Commission of Inquiry into Money Laundering in British Columbia

REPLY SUBMISSIONS OF THE BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

Counsel for the British Columbia Civil Liberties Association:

Megan Tweedie and Jessica Magonet
British Columbia Civil Liberties Association
306 – 268 Keefer Street
Vancouver BC V6A 1X5
Tel: 604.687.2919
Fax: 604.687.3045
Email: megan@bccla.org
jessica@bccla.org

INDEX

PART **PAGE**

PART 1 – POINTS IN REPLY 1
A. Overview 1
B. Policing and Enforcement 1
C. Foreign Investment in Real Estate and Money Laundering 2
D. Information Sharing 4
E. Beneficial Ownership Registries 5

LIST OF AUTHORITIES 8

PART 1 – POINTS IN REPLY

A. Overview

1. In these reply submissions, the British Columbia Civil Liberties Association (the "BCCLA") will reply to points raised by other participants on several key issues: (1) policing and enforcement; (2) foreign investment in real estate and money laundering; (3) information sharing; and (4) beneficial ownership registries.

B. Policing and Enforcement

2. The BCCLA strongly disagrees with the recommendation of the Criminal Defence Advocacy Society ("CDAS") "that the BC and Federal Governments [should] commit to real and substantial increases in the resourcing for police investigative agencies traditionally tasked with fighting ML in Canada."[1] This is quite a surprising position for CDAS to take, particularly given that its interest in this Commission "relates primarily to a concern that, in the search for solutions to the perceived ML crisis, government and regulatory actors may be tempted to undertake or engage increasingly invasive AML measures of unknown, unproven or even doubtful efficacy."[2] It is the BCCLA's position that the government should consider less invasive regulatory measures to address money laundering before investing more resources in policing, especially given that specialized police units have failed to make an impact.[3] The BCCLA also urges the government to tackle one of the root causes of money laundering, our failed model of drug prohibition, rather than relying on increased enforcement.[4]

3. The BCCLA supports CDAS's recommendation that "a minimum value threshold should be adopted under which assets may not be seized as part of BC's forfeiture regime."[5] This would help mitigate some of the access to justice issues created by the current civil forfeiture regime.[6]

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[1] CBABC and CDAS Closing Submissions, ¶50
[2] CBABC and CDAS Closing Submissions, ¶36
[3] See BCCLA Closings Submissions, ¶131
[4] Ex. 836 (BCCSU Report); BCCLA Closing Submissions, ¶¶132-42
[5] CBABC and CDAS Closing Submissions, ¶47
[6] See BCCLA Closing Submissions, ¶27; CBABC and CDAS Closing Submissions, ¶40

4. Several participants in this Commission have raised concerns that *Jordan*[7] and *Stinchcombe*[8] – key decisions regarding *Charter* protections in criminal proceedings – have made Canada a desirable destination for money laundering and have hindered law enforcement's ability to tackle this issue.[9] However, no participant has pointed to evidence that these decisions have made Canada more attractive to money launderers. Further, even if these decisions can create challenges for the investigation and prosecution of money laundering, this is simply a feature of living in a country with a constitution that protects the rights of accused people. It is incumbent on the state to investigate and prosecute money laundering offences, like all offences, in a manner that respects *Charter* rights.

5. The BCCLA believes it is significant that, to date, not a single participant in this Commission has recommended the adoption of Unexplained Wealth Orders ("UWOs") in British Columbia. Further, even the Province has acknowledged that "[t]he effectiveness and practical utility of UWOs … remains an open question based on the evidence before this Commission."[10] This further supports the recommendation made in our closing submissions that UWOs should not be introduced in BC, particularly given the *Charter* concerns that UWOs raise.[11]

C. Foreign Investment in Real Estate and Money Laundering

6. The BCCLA agrees with the BC Real Estate Association ("BCREA") that "[f]oreign capital is not in and of itself illegal, nor is it inherently indicative of money laundering"[12] and that "there has been a conflation in the public discourse surrounding money laundering and foreign investment in real estate."[13]

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[7] *R v Jordan*, 2016 SCC 27 [*Jordan*]
[8] *R v Stinchcombe*, [1991] 3 SCR 326 [*Stinchcombe*]
[9] See SNPBC Closing Submissions, ¶13; Coalition Closing Submissions, ¶37; see also Canada Closing Submissions, ¶¶221-22
[10] Province Closing Submissions, ¶157
[11] See BCCLA Closing Submissions, ¶¶35-45
[12] BCREA Closing Submissions, ¶26
[13] BCREA Closing Submissions, ¶37

7. The Coalition of Transparency International Canada, Canadians for Tax Fairness and Publish What You Pay Canada ("Coalition") argues that research regarding which foreign and domestic sources are contributing the most to the influx of proceeds of crime "is not inherently racist."[14] The BCCLA agrees with this statement. However, the country of origin of laundered money may not be relevant in the context of this Commission. Indeed, the Terms of Reference do not task this Commission with examining the country of origin of proceeds of crime in British Columbia. The BCCLA would encourage this Commission to adopt an ethno-agnostic approach to making findings and recommendations about money laundering. As discussed in our closing submissions, "[t]he country of origin of laundered funds should not be identified except where it is relevant. Where possible, it is preferable to refer to the specific individuals, actors, or criminal organizations involved in laundering the proceeds of crime."[15]

8. The BCCLA agrees with the Province that "whether foreign investment is a causative factor in relation to the affordability crisis in residential real estate markets in BC, and whether the foreign investment that has occurred has incorporated an element of money laundering, are separate questions."[16] However, the BCCLA strongly disagrees with the Province's assertion that this Commission "must have regard to the Court's findings in *Li*"[17] in assessing whether foreign investment has had an impact on BC's housing market. The Commissioner is tasked with making factual findings based on the evidence before him, and is not bound by findings of fact made by the BC Supreme Court in a completely different context.[18] In particular, and contrary to what the Province seems to suggest, the trial judge's decision in *Li* to exclude an expert report by Professor Henry Yu should have

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[14] Coalition Closing Submissions, ¶7
[15] BCCLA Closing Submissions, ¶114
[16] Province Closing Submissions, ¶76
[17] Province Closing Submissions, ¶80
[18] Issue estoppel does not apply as the parties in these two proceedings are not the same (*Toronto (City) v CUPE, Local 79*, 2003 SCC 63 [*CUPE*], ¶23). Collateral attack does not apply as findings of this Commission would not undermine the judicial order in *Li v British Columbia*, 2019 BCSC 1819 [*Li*] (see *CUPE*, ¶¶33-34; *Danyluk v Ainsworth Technologies Inc.*, 2001 SCC 44, ¶20)

no bearing on this Commission's assessment of Professor Yu's evidence.[19] The expert report in question is not before this Commission. The rules of evidence before public inquiries differ from those of courts.[20] Further, the Court of Appeal in *Li* determined that the trial judge's decision to exclude the historical portion of Professor Yu's report was unreasonable.[21]

D. Information Sharing

9. Some participants in this Commission have called for increased information sharing between regulators, private entities, and government.[22] The BCCLA submits that amendments to privacy legislation are not required to enable the information sharing required to combat money laundering. As Barbara McIsaac, Q.C. opined, privacy legislation already permits public bodies and private entities to share information for the purposes of combatting money laundering.[23]

10. The BCCLA is concerned about the Province's characterization of the evidence regarding the Finance, Real Estate and Data Analytics Unit ("FREDA"). The Province's summary emphasizes that FREDA's current role is to provide statistical analysis for policy purposes, rather than "intelligence about specific individuals."[24] When discussing how FREDA's mandate may shift in the future, the Province writes:

> FREDA's data branch is currently working to develop its capacity and data holdings. The short-term objectives of the branch are to support the Tax Policy Branch and Intergovernmental Fiscal Relations Branch of the MOF; its short to medium-term goals are to provide data analytics support to other MOF areas. Once additional capacity is in place, it will consider issues such as AML. This work would not be focussed on detecting particular transactions or bad actors, but rather on supporting evidence-based policy analysis and using statistical information to discover trends and draw general conclusions about activity and potential policy responses.[25]

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[19] See Province Closing Submissions, *fn* 151; *Li*, ¶¶38-47
[20] *Public Inquiry Act*, SBC 2007, c. 9, s. 14(1); *Canada (Attorney General) v Canada (Commission of Inquiry on the Blood System)*, [1997] 3 SCR 440, ¶57
[21] *Li v British Columbia*, 2021 BCCA 256, ¶¶224-25
[22] See CPA Closing Submissions, ¶91; SNPBC Closing Submissions, ¶¶46-47; LSBC Closing Submissions, ¶¶85-87; Province Closing Submissions, ¶¶150-53, 161
[23] Ex. 319 (McIsaac), pp. 6, 109
[24] Province Closing Submissions, ¶43, see also ¶¶45-46
[25] Province Closing Submissions, ¶45 [emphasis added]

11. However, the evidence indicates that identifying individual money launderers may become a long-term goal of FREDA. The FREDA Data Branch Strategy document states that FREDA will "explore this possibility" of "provid[ing] information about specific individuals to law enforcement authorities" in the future, as recommended by the Maloney Report, though it notes that doing so could raise legal concerns.[26] The document also notes that, going forward, "[t]he analysis done by the Branch could provide leads to the civil forfeiture office and, if new tools are implemented, the analysis could lead to forfeitures related to unexplained wealth orders."[27] When questioned by the BCCLA about FREDA's future work to provide intelligence on specific individuals, Dr. Dawkins specified that this strategy document is "talking about what could potentially happen in the future."[28] These potential long-term goals of FREDA should be considered by this Commission in its examination of the privacy implications of AML initiatives.

12. In its closing submissions, Canada discusses FINTRAC's independence from law enforcement and writes that FINTRAC's "mandate and powers were designed to safeguard individual privacy and respect for the *Charter*."[29] In the BCCLA's view, this should give the Commissioner serious pause about making recommendations for increased information sharing between FINTRAC and law enforcement.

E. Beneficial Ownership Registries

13. The BCCLA is strongly opposed to the Coalition's recommendation that prison sentences should be imposed for those who fail to report or fraudulently report beneficial ownership information. This type of punishment is grossly disproportionate to the underlying wrongful conduct and would raise s. 12 *Charter* concerns.[30]

14. The Coalition argues for a public corporate beneficial ownership registry in their closing submissions.[31] However, they consistently minimize the privacy impacts of a such

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[26] Ex. 687 (FREDA Strategy Document), p. 14, see also p. 8
[27] Ex. 687 (FREDA Strategy Document), p. 15
[28] TR March 8, 2021 (Dawkins), p. 75; see also p. 9
[29] Canada Closing Submissions, p. 13
[30] *R v Boudreault,* 2018 SCC 58, ¶47
[31] See Coalition Closing Submissions, ¶118

a registry. They write: "While the Coalition acknowledges that the creation of a registry might engage certain privacy interests, the Coalition submits that if any minor privacy interest is engaged it is justified by the benefits of having public access to the registry."[32] Similarly, in their s. 8 *Charter* analysis, they argue that the type of information that would be collected in a corporate beneficial ownership registry would "attract a relatively low expectation of privacy, if any."[33] The BCCLA disagrees that the privacy impacts of a public beneficial ownership registry would be minor. It is well-recognized that financial information (which is akin to beneficial ownership information) attracts a reasonable expectation of privacy.[34] Further, individuals may have a strong interest in shielding the sensitive information that would be captured in this registry from public access, information including their name, aliases, date of birth, citizenship information, address, beneficial ownership information, and status as a politically exposed person.[35] As the evidence before this Commission showed, a public corporate beneficial ownership registry could create risks of identity theft, fraud, and harassment.[36]

15. The Coalition submits "that there is no justification in law for corporate secrecy."[37] However, the jurisprudence shows that legal persons do benefit from s. 8 *Charter* protection.[38]

16. The Coalition also argues that a public corporate beneficial ownership registry would be "the least intrusive means to achieve the corporate transparency objectives" and thus that any s. 8 *Charter* infringement could be justified under s. 1.[39] The BCCLA disagrees. A corporate beneficial ownership registry does not need to be publicly accessible to achieve its goals. Indeed, as Dr. Sharman testified, a better approach to verifying the

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[32] Coalition Closing Submissions, ¶131 [emphasis added]
[33] Coalition Closing Submissions, ¶187
[34] *Schreiber v Canada (Attorney General)*, [1998] 1 SCR 841; *Royal Bank of* Canada *v Trang*, 2016 SCC 50, ¶36; *R v Cole*, 2012 SCC 53, ¶¶47-48
[35] Coalition Closing Submissions, p. 50
[36] Ex. 308 (Beneficial Ownership Consultation), p. 3; TR December 1, 2020 (Primeau), p. 105; Ex. 703 (Work Stream 1 Study), p. 11
[37] Coalition Closing Submissions, ¶188
[38] See *Hunter et al v Southam Inc.*, [1984] 2 SCR 145
[39] Coalition Closing Submissions, ¶198

information in a registry would be to rely on licensed and regulated intermediaries rather than the public.[40] In a provincial consultation on establishing a corporate beneficial ownership registry, public support for a *public* registry was low given the ineffectiveness of public access for verifying data.[41] In their closing submissions, the Coalition contemplates a robust verification process for entries in a beneficial ownership registry by a register or a third party, rendering public access unnecessary.[42] Providing the public with access to the sensitive information in a corporate beneficial ownership registry where such information is not required for verification is not minimally intrusive.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

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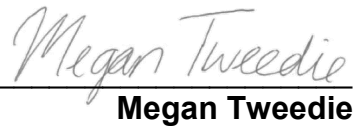

Megan Tweedie
Senior Counsel for the British Columbia Civil Liberties Association

Jessica Magonet
Counsel for the British Columbia Civil Liberties Association

[40] TR May 6, 2021 (Sharman), p. 64
[41] Ex. 308 (Beneficial Ownership Consultation), p. 3; TR December 1, 2020 (Primeau)
[42] Coalition Closing Submissions, ¶¶149-62

LIST OF AUTHORITIES

Authorities	Paragraph(s)
CASES	
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Hunter et al v Southam Inc., [1984] 2 SCR 145	15
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R v Boudreault, 2018 SCC 58	13
R v Cole, 2012 SCC 53	14
R v Jordan, 2016 SCC 27 [*Jordan*]	4
R v Stinchcombe, [1991] 3 SCR 326 [*Stinchcombe*]	4
Royal Bank of Canada v Trang, 2016 SCC 50	14
Schreiber v Canada (Attorney General), [1998] 1 SCR 841	14
Toronto (City) v CUPE, Local 79, 2003 SCC 63 [*CUPE*]	8
STATUTORY PROVISIONS	
Canadian Charter of Rights and Freedoms, ss. 1, 8, 12, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11 [*Charter*]	4-5, 13-16
Public Inquiry Act, SBC 2007, c. 9, s. 14(1)	8