

Stool Pigeon Profession

By Albert S. Frank, LL.B.

Accountants, stockbrokers, real estate agents, lawyers, and various other persons and entities have recently been drafted to serve as unpaid informants against their own clients, contrary to the normal concepts of fiduciary duty and professional ethics. This is the result of the recently enacted *Proceeds of Crime (Money Laundering) Act*, the "Act," which is to be implemented as early as October of 2001.

The *Act* has various reporting requirements, the most troubling of which is to report on the client when there is a "suspicious transaction."

Suspicious Transactions

"Guideline 2: Suspicious Transaction Reporting," published by the government agency FINTRAC, has almost 15 pages of indicators that a transaction might be suspicious. Here are some examples.

One indicator is that the client has "unusual knowledge of the law in relation to suspicious transaction reporting in keeping with the transaction being conducted." So knowing the law can cause suspicion, and lead to the client being reported to FINTRAC. And here I thought that knowing as much as possible about our laws was part of good democratic citizenship.

At least if the client shows no knowledge, the above indicator does not apply. But another indicator is that the client "seems to be wilfully blind to being involved in money laundering activities." This is strange – surely the client would know whether or not he or she is involved in money laundering and the question of willful blindness could not apply.

But maybe showing little or no knowledge of the law of money laundering could be seen as wilful blindness. So showing too much knowledge can be suspicious and showing too little can also be suspicious.

Another indicator is that the client "frequently conducts large cash transactions, which is unusual for the client." If the client does something "frequently," how can it be "unusual for the client"?

A client who wants to keep a large amount of capital in cash might be concerned that deposit insurance only goes up to \$60,000. So it could be prudent to go to various institutions in the area and open one account of under \$60,000 in each. But one of the indicators is that client "appears to have accounts with several financial institutions in one area."

So maybe it is better to keep all the cash in an account at a securities firm, where the deposit insurance is higher. But wait – one of the indicators is that the client "uses securities or futures brokerage firm as a place to hold funds that are not being used in trading of securities or futures for an extended period of time."

One indicator specifically for lawyers is that the client "requests anonymity." Until now

the law always said that clients were **entitled** to anonymity.

Another is that the client "offers to pay unusually large fees to get assistance on a transaction involving large sums." It is only reasonable to pay an unusually large fee if large sums are involved and a more moderate fee if smaller sums are involved.

Bureaucratic Burden

The Act imposes a heavy bureaucratic burden on those covered by it. It is not just that they must send elaborate reports about their clients. They must also implement a "compliance regime."

This includes appointing a compliance officer to implement the regime, with the authority and resources necessary to be effective. The person or entity, as part of the compliance regime, also develops and applies compliance policies and procedures and reviews those policies and procedures as often as necessary to test their effectiveness.

The time and effort and expense imposed by this bureaucratic burden shall inevitably raise the expense to the clients, cut into profit margins, or both.

Penalties

The Act is rich with penalties.

Failure to implement a compliance regime can lead to up to five years of imprisonment and/or a fine of \$500,000. Failure to retain records can lead to up to five years of imprisonment and/or a fine of \$500,000. Failure to report a large cash transaction can lead to a fine of \$500,000 for a first offence

and \$1,000,000 for each subsequent offence. Failure to report a suspicious transaction can lead to up to five years of imprisonment and/or a fine of \$2,000,000.

A kind of penalty in the opposite direction is that the client could sue the person or entity that reported. Here the *Act* offers a glimmer of good news. According to section 10 no criminal or civil proceedings may be brought against a person or entity for making a report in good faith under the "suspicious transactions" section of the *Act*.

But this is not a complete protection; it depends on "good faith." Suppose the client sues. The person or entity that made the report defends based on section 10. The client says "prove you acted in good faith — I don't believe it." If no settlement were reached, this issue would likely have to go to a trial.

If the client wins at trial, would the defendant's insurer cover what the defendant must pay? Maybe not. On the other hand, where a person or entity fails to report, and is convicted under the *Act*, would the insurer pay the fine, which could be up to \$2,000,000? Probably not.

Let's hope the Courts strike down the *Act* as unconstitutional.

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POSTSCRIPT – The above article appeared in the August, 2001 issue of *The Bottom Line*, before the vicious attacks of September 11, 2001. Since then I have heard it suggested that the struggle against terrorism justifies the *Act*. Before I could support the *Act*, however, there would have to be good reason to believe that it would

really help the struggle against terrorism, which seems unlikely. Even then, something would have to be done about the nonsensical guidelines.

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