering effect on persons intent on laundering money in this country. Whether their impact will be anything more than transitory remains to be seen.

During May 1990, the president of the Toronto Dominion Bank, Robin Korthals, among others, attempted to convince an American Congressional committee that Canadian banks were already tough and

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[29] John Valorzi and Scott White, "Money-laundering law helps in grabbing drug profits," Times-Colonist, 29 Sept. 1989 at A11.

[30] Supra., nt. 10 at 163.

[31] Ibid.

becoming even tougher on money launderers.[32] Setting his own employees up as a scapegoat, he expressed the concern, however, that the lure of large sums of money could corrupt bank employees, thereby nullifying the voluntary efforts of the banks. Warren Moysey, president of the Canadian Imperial Bank of Commerce and chairman of the powerful Canadian Bankers' Association,[33] opined that Canada was "doing all it can to stop the flow of drug money." In support of his opinion, he pointed to both the amendments and training programs for tellers and other staff.[34] Senator John Kerry of Massachusetts was of a different mind. He remarked: "Canada is a friendly country whose bankers are thumbing their noses at our banking laws."[35]

American concerns with Canada's banking industry are not without foundation in recent history. During March 1990, Canadian Press reported that Baby Doc Duvalier, former dictator of Haiti,

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[32] "Banker: Drug cash can foil bids to expose dirty money," Times-Colonist, 17 May 1990 at B11.

[33] The banking lobby is credited with preventing the passage of bank reporting or regulation legislation. Victor Malarek writes:

> Canadian banking executives have fought pitched battles in the boardrooms of Ottawa to keep the federal government from imposing measures that would require banks or other financial institutions to disclose information that could help police detect money laundering by international narcotics traffickers.

Malarek views the absence of reporting requirements in Bill C-61 as a win for the banking lobby (supra, nt. 10 at 164).

[34] Ibid.

[35] As quoted by Jensen, supra, nt. 4 at 43.

laundered $41.8 million of illicit monies through unknowing Canadian banks between 1986 and 1987.[36] An hour after the Canadian Press report was aired, Canada's Minister of State for Finance, Gilles Loiselle, advised that the government would introduce legislation aimed at requiring financial institutions and other businesses to maintain records of interest to financial investigators. Loiselle and his Advisory Committee on Money Laundering, composed overwhelmingly of representatives from the financial world, rejected the transaction reporting systems of the United States and Australia in favour of one that advocates better record keeping.[37]

The Canadian approach is - typically Canadian. It is not proactive, as in the United States and Australia, where the regulations are designed to assist law enforcement agencies in their search for money laundering operations. The proposed Canadian approach is reactive, it will improve the 'audit trail,' or ability of investigators to follow a money laundering scam post facto.[38] In Canada, investigators will be forced to rely on traditional investigative methods and sources to isolate suspicious

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[36] "Money laundering law must not be delayed," Times-Colonist, 25 Mar. 1990 at A4.

[37] Ibid.

[38] This approach apparently has the support of the Commissioner of the R.C.M.P., Norman Inkster: "I think the major banks are willing to co-operate and if that occurs, the requirement for reporting is not essential" (as quoted in Stuart McCarthy, "Crime Profits Keep Piling Up," The Ottawa Sunday Sun, 12 Feb. 1989).

transactions.[39]

THE STRIKE FORCE

Prosecutors and the police in the United States faced similar problems two decades ago. The lack of legislative tools combined with a vast, sometimes incomprehensible array of law enforcement and investigative agencies at the federal, state and municipal levels, forced them to cooperate. They resorted to joint operations aimed at combining the resources of various investigative and prosecutorial agencies in pursuit of a common target. Though not always successful,[40] joint operations, often dubbed strike forces or task forces, have been refined over the years and now oftentimes resemble independent law enforcement authorities.

America's first federal strike force commenced work in Buffalo in 1966, followed by 17 others in the next five years.[41] Permanent federal and state task forces now exist in many parts of the nation, dedicated to countering particular criminal activity or organizations. A study of the strike forces completed by Canada's

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[39] For example, public records, garbage searches, tax information, wiretaps, surveillance and informants.

[40] The American experience was dampened in 1977 by a General Accounting Office study which described the strike forces as failures, emphasizing a lack of clear objectives, control and evaluation (supra, nt. 7 at 50-55 and Addendum).

[41] Ibid. at 50.

Ministry of the Solicitor General divided their work into four stages: identification of targets, intelligence sharing on identified targets, close cooperation between supervisory level agents from various organizations and the introduction of specialized attorneys to prepare for grand jury hearings.[42]

The very nature of complex, financial investigations calls for a task force approach. Not only is it a complex area of law, but it overlaps with the law governing frauds, conspiracies and wiretaps. In addition, the investigations themselves are prone to becoming mired in a sea of paper. The length of time required to bring a matter to court often affords witnesses and offenders an opportunity to leave the jurisdiction and can destroy the initiative and interest of investigators and prosecutors. Also, the targets of complex financial investigations are often very powerful in terms of financial and political strength and sufficiently insulated to resist all but the most aggressive investigative approaches.[43]

The concept of a task force approach to criminal investigation is worthy of serious consideration in Canada. With both a federal system of government and a fractured criminal justice system, not unlike the United States,[44] cooperation in order to achieve a

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[42] Ibid. at 51.

[43] Ibid. at 45.

[44] Both countries have three principal levels of government, each level possessing police forces or investigative agencies. The proportionately greater number of police departments in the United States is attributable to Canada's long history of contracting by provincial and municipal

common goal is desirable. For the proceeds of crime amendments, it may be a necessity. Police officers are primarily investigators. They require close support, in the form of legal advice from Crown counsel, as well as technical expertise from accountants, bankers and business persons when dealing with complex commercial investigations. If the investigations involve drugs or the proceeds of drug trafficking, then federal, provincial and municipal governments each have a stake in the outcome. By combining the investigative talent of police officers and specialists from each level, a task force becomes an attractive vehicle. Obviously inter-force rivalries will occur.[45] As well, different operating methods and administrative procedures will pose start-up problems. Nevertheless, the value of a coordinated approach surely outweighs such irritants.

A side benefit of a unified approach is the educational value to investigators and prosecutors who may be new to financial investigations. As noted in Chapter Three, the fear of the unknown has caused many investigators and lawyers to shy away from proceeds

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governments for R.C.M.P. services.

In the United States, constitutional responsibility for criminal law rests with the states whereas in Canada, criminal law is enacted by Parliament, however administered by the provinces and municipalities. Drug laws and certain other federal statutes present an anomaly in Canada. Though criminal in nature and effect, violations are investigated by police forces at all levels, yet prosecuted federally.

[45] These cannot be underestimated. Malarek refers to "fierce" inter-agency rivalries, noting that "RCMP investigators are widely reputed to be extremely territorial, often refusing to cooperate in investigations mounted by municipal police forces" (supra, nt. 10 at 6).

of crime cases. The same phenomenon occurred with the RICO statutes in the United States. There the absence of inservice training programs and inadequate policy guidelines dampened interest. In an attempt to counter the problem, at least one strike force leader, a senior federal attorney, travelled the United States for almost two years, educating prosecutors.[46]

Integral to an asset forfeiture strike force or team approach is a support unit which can manage seized assets. Although it is possible that many assets will remain with their custodians, such as banks, or even under the care and management of an accused, such as a residence, many others will require regular and costly management services. Various options are available, including resort to receivers and asset management professionals.

Unfortunately the amendments place the choice of options squarely in the lap of the presiding judge, who will oftentimes pass it on to the agency of last resort, the police. The legislation provides virtually no guidance. The ad hoc arrangements which exist today must be replaced by asset management based upon sound fiscal principles and in the care of professionals, thereby freeing the judiciary and law enforcement from an onerous and unwanted task.

In the United States, the Marshals Service manages the great bulk of assets seized by federal agents and arranges for their sale

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[46] Supra, nt. 7 at 44.

through brokers and auctioneers.[47] Among the 200 employees engaged in such activity, the Service employs persons with a wide background of expertise, including ranchers, pilots and realtors.[48] In an attempt to avoid liability for improper seizures and unnecessary management responsibilities, the marshals conduct a background search on targeted assets, identifying those which are heavily encumbered.[49] Municipalities employ similar management teams. In Detroit, approximately 30 persons review reports, target assets and manage them after seizure.[50]

ASSET SHARING

The avid pursuit of assets and money laundering operations which characterized the American war on drugs during the 1980's depended heavily on the strike force vehicle. However, in addition, inter-agency cooperation extended to other areas. Since the establishment of a federal asset seizure fund in 1984, law enforcement agencies have been entitled to receive, either in specie or otherwise, various of the assets confiscated from suspect offenders. Numerous federal laws authorize the transfer of

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[47] G. Patrick Gallagher, Asset Forfeiture - The Management and Disposition of Seized Assets (Washington: Bureau of Justice Assistance, Nov. 1988) at 2 and 6.

[48] Ibid. at 7.

[49] Ibid. at 8.

[50] Ibid.

confiscated property to state or municipal law enforcement agencies "which participated directly in any of the acts which led to the seizure or forfeiture of the property."[51] Such equitable sharing is intended to reflect the relative contributions of the agencies involved in a joint operation.[52] Adoptive sharing arrangements also exist in which state or local agencies seize property which can be confiscated under federal law. They then ask the federal Department of Justice to adopt their seizure and share in the eventual confiscation.

The incentive for law enforcement agencies to pursue financial investigations is obvious. When agencies combine their efforts, such as in a strike force, they all share the wealth. By 'paying their way,' the police need not concern themselves unduly with the impecunious nature of their political masters. Budgets become secondary.

However, the potential for abuse exists. Tom Naylor has argued that allowing police forces to retain seized monies reduces the police to the status of bounty-hunters.[53] Furthermore, a tendency develops among police forces to target only those cases which will yield assets, tending to forego others which might

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[51] See, for example, Title 18, s. 981(e) and Title 21, s. 881(e)(3) of the U.S. Code.

[52] See generally Michael F. Zeldin, Harry S. Harbin and Stefan D. Cassella, Money Laundering Forfeitures, rev. ed. (Washington: Dept. of Justice, 11 May 1990).

[53] Bruce Livesey, "A dangerous drug-war weapon - Power to seize suspects' assets may threaten civil liberties," The Globe and Mail, 19 Feb. 1990 at A7.

produce government revenue, in the form of fines. One prominent Toronto defence lawyer, Clayton Ruby, suggests that Canadian police forces may purposely be delaying their enforcement of the proceeds of crime amendments in the hope of obtaining a similar sharing agreement.[54]

As yet, Canadian governments have not agreed where seized assets will go or who will assume liability if the Crown is required to indemnify persons as a result of the Attorney General's mandatory undertakings. Paul St. Denis of the federal Department of Justice suggests that confiscated assets will be placed in a central fund and later dispersed among various federal and provincial budgets.[55] The Canadian Chiefs of Police, caucused at their General Assembly in 1989, passed a resolution calling for the reimbursement to police forces "from the forfeited proceeds of crime" of "funds expended on police resources and other costs."[56] In response, the Minister of Justice agreed to review the matter.[57]

The sharing philosophy is akin to an infusion of private enterprise into law enforcement. It has merit, although the excesses of the American experience should serve as a warning to Canadian legislators that strict accountability and oversight are

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[54] Ibid.

[55] Supra, nt. 38.

[56] "84th Annual General Meeting" - September 14, 1989 - Resolutions," (Oct. 1989) 8 Cdn. Police Chief Newsletter 8.

[57] "Canadian Association of Chiefs of Police Major City Mayors' Caucus Symposium on Illicit Drugs Communique - October 26, 1989," (Nov. 1989) 8 Cdn. Police Chief Newsletter 2 at 3.

integral to the success of such a program. The goals of law enforcement cannot take second place to a 'quick buck.' On the other hand, what better way to offset mounting law enforcement expenses, particularly as they relate to sophisticated financial crimes.

THE AMENDMENTS - CAN THEY WEATHER THE STORM?

Operational strategies mean very little unless they are premised on strong and effective legislation. Chapter Two highlighted certain textual and interpretive problems with the proceeds of crime legislation, whereas Chapter Three considered various Charter challenges. The amendments are sure to be the subject of considerable argument and numerous appellate decisions. They touch upon many topical areas in criminal law, not the least of which being the Charter. It is obviously too early to predict with any degree of certainty what the outcome of these challenges will be, save to predict a turbulent puberty.

The definitions of 'proceeds of crime' and 'laundering proceeds of crime' are sure to provoke much disagreement. The search and restraint provisions will be the subject of numerous pre-trial motions which will tend to delay confiscation cases. Most of the motions will deal with the release of seized or restrained items under the various restorative provisions.

The differentiation between in personam and in rem

confiscation poses unique problems, but not as many as the introduction of two different burdens of proof in the case of the former. The balance of probabilities test is one of the weakest links in the legislation, closely followed by the inference which applies to persons who die or abscond.

Additional dilemmas are faced by the nature of mandatory financial undertakings, the definition for 'Attorney General,' the mandatory imprisonment in default provisions and the net worth inference. Nevertheless, the amendments have much to commend them. In my opinion, the legislation will survive the challenges ahead, though not intact. Unfortunately, those aspects which are most vulnerable are also those of greatest importance, for example, the laundering offence and confiscation on a balance of probabilities. Only time will tell whether the legislation will survive. The alternative is not attractive.

PLEA BARGAINING AND EXTRA-JUDICIAL ARRANGEMENTS

When a legislative scheme is flawed, the Crown is forced to make the best of a bad situation. Plea bargaining is an easy, though undesirable, alternative. In the past, prosecutors could make arrangements with accused persons which contemplated agreeing to reduced sentences and the withdrawal of counts on multiple count informations and indictments, in exchange for guilty pleas. Sometimes they made less obvious concessions; for example, failing

to apprise a court of all the circumstances of an offence or certain aspects of an accused person's criminal past. With the proceeds of crime amendments, the Crown acquires an extremely powerful weapon to wield over accused persons. No longer is it only a person's continued liberty which is at stake. Now, the threat of financial ruin through the confiscation of assets is added to the stakes. How easy it will be, for example, to offer an accused the choice between a lengthy prison term or a lesser term combined with the confiscation of a seized sports car or speedboat. Or, in exchange for a plea of guilty, the Crown might evidence its willingness to forego a confiscation hearing, thereby allowing an offender to retain ownership of suspect assets.

The most dramatic example to date of an extra-judicial accommodation involving the amendments resulted from an investigation spearheaded by American authorities into the activities of the Banco de Occidente of Panama. Approximately $100 million of its assets were frozen in various countries, $13.5 million of which were on deposit to its account in the Toronto branch of a Swiss bank. During early July 1989, the Supreme Court of Ontario ordered the release of the Toronto funds and their repatriation to the Bank's frozen New York account. In a statement of facts presented to the Court, the accused Bank, Canada and the United States agreed that the proper forum for resolution of the matter, including the issue of confiscation, was the United

States.[58] Canada's rationale for agreeing to the release became clear the following month when the Bank pleaded guilty in the United States and received a $5 million fine. For Canada's help in seizing the assets, it received a proportionate share, $1.2 million.[59] Neither the Bank nor its officers faced Canadian courts. The Criminal Code merely served as a vehicle by which the deposits could be frozen. Furthermore, Canada received only a fraction of the monies restrained in this country, all (or none) of which could presumably have been confiscated.[60]

AVOIDING THE 'BIG FISH'

Unless and until law enforcement obtains strong support from its political masters to pursue the 'kingpins' of organized crime, it is reasonable to assume that police and the Crown will be apprehensive of the downside risks associated with prosecuting the amendments. The inevitable alternative is for law enforcement agencies to concentrate on lesser targets, more easily attainable

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[58] "Judge orders RCMP to give up $16 million seized in drug probe," The Sunday Star, 2 July 1989.

[59] Supra, nt. 12.

[60] This arrangement highlights the value to the United States of its equitable sharing program. The program is not restricted to domestic law enforcement agencies and, as a result, foreign agencies are often more willing to cooperate with American authorities than to initiate their own domestic cases, knowing that money will flow to them as a result of America's confiscation legislation.

statistics and smaller asset seizures. If the legislation captures only minor criminals, petty thieves, prostitutes and the like, its objectives are largely defeated.

A parallel can be drawn to the failure of Canada's habitual criminal legislation. Although in force for many years, those captured in its net were generally a fringe of the dangerous criminal element, largely poor, uneducated, social misfits, relegated by themselves and by society to a life of petty crime.

Richard Peck, a bencher of the Law Society of British Columbia, recently expressed his hope that the Crown will act "responsibly and sparingly" in its use of the new legislation. Concerned with the search of lawyers' offices, he added that "the mere act of searching a lawyer's office is going to cause great anguish."[61]

Few would disagree that the legislation must be used responsibly. During its formative stages, this may also require acting sparingly.[62] Thereafter, it will be incumbent on law enforcement officials to use it responsibly and regularly in order to obtain definitive judicial rulings and, hopefully, achieve its high objectives. To do otherwise will be to relegate it to obscurity.

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[61] Larry Still, "Drug profits target of new law," The Vancouver Sun, 9 Nov. 1989 at A13.

[62] Commissioner Inkster of the R.C.M.P. supports this philosophy. Interviewed shortly after proclamation of the amendments, he stated: "We want to go carefully so that we get good cases and good seizures" (as quoted by Stuart McCarthy, supra, nt. 38).

Regular use does not mean using it on petty criminals, the easy targets. Resources must be concentrated on those who make a difference in the criminal underworld. If this means upsetting the collective psyche of certain professional groups, be they lawyers, accountants or businesspersons, then so be it.

SUMMARY

Money has been described as "the life-support system" of organized crime.[63] It is more than that. It not only fuels the process but is its raison d'etre. In the illegal drug world, cash is the medium of exchange. But cash is cumbersome and, in large quantities, weighs a tremendous amount.[64] Preventing criminal organizations from ploughing their profits into legitimate investments is crucial to stemming the tide of drug trafficking and other organized crime.

Canada provides an ideal environment for the laundering of money. It displays stability in both its political and financial spheres. Vancouver, Toronto and Montreal are major world cities, boasting large ethnic communities and international banking

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[63] James D. Harmon, executive director of the President's Commission on Organized Crime, as quoted in Sarah Bartlett and others, "Money Laundering - Who's Involved, How it Works, and Where It's Spreading," Business Week, 18 Mar. 1985 at 75.

[64] A suitcase containing $1 million in $20. bills weighs 50 kilograms. The large drug cartels reportedly weigh rather than count their money (supra, nt. 10 at 162).

facilities. Geographically, Canada is a gateway to the United States with easy air and water access to Asia and Europe. Its criminal sanctions are mild by the measure of many other countries. There is almost complete freedom of movement within the nation for both persons and assets. In addition, it has a resident market for drugs and consequently, persons willing to take the chance of transporting drugs or dirty money.

As noted in Chapter Three, the insignificant amount of litigation which has resulted from the amendments since their proclamation almost two years ago is likely the result of various internal and external considerations. However, despite the problems posed by the amendments, they are a first step. Although some may not survive the tests to be faced in the courts, they are based upon sound principle: taking the profit out of crime. To even approach this noble objective, however, will require more than the amendments, in isolation, can deliver. Also required are a tracing mechanism with mandatory financial reporting, a team approach to investigations involving a sharing of proceeds and, most of all, political will.

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