THE COMMISSION OF INQUIRY INTO MONEY LAUNDERING IN BRITISH COLUMBIA

("The Cullen Commission")

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INTRODUCTION

1. This is the joint closing submission on behalf of both the Canadian Bar Association's British Columbia Branch (CBABC) and the Criminal Defence Advocacy Society (CDAS) for the Commission of Inquiry into Money Laundering in British Columbia (the "Commission").

2. While the CBABC represents the interests of BC lawyers in all practice areas, CDAS represents the interests of a subset that group; namely, BC's criminal defence bar. Both organizations acknowledge that money laundering ("ML") has been, and continues to be, a significant problem in BC.

3. Both organizations also acknowledge that the Commission's mandate is to conduct hearings and make findings of fact respecting ML in BC and also make recommendations considered necessary and advisable regarding:
    - **a.** The extent, growth, evolution, and methods of ML in the following sectors: iv. professional services, including the legal profession;
    - **b.** The acts or omissions of regulatory authorities or individuals with powers, duties or function in respects of those sectors to determine if those acts or omissions have contributed to ML in BC;
    - **c.** The scope and effectiveness of the powers, duties and functions exercised or carried out by the regulatory authorities; and
    - **d.** Barriers to effective law enforcement.

4. The Commission's ultimate conclusions and recommendations stand to significantly affect how lawyers do their jobs going forward. They also stand to impact the extent to which members of the public (clients) will continue to feel confident that their dealings with lawyers will remain strictly confidential.

5. In granting joint standing to the CBABC and CDAS the Commission acknowledged these two organizations may assist the Commission to ensure that the foundational principles of the lawyer-client relationship (including the independence of the legal profession, solicitor-client privilege and the duty of confidentiality) are fully and fairly considered in any recommendations made.

6. Throughout these submissions, the CBABC and CDAS provide a set of recommendations in response to the totality of the evidence led at the Commission.

CBABC

7. The CBABC represents over 7,000 lawyers in BC. It speaks for the interests of the legal profession. This contrasts with the role of Law Society of British Columbia ("LSBC"), the regulator for lawyers in this province. Unlike the CBABC, the function of the LSBC is to protect the interests of the public.

8. In its application for standing as a participant in the inquiry, the CBABC submitted that the findings of fact and recommendations of the Commission will directly affect lawyers who are the front line of the client relationship and service: this is significant as lawyers carry the responsibility of preserving the foundational principles of the lawyer-client relationship, including the independence of the legal profession, solicitor-client privilege and the duty of confidentiality.

9. The CBABC's principal interest in this proceeding is the zealous protection of solicitor-client privilege, in the public interest. The CBABC is also concerned about public misinformation suggesting there is a high risk of ML inherent in the work of lawyers, or that lawyers are to blame for the perceived ML crisis.

THE CBA'S COMMITMENT TO THE FUNDAMENTAL PRINCIPLES OF THE LAWYER-CLIENT RELATIONSHIP

10. In its role as the voice of the legal profession in BC, the CBABC seeks to emphasize the nature and importance of certain foundational principles essential to the role that lawyers perform for their clients including the duty of confidentiality, solicitor-client privilege, and the independence of lawyers.

DUTY OF CONFIDENTIALITY

11. The duty of confidentiality refers to a lawyer's ethical and professional obligation not to disclose to anyone information received from a client in the course of a professional relationship.[1]

SOLICITOR-CLIENT PRIVILEGE

12. Solicitor-client privilege is narrower in scope and refers to the sacrosanct privilege that attaches to communications between lawyer and client relating to the giving or receiving of legal advice.[2] It is a principle of fundamental justice and protected by s. 7 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*").[3]

INDEPENDENCE

13. "Independence" in the context of the role that individual lawyers must play in relation to their clients refers to the proposition that the state cannot impose duties on lawyers that interfere with their duty of commitment to advancing their clients' legitimate interests.[4] It is also a principle of fundamental justice and protected by s. 7 of the *Charter.* As Cromwell J. explained in his reasons (for a majority of the SCC on this point):

> [84] We should, in my view, recognize as a principle of fundamental justice that the state cannot impose duties on lawyers that undermine their duty of commitment to their clients' causes. Subject to justification being established, it follows that the state cannot deprive someone of life, liberty or security of the person otherwise than in accordance with this principle.[5]

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[1] *Foster Wheeler Power Co. Co. v. Société intermunicipale de gestion et d'élimination des déchets (SIGED) inc.,* [2004] 1 S.C.R. 456, 2004 SCC 1
[2] *R. v. Campbell*, [1999] S.C.J. No. 16
[3] *Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11, s 91(24)*; *R. v. Lavalee, Rackel & Heintz v. Canada (Attorney General)*, [2002] S.C.J. No. 61 (S.C.C.
[3] *Canada (Attorney General) v. Federation of Law Societies of Canada, 2015 SCC 7 (*the "2015 *Federation* decision"*),* at para 77
[4] *Ibid.*
[5] *Ibid* at para. 84

THE CBABC'S RECORD ON ANTI-MONEY LAUNDERING INITIATIVES

14. The CBA has a long history of action on issues related to ML, and has participated in consultation, review and discussion with the federal government and law societies regarding anti-money laundering ("AML") legislation since 1998. The CBA also intervened in two previous constitutional challenges to federal AML legislation.

15. The CBABC has produced documents for the Commission (letters and submissions prepared by the CBA dating back to 1998) that demonstrate its longstanding commitment to uphold and defend the above-referenced core principles. The CBABC's documents further show that the CBA has consistently raised the alarm that AML measures requiring lawyers to disclose client records to the government will violate these core principles.

16. The CBA successfully advanced that position most recently at the Supreme Court of Canada as an intervenor in *Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7. This case was the culmination of a lengthy and still ongoing effort to publicly challenge federal *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*[6] regulations.

17. The CBA has steadfastly maintained that the proper approach to dealing with concerns about ML in the legal profession must be through independent self-regulation so as to ensure that the legal profession is not forced into a situation where it must "spy" on clients on behalf of the federal government.

18. The CBABC also remains concerned with the extent to which the public has been left with the inaccurate and improper impression that lawyers have been somehow causal of the perceived ML crisis in BC.

THE CBABC'S POSITION ON COMMISSION EVIDENCE

19. In Dr. Peter German Q.C.'s second report, (Dirty Money 2),[7] he characterized lawyer trust accounts as "black holes" and described solicitor-client privilege as something that "lawyers enjoy and zealously guard" without reference to the privilege actually

[6] (S.C. 2000, c. 17)
[7] Ex. 883, pp. 125-126

being enjoyed by members of the public, and that lawyers zealously guard the privilege on behalf of their clients. Solicitor-client privilege is an ancient and essential aspect of our legal system that protects private citizens who seek the advice of lawyers.

20. The CBABC was pleased to see German, in certain respects, take a softened approach during testimony before the Commission. For example, he explicitly acknowledged the essentiality and constitutional importance of solicitor-client privilege.[8] The CBABC was also encouraged to see German acknowledge that the LSBC was "leading the way" as compared with other provinces in terms of AML regulatory measures.

21. Regarding the so-called "No Cash Rule", German maintained a hardline position while testifying to his view that lawyers should be limited to the greatest extent possible when it comes to allowing the deposit of cash into trust accounts.[9]

22. He also maintained a view that lawyers should be subject to third-party reporting of cash and suspicious transactions. But German offered no suggestion as to how such a regime could be set-up in Canada, given the 2015 *Federation* decision, and its holding that the *PCMLTFA* regime must not apply to the legal profession.[10] Neither did any other witness provide the Commission with a detailed proposal as to how third-party reporting might be constitutionally achieved.

23. An external reporting requirement for lawyers would inevitably breach solicitor-client confidentiality. Cash and suspicious transaction reporting would require documentation and disclosure of the source of funds to a party outside LSBC. This disclosure would necessarily indicate that a specific person was in the process of seeking legal advice. This dynamic in and of itself would constitute a breach of solicitor-client confidentiality.

24. Reporting of this kind is also in tension with a lawyer's duty of loyalty to the client, which prohibits lawyers from becoming agents of the state against their clients.

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[8] Transcript (12 April 2021), 38, l. 23, (13 April 2021), Pg. 8, line 2 & pg. 85, line 7
[9] Transcript (12 April 2021), pg. 39, l. 11
[10] Transcript (12 April 2021, pg 41, line 2

Anxiety over the reporting requirement could dissuade would-be clients from seeking legal advice out of fear that doing so would cause them to appear guilty of a crime. Such a cooling effect on the solicitor-client dynamic is antithetical to a robust and properly functioning legal system in a free and democratic society and must be avoided.

25. Perhaps most telling in German's testimony are the gaps in his analysis. For example, German was forced to concede under cross-examination that his views of the legal profession and, in particular the "no cash rule" and third-party reporting requirements were arrived at absent any consultation from constitutional legal scholars or experts.[11]

26. Of particular note, German provided no conclusive evidence that the regulation and administration of lawyer trust accounts are causing or exacerbating the ML problem in BC. Neither German or any other witness has provided compelling evidence to suggest that LSBC's ongoing and evolving regulatory approach is insufficient in relation to its purpose in stopping and deterring ML in British Columbia.

27. There was no oral evidence from witnesses about lawyers in their work, or how lawyers participate in real estate transactions. Given that there was no oral evidence suggesting a connection between the work of lawyers or legal processes and the risk of ML in real estate transactions, the CBABC will not provide written submissions on this topic.

The LSBC's Position on the Sufficiency of the regulatory AML regime for Lawyers

28. LSBC is a separate party to these proceeding. Both the CBABC and CDAS agree with and adopt the positions taken by the LSBC – especially regarding the sufficiency of the current regulatory AML regime for lawyers in British Columbia. At the same time, the CBABC and CDAS approach this proceeding from a different vantage point. The CBABC and CDAS are professional organizations representing

[11] Transcript (13 April 2021), pg. 90, l. 1

lawyers. The LSBC, on the other hand, is a regulator and tasked with protecting the public interest.

29. We have had an opportunity to review an early draft of the LSBC's extensive closing submission. It is our obligation at these proceedings to *not* duplicate the substance of the LSBC's material.

30. In their draft submission the LSBC has comprehensively set out and justified the overall position that BC's regulatory AML framework for lawyers is robust, appropriate, and sufficient to protect the public from the ongoing threat of ML.

Recommendations

31. The CBABC and CDAS agree with and formally adopt all of the specific recommendations set out in the LSBC's closing submission.

32. The CBABC and CDAS recommend that the government refrain from creating a regulatory AML regime for lawyers (or attempting to apply an existing regulatory AML regime to lawyers).

33. The CBABC and CDAS recommend that the Commission explicitly recognize the essential nature and constitutional and legal character of certain foundational elements of the lawyer-client relationship, namely the independence of lawyers, the duty of confidentiality and solicitor-client privilege.

CDAS

34. CDAS represents over 200 members of the legal profession and is engaged in advocacy, law reform and education in matters relating to defence work in the criminal justice system. It was founded in 2015 by members of the British Columbia criminal defence bar who identified a gap in the area of law reform for criminal justice issues specifically affecting criminal defence lawyers and their clients.

35. As criminal defence lawyers CDAS members are particularly concerned with the rule of law, the independence of the bar, and the constitutional rights of accused individuals. The work of the Society is focused in a manner that recognizes the fundamental importance of those principles.

36. CDAS's specific interest in this proceeding 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. CDAS is concerned that by engaging these measures, legislatures, police organizations, and other regulatory bodies will unduly and unfairly trample on the privacy rights of British Columbians.

CDAS'S POSITION ON COMMISSION EVIDENCE

Asset Forfeiture

37. Several witnesses addressed the Commission on civil and administrative asset forfeiture. While Phil Tawtel, the Executive Director of BC's Civil Forfeiture Office, touted BC's civil forfeiture regime, he could not confirm in any meaningful way that the process was effective.[12] Under cross-examination he admitted there has neither been an auditor's review of the regime or any other meaningful assessment of the regime's effectiveness as it specifically relates to ML.[13]

38. Jeffrey Simser, author of the textbook "Civil Asset Forfeiture in Canada"[14], testified that he was unaware of any research establishing that civil forfeiture has been effective in deterring unlawful activity or combatting ML in Canada.[15]

39. Tawtel also confirmed that vast majority of forfeitures in BC involve low-value assets (less than $75,000) obtained through the administrative forfeiture regime.[16] The Commission heard that approximately 80% of those forfeitures occurred in circumstances where property owners had failed to respond to forfeiture efforts, resulting in a default forfeiture orders.[17] The takeaway is that a large volume of assets are being forfeited to the BC government without the safeguards provided by a rigorously-exercised adversarial process including judicial oversight.

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[12] Transcript (18 December 2020), pg. 129, l. 1 – pg. 130, l. 5.
[13] Transcript (18 December 2020), pg. 129, ll. 1-6
[14] Jeffrey Simser, *Civil Asset Forfeiture in Canada* (Toronto: Thomson Reuters, 2012).
[15] Transcript (14 December 2020), pg. 145, l. 16 – pg. 147, l. 4.
[16] Transcript (18 December 2020), pg. 105, l. 18 – pg. 111, l. 25
[17] *Ibid.*, pg. 108, ll. 1-5.

40. It is unsafe to assume that default forfeiture orders are indicative that the governments forfeiture efforts are meritorious. It may well be that the costs associated with responding to such efforts is prohibitive. After all, Legal Aid is not available to those who face asset forfeiture and lawyers' fees are expensive. Obviously, in many cases those fees will be more expensive than the value of the item sought for forfeiture. In other words, whether a property owner is culpable or not, it may simply not be worth it to contest the asset forfeiture in court.

41. When this dynamic was put to Tawtel in cross-examination, he agreed that whether there should be a threshold value below which seizures should not occur was an important issue to consider but offered no substantive response or counterpoint to the fairness concern raised.[18]

Unexplained Wealth Orders

42. The Commission heard evidence related to Unexplained Wealth Orders ("UWOs"). UWOs have been considered as a possible addition to BC's AML arsenal

43. Anton Mosieinko, a research fellow at the Centre for Financial Crime and Security Studies of the Royal United Services Institute ("RUSI") was called before the Commission as an expert in this area. He described a UWO as "(a)ny legislation that creates a presumption that a person's property constitutes the proceeds of crime."[19] Their purpose is to both deter ML and to gather intelligence regarding the same.

44. Mosieinko concluded there exists no international consensus on the desirability of UWOs (in general or from a human rights perspective) and concluded that ultimately, there is a need for more research as to what deterrent effect, if any, UWOs might have on ML if implemented in Canada.[20]

45. Simser testified that it is "hard to know" how suitable or effective UWOs might be in addressing the problem of ML in Canada and added that their use would not be his "first choice" in combatting ML.[21]

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[18] *Ibid.*, pg. 110, l. 1 – p. 111, l. 23.
[19] Transcript (15 December 2020), pg. 15, l. 3
[20] *Ibid.*, pg. 131, l. 11
[21] Transcript (14 December 2020), pg. 83, l. 19 – pg. 85, l. 21

Recommendations

46. CDAS recommends that BC's forfeiture regime not be expanded absent clear empirical evidence, of which there is currently none, of the effectiveness of the current regime in stopping or discouraging ML.

47. CDAS recommends a minimum value threshold should be adopted under which assets may not be seized as part of BC's forfeiture regime. The administrative regime, in its current form, promotes an unfair process for those who simply cannot afford to mount a robust defence against a government forfeiture claim.

Enforcement

48. One recurrent theme from the evidence of law enforcement officials that appeared before the Commission was the desperate need for increased resources to be provided to the police agencies tasked with investigating ML.[22] CDAS does not dispute the need for further and better resources to be applied to conventional investigative policing agencies and favours such an approach over efforts to change, in substance the nature of the current AML regime.

49. It makes little sense to reject or determine that the current substantive approach to AML in BC is insufficient if police agencies have to this point been starved and left in a position to fail from the get-go. If the AML crisis persists even after traditional policing efforts have been properly resourced, then and only then will it be appropriate to explore drastically changing and strengthening the substance of BC's AML regime.

Recommendation

50. The CBABC and CDAS recommend that the BC and Federal Governments commit to real and substantial increases in the resourcing for police investigative agencies traditionally tasked with fighting ML in Canada. Until the current police enforcement regime is properly funded, British Columbians will have no way of knowing whether a

[22] See for example Transcript (7 April 2021), pg. 50, ll. 1-10

move toward different and potentially more invasive and coercive AML measures would be necessary and appropriate.

CONCLUSION

51. The membership of CBABC and CDAS possess practical knowledge of how and why lawyers do the work they do and the foundational principles that underly the essential role that lawyers play in a free and democratic society. The CDAS membership holds additional specialized knowledge of the work that criminal defence lawyer do and, of particular relevance to this proceeding, an intimate appreciation of the importance of protecting the privacy rights of clients who face investigation for criminal or regulatory misconduct.

52. Both organizations have attempted to bring the considerable expertise and knowledge of their membership to bear at these proceedings in an effort to raise and illuminate concerns related to ML and potential future AML measures that may be brought to bear on lawyers and their clients going forward.

53. Both organizations agree that the evidence heard by the Commission makes it clear that ML is an ongoing concern in British Columbia, and appropriate and robust AML measures and enforcement are called for. What has also been clear, however, is that multiple assertions that lawyers are at risk for ML are based on theory, supposition, and inference. There is little to no actual evidence connecting lawyers and their work to ML, and certainly insufficient evidence to give this Commission a basis for encroaching on constitutionally protected rights.

54. In closing summary, the recommendations previously set out throughout the body of this submission are as follows:

    1. The CBABC and CDAS agree with and formally adopt all of the specific recommendations set out in the LSBC's closing submission.
    2. The CBABC and CDAS recommend that the government refrain from creating a regulatory AML regime for lawyers (or attempting to apply an existing regulatory AML regime to lawyers). Unless empirical evidence is produced that shows a real link between ML and some deficiency in the LSBC's AML regime, the LSBC's

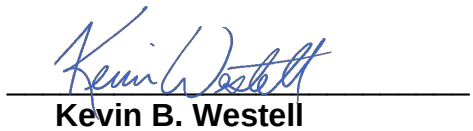
regime should be left as the sole administrator of regulatory AML measures when it comes to lawyers.

3. The CBABC and CDAS recommend that the Commission explicitly recognize the essential nature and constitutional and legal character of certain foundational elements of the lawyer-client relationship, namely the independence of lawyers, the duty of confidentiality and solicitor-client privilege
4. CDAS recommends that BC's forfeiture regime not be expanded absent clear empirical evidence, of which there is currently none, of the effectiveness of the current regime in stopping or discouraging ML.
5. CDAS recommends a minimum value threshold should be adopted under which assets may not be seized as part of BC's forfeiture regime. The administrative regime, in its current form, promotes an unfair process for those who simply cannot afford to mount a robust defence against a government forfeiture claim.
6. The CBABC and CDAS recommend that the BC and Federal Governments commit to real and substantial increases in the resourcing for police investigative agencies traditionally tasked with fighting ML in Canada. Until the current police enforcement regime is properly funded, British Columbians will have no way of knowing whether a move toward different and potentially more invasive and coercive AML measures would be necessary and appropriate.

55. The CBABC and CDAS appreciate the opportunity they have enjoyed to participate in the Cullen Commission and thank the Commissioner, Commission Counsel, Commission Staff, as well as witnesses and fellow participants for the time and commitment they have applied to this important matter.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Vancouver, British Columbia this 9th day of July, 2021.



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