

# **Commission of Inquiry into Money Laundering in British Columbia**

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**WRITTEN SUBMISSIONS OF THE BRITISH COLUMBIA CIVIL  
LIBERTIES ASSOCIATION WITH RESPECT TO OPINION OF THE  
HONOURABLE THOMAS A. CROMWELL C.C. DATED  
FEBRUARY 9, 2021**

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## OVERVIEW

1. In Part 2 of its closing submissions dated July 8, 2021, the BC Civil Liberties Association (the “BCCLA”) addressed civil forfeiture proposals made to the Commission, including unexplained wealth orders (“UWOs”). The BCCLA submitted that the effectiveness of such approaches to combatting money laundering has not been adequately assessed and that the use of such draconian approaches could not therefore be justified. Approaches that limit individual rights and liberties, and may disproportionately impact marginalized populations, should simply not be pursued when their effectiveness is unknown. This is so regardless of whether the proposed approach could withstand *Charter* scrutiny. That said, the BCCLA articulated several serious ways in which civil forfeiture regimes and UWOs may infringe *Charter* rights, including the right to privacy, the presumption of innocence, and the protection from self-incrimination. The existence of such significant concerns dictates an even more cautious approach to using civil forfeiture approaches to curb money laundering when there is no credible evidence as to their effectiveness.

2. Subsequently, the Commission advised that the Honourable Thomas A. Cromwell C.C. had provided an opinion in February 2021 with respect to whether three potential changes to British Columbia’s civil forfeiture scheme would be within provincial legislative competence and compliant with the *Charter* (the “Cromwell Opinion”). These changes are as follows:

- a. providing the Director of Civil Forfeiture with authority to apply for, and the courts with the authority to issue, “unexplained wealth orders”;
- b. enabling the Director of Civil Forfeiture to share information obtained in the exercise of his or her information gathering powers with criminal law enforcement agencies, tax authorities, and regulators; and

- c. embedding a provincial civil forfeiture office (“CFO”) within a provincial law enforcement agency or giving a provincial law enforcement agency a mandate to pursue civil asset forfeiture.<sup>1</sup>
3. The Cromwell Opinion concludes that:
  - a. provisions modeled on the UK UWO scheme would not cause unjustified infringements of *Charter* rights, but would give rise to many *Charter* issues;<sup>2</sup>
  - b. information sharing by the CFO with law enforcement may violate the *Charter* in some circumstances;<sup>3</sup> and
  - c. combining civil forfeiture and law enforcement personnel would raise constitutional concerns.<sup>4</sup>
4. The Commission advised the parties that the Cromwell Opinion may inform the Commissioner’s analysis and recommendations in this matter and requested that the parties provide any comment with respect to the Cromwell Opinion by way of a maximum 10-page submission.
5. Below, the BCCLA provides its submissions on the Cromwell Opinion and the three changes to civil forfeiture laws it considers.

#### **A. Change 1: Unexplained Wealth Orders**

6. The Cromwell Opinion concludes that UWO provisions could be added to the *Civil Forfeiture Act*<sup>5</sup> (“CFA”) without violating the division of powers.<sup>6</sup> It also concludes that “provisions modeled on the UK UWO scheme would not constitute unjustified

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<sup>1</sup> Cromwell Opinion, ¶2

<sup>2</sup> Cromwell Opinion, ¶6

<sup>3</sup> Cromwell Opinion, ¶7

<sup>4</sup> Cromwell Opinion, ¶¶7-8

<sup>5</sup> *Civil Forfeiture Act*, SBC 2005, c. 29

<sup>6</sup> Cromwell Opinion, ¶4

infringements of any right guaranteed by the *Charter*.<sup>7</sup> In the course of assessing the constitutionality of UWOs, the Cromwell Opinion determines that the existing *CFA* provisions are (with one exception) validly enacted provincial legislation.<sup>8</sup>

7. The BCCLA submits that the use the Commission can make of this opinion regarding UWOs is quite limited. The Commission cannot decide the constitutionality of existing or proposed civil forfeiture legislation. It would also be inappropriate for the Commission to comment on the *vires* of the *CFA* as currently drafted as well as on the constitutionality of potential UWO provisions. As such, the Commission may only use the Cromwell Opinion on UWOs (in combination with the opinions with respect to constitutionality expressed by the other parties, including the BCCLA) to make findings of fact with respect to the state of the law on UWOs; namely, that UWOs are extremely contentious. Further, even if it were possible to adopt *Charter*-compliant UWO legislation, the BCCLA maintains that the Commission should not recommend the adoption of UWOs due to their draconian nature and the lack of evidence of their effectiveness.

**i. The Commission Cannot Decide the Constitutionality of Existing or Proposed Civil Forfeiture Legislation**

8. The Commission is not a superior court of inherent jurisdiction and has no authority to grant formal declarations of unconstitutionality pursuant to s. 52(1) of the *Constitution Act, 1982*.<sup>9</sup>

9. Further, the Commission cannot make constitutional determinations regarding the *CFA* or proposed UWO provisions. These constitutional questions are not properly before the Commission<sup>10</sup> and fall outside the scope of its mandate. The Commission's mandate is to make findings of fact and recommendations that are relevant to the Commission's

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<sup>7</sup> Cromwell Opinion, ¶6

<sup>8</sup> Cromwell Opinion, ¶4

<sup>9</sup> See *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, 2003 SCC 54, ¶31; *Windsor (City) v. Canadian Transit Co.*, 2016 SCC 54, ¶70; *R. v. Lloyd*, 2016 SCC 13, ¶15; *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570, at p. 592

<sup>10</sup> See *Lloyd*, ¶15

terms of reference.<sup>11</sup> The Commission's role does not include deciding the constitutionality of civil forfeiture legislation.

**ii. Inappropriate to Comment on *Vires* of the CFA and Constitutionality of UWO Provisions**

10. Given the record in this matter, it would equally be inappropriate for the Commission to make general comments regarding the *vires* of the CFA as well as anticipatory comments about the constitutionality of potential UWO provisions.

11. With respect to the CFA, the Cromwell Opinion confirms that the *vires* of this law is currently being litigated before the BC Court of Appeal.<sup>12</sup> This is the proper forum for this issue to be determined, based on a full evidentiary record and fulsome legal arguments. None of the parties to this Commission have addressed the *vires* of the CFA in their closing submissions and no evidence on this issue was led before the Commission. Assessing the *vires* of the CFA falls outside the scope of the Commission's mandate, and there is a risk that comments made by the Commission on this point could impact ongoing litigation.

12. It would also be inappropriate for the Commission to comment on the constitutionality of potential UWO provisions, for several reasons.

13. First, there is insufficient material before the Commission for it to express considered views on this point. Any such conclusion would be made in a factual vacuum, given that there is no *lis* before the Commission and no draft or proposed legislation to ground any comment. Many different models for UWO legislation exist across the world, and it is unclear what kind of model is being contemplated in British Columbia.

14. Second, as the BCCLA noted in its closing submissions, essentially no witnesses with expertise in Canadian constitutional law were called to speak to the implications of

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<sup>11</sup> *Public Inquiry Act*, SBC 2007, c. 9, s. 28(1) and Terms of Reference.

<sup>12</sup> See Cromwell Opinion, ¶¶49-52; *British Columbia (Director of Civil Forfeiture) v. Angel Acres Recreation and Festival Property Ltd.*, 2020 BCSC 880; *British Columbia (Director of Civil Forfeiture) v. Angel Acres Recreation and Festival Property Ltd.*, 2020 BCCA 290

the proposals presented to the Commission. The Cromwell Opinion does not fill this vacuum, including because no party was able to examine the Honourable Mr. Cromwell with respect to his opinions, expert or otherwise.

15. Third, the parties are unable to fully respond to a 60-page opinion regarding constitutional law in a 10-page submission. The Commission therefore does not have the benefit of complete submissions on the constitutional issues, such that it would be inappropriate for it to weigh in and comment on the constitutionality of prospective UWO provisions in its Final Report.

### iii. The Commission May Make Findings of Fact Regarding UWOs

16. As the Commission cannot make any determination or comment as to the constitutionality of potential UWO legislation, the competing opinions in that regard are only relevant to the extent they establish that UWOs are controversial and contentious.

17. In some respects, the complex and contentious nature of UWOs is reflected in the Cromwell Opinion. The Cromwell Opinion concludes that a UK model of UWOs would not lead to unjustified infringements of *Charter* rights.<sup>13</sup> However, this opinion is somewhat equivocal and does not completely endorse UWOs. The Cromwell Opinion notes that the use of UWOs “would give rise to a number of *Charter* issues, which would, in some respects, limit their usefulness.”<sup>14</sup> It explains that UWO provisions that do not tie the UWO to a specific property (such as those that exist in Australia) “could be constitutionally problematic in Canada.”<sup>15</sup> Further, the Cromwell Opinion concludes that the UK UWO regime raises some *Charter* issues. It states that “[t]he protections against subsequent use of compelled statements in the UK UWO provisions do not meet... *Charter* standards.”<sup>16</sup> It also indicates that the “politically exposed persons” provisions of the UK UWO regime may be unconstitutional in Canada.<sup>17</sup> The opinion also states that the

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<sup>13</sup> Cromwell Opinion, ¶6

<sup>14</sup> Cromwell Opinion, ¶6

<sup>15</sup> Cromwell Opinion, *fn* 84

<sup>16</sup> Cromwell Opinion, ¶118

<sup>17</sup> Cromwell Opinion, ¶87

chance of success of a s. 8 *Charter* argument regarding the presumption created by UWO legislation “cannot be dismissed as speculative.”<sup>18</sup>

18. The Cromwell Opinion must be considered in the context of all of the evidence and submissions before the Commission. In this context, the controversial nature of UWOs becomes even more evident. As the BCCLA highlighted in its closing submissions, numerous experts before this Commission raised serious human rights concerns about UWOs.<sup>19</sup> The evidence before the Commission is that “[t]here is no international consensus on whether the introduction of UWOs is desirable from the standpoint of striking the right balance between crime prevention and human rights protection.”<sup>20</sup> The BCCLA’s submissions also vigorously contest the compliance of UWOs with the *Charter*.<sup>21</sup>

19. While this is not the proper arena to resolve these competing views, it is relevant that the legal community does not have a settled view of the law in this area. The evidence before this Commission is that UWOs are extremely controversial. The unsettled and contentious nature of the law in this area highlights the draconian nature of civil forfeiture laws. While there may be a difference of opinion as to whether UWOs go so far as to violate the *Charter* (which cannot be resolved through these proceedings), there is no question that they have a significant impact on individual rights and liberties.

#### iv. UWOs Should Not Be Adopted in BC

20. Even if it were possible to implement UWO provisions in a manner that did not lead to unjustified infringements of the *Charter* (a point that the BCCLA vehemently contests), the BCCLA nonetheless maintains that such provisions should not be adopted. As the BCCLA notes in its closing submissions, UWOs erode critical rights and are

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<sup>18</sup> Cromwell Opinion, ¶143

<sup>19</sup> See BCCLA Closing Submissions, ¶¶35-45

<sup>20</sup> [Ex. 382](#) (Wood and Moiseienko), p. 27

<sup>21</sup> BCCLA Closing Submissions, ¶¶35-43

“unquestionably draconian.”<sup>22</sup> It is the BCCLA’s position that such regimes should therefore not be pursued, particularly in the absence of credible evidence of efficacy.<sup>23</sup>

### **B. Change 2: Information Sharing**

21. The Cromwell Opinion raises serious constitutional concerns about information sharing between the CFO and law enforcement. The opinion concludes that “[c]ivil forfeiture offices cannot use their investigative powers for the predominant purpose of investigating penal liability.”<sup>24</sup> It also concludes that “sharing compelled information with law enforcement for the purposes of a criminal investigation and prosecution likely breaches s. 7 of the *Charter* and likely engages s. 8 of the *Charter*.”<sup>25</sup> The BCCLA agrees such information sharing is constitutionally problematic. Given these significant *Charter* issues, the Commission should not recommend modifications to BC’s civil forfeiture scheme that would allow the CFO to share information with law enforcement.

### **C. Change 3: Combining Law Enforcement and Civil Forfeiture Personnel**

22. The Cromwell Opinion also expresses constitutional concerns about combining law enforcement and civil forfeiture personnel, from both a division of powers and *Charter* perspective.<sup>26</sup> The BCCLA shares these concerns and indeed expressed similar concerns in its closing submissions.<sup>27</sup> The Commission should not recommend embedding a provincial civil forfeiture office within a provincial law enforcement agency or giving a provincial law enforcement agency a mandate to pursue civil asset forfeiture.

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<sup>22</sup> *Murphy v GM; Gilligan v. CAB*, [2001] IESC 82, p. 30, per Keane CJ.; [TR December 16, 2020](#) (King), p. 182

<sup>23</sup> See BCCLA Closing Submissions, ¶44; see also Province Closing Submissions, ¶157

<sup>24</sup> Cromwell Opinion, ¶181

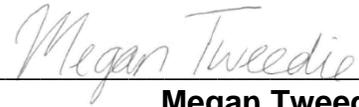
<sup>25</sup> Cromwell Opinion, ¶7

<sup>26</sup> Cromwell Opinion, ¶8

<sup>27</sup> BCCLA Closing Submissions, ¶23

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: October 1, 2021



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## LIST OF AUTHORITIES

Authorities	Paragraph(s)
<b>CASES</b>	
<a href="#"><u>British Columbia (Director of Civil Forfeiture) v. Angel Acres Recreation and Festival Property Ltd.</u></a> , 2020 BCSC 880	11
<a href="#"><u>British Columbia (Director of Civil Forfeiture) v. Angel Acres Recreation and Festival Property Ltd.</u></a> , 2020 BCCA 290	11
<a href="#"><u>Douglas/Kwantlen Faculty Assn. v. Douglas College</u></a> , [1990] 3 S.C.R. 570	8
<a href="#"><u>Murphy v GM; Gilligan v. CAB</u></a> , [2001] IESC 82	20
<a href="#"><u>Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur</u></a> , 2003 SCC 54	8
<a href="#"><u>R. v. Lloyd</u></a> , 2016 SCC 13	8-9
<a href="#"><u>Windsor (City) v. Canadian Transit Co.</u></a> , 2016 SCC 54	8
<b>STATUTORY PROVISIONS</b>	
<a href="#"><u>Canadian Charter of Rights and Freedoms</u></a> , ss. 7-8, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 [ <i>Charter</i> ]	1, 3, 6, 17-18, 20-22
<a href="#"><u>Civil Forfeiture Act</u></a> , SBC 2005, c. 29 [ <i>CFA</i> ]	6-7, 9-11
<a href="#"><u>Constitution Act, 1982</u></a> , s. 52(1), being Schedule B to the <a href="#"><u>Canada Act 1982 (U.K.), 1982, c. 11</u></a>	8
<a href="#"><u>Public Inquiry Act</u></a> , SBC 2007, c. 9, s. 28(1)	9