Criminal Code changes affecting money laundering in Canada What your company needs to know

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On June 21, 2019, a Criminal Code of Canada amendment came into force that will dramatically change how money laundering can be investigated and enforced. The amendment was made to section 462.31 of the Criminal Code regarding the offence of laundering proceeds of crime (money laundering). Subsection 462.31(1) has been amended to read:

> 462.31(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, knowing or believing that, **or being reckless as to whether**, all or a part of that property or of those proceeds was obtained or derived directly or indirectly as a result of…[emphasis added]

By adding the language, “or being reckless as to whether”, the amendment of the section adds an alternative mental element of “recklessness” to the offence of money laundering. This wording allows a criminal offence to be established by the authorities where it can be demonstrated that actions were **reckless** as to whether property had been obtained or derived because of a “designated offence” (which term captures most indictable offences, including corruption offences). In essence, a money laundering offence may now be committed in cases where an individual is aware **of a risk** that the property may be proceeds of crime, but, in the face of that risk, continues to carry out the prohibited activity.

The legislative intent behind this amendment may have been to capture the career-type money launderer, but the effect is that it creates potential exposure on any transaction whose origins raise concerns and have a potentially problematic appearance. To ignore these concerns, and not make further enquiries and determinations into red flags surrounding a commercial transaction, opens the door to possible criminal risks that in the past were unlikely to be of concern.

Recklessness is not a new concept in criminal law. The Supreme Court of Canada has noted on several occasions that in accordance with well-established principles for the determination of criminal liability, recklessness, to form a part of the criminal *mens rea*, must have an element of the subjective. Recklessness will be found where a party, aware that there is danger that their conduct could bring about the prohibited result, nevertheless persists, despite the risk. Essentially, it is satisfied by one who sees the risk and takes the chance. It is in this sense that the term "recklessness" is used under criminal law, and is clearly distinct from the concept of civil negligence.

Recklessness is also distinct from wilful blindness, the latter being capable of acting as a substitute for knowledge. While recklessness involves knowledge of danger or risk, and persistence in a course of conduct that creates a risk that the prohibited result will occur, wilful blindness arises where a person who has become aware of the need for some inquiry, consciously declines to make the inquiry because they do not wish to know the truth. The culpability in recklessness is justified by consciousness of the risk and proceeding in the face of it, while in wilful blindness it must be shown the individual was at fault in deliberately failing to inquire when they knew there was reason for inquiry.

The true practical concern that the change in legislation causes is that any conversion of a property that is determined to occur “recklessly” elevates the transaction to risking the likelihood that money laundering charges can result. It is worth bearing in mind that the *mens rea* of money laundering only requires an intention to convert one form of property into another, for example, converting one currency into another, not an intention to disguise or conceal its origin. As the Supreme Court of Canada has determined, "convert" deserves its "ordinary, literal meaning." The words "conceal" and "convert" are not synonymous. Conceal means to hide, but convert has a broader meaning; it means to change or transform. By using the broader word "convert", the legislation recognizes that money laundering can be effected by simple currency exchanges, such as converting Canadian dollars to foreign dollars. In other words, although the purpose of money laundering is to disguise the source of the funds, this disguising is often accomplished by a mere currency exchange. To prohibit money laundering by simple currency exchanges, the legislation used the word "convert".

In short, a seemingly simple amendment to the Criminal Code money laundering offence has the potential for wide-ranging criminal consequences on day-to-day transactions if an appropriate risk assessment does not occur. For companies engaging in business with a Canadian connection, the message is clear: Transactions must be scrutinized and vigorously considered, or money laundering charges are a potential outcome. The change is particularly significant for companies that are alerted to **potential** acts of fraud or corruption by an employee or intermediary acting on their behalf, but have not (yet) reached a definitive conclusion as to whether the fraud or corruption has occurred. Under the newly-amended money laundering offence, the mere awareness of the **risk** that some property (including contract revenues) may be tainted by underlying criminal conduct, now creates immediate and ongoing exposure for the company to money laundering charges. Companies should not lose sight of potential money laundering issues during the period in which they are still investigating potential fraud or corruption by employees or agents.

For more information about this amendment to the Criminal Code, please contact Anthony Cole or Murray Rodych.

Your Key Contacts

Anthony J. Cole
Partner, Calgary
D +1 403 268 3036
anthony.cole@dentons.com

Murray A. Rodych
Counsel, Calgary
D +1 403 268 7152
M +1 403 560 3461
murray.rodych@dentons.com