

Cullen Commission of Inquiry into Money Laundering in British Columbia: Opening Statement of CBA-BC and CDAS

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INTRODUCTION

1. I am here today to offer opening remarks on behalf of two organizations: the Canadian Bar Association, British Columbia Branch (the CBA-BC) and the Criminal Defence Advocacy Society (CDAS). These two organizations are very different in nature but both share a grant of standing for this Commission. I am authorized by both organizations to make these submissions.
2. With respect to CDAS, I am currently one of two representatives of the Vancouver region. With respect to the CBA-BC, I am a member-at-large for its CBA National Criminal Justice Section.
3. It is my pleasure to have the opportunity to speak to the Commission today regarding the role of lawyers, and the serious issue of money laundering in our province.

CANADIAN BAR ASSOCIATION – BRITISH COLUMBIA BRANCH (“CBA-BC”)

4. The CBA is a national organization with membership of over 38,000 jurists, judges, academics and law students from across Canada. The CBA has been in existence since 1896 and was formally incorporated by an Act of Parliament in 1921; branches exist in every province and territory in Canada. CBA-BC, the British Columbia Branch, has over 7,000 members in a wide range of practice areas including criminal justice, real estate, corporate law, family law and civil litigation.
5. Part of the mandate of the CBA and the CBA-BC includes formulating positions on behalf of the legal profession and then advocating those positions to the public, public bodies, officials and the government. CBA also intervenes on cases at the Supreme Court of Canada on matters of concern to the profession.
6. Its mission is the following:

- a. To improve the law;
 - b. To improve the administration of justice;
 - c. To improve and promote access to justice;
 - d. To promote equality in the legal profession and in the justice system;
 - e. To improve and promote the knowledge, skills, ethical standards and wellbeing of members of the legal profession;
 - f. To represent the legal profession; and
 - g. To promote the interests of the members of the Canadian Bar Association in British Columbia.
7. It is an express value of the CBA-BC to improve the administration of justice, which includes the preservation of the **independence** of the judiciary and the legal profession.

CRIMINAL DEFENCE ADVOCACY SOCIETY (“CDAS”)

8. The Criminal Defence Advocacy Society was founded in 2015 as a non-profit society by members of the criminal defence bar in British Columbia, and is engaged in advocacy, law reform and education of its members. Our members are particularly concerned with the rule of law, the independence of the bar, and the constitutional rights of accused individuals. Our organization has intervened at the Supreme Court of Canada to provide a unique perspective on issues of public policy.
9. Both CBA-BC and CDAS recognizes that the work of this Commission will raise important legal principles and practice issues that will affect both members of the bar and the private citizens that our members typically serve.

OVERVIEW OF JOINT POSITION

10. Both the CBA-BC and CDAS acknowledge and agree with many of the overarching findings of the Terms of Reference (TOR) Reports. There can be no doubt that money laundering has become a serious problem in Canada and, in particular, British Columbia warranting the valuable analysis found within the TOR Reports and the attention of this Commission. Both CDAS and the CBA-BC seek to provide meaningful assistance in the

search for answers and improvements that will lessen the extent of this problem to the benefit of all British Columbians.

11. At the same time, both organizations are wary that the zealous search for solutions to the money laundering problem will lead to investigative and regulatory overreach that could endanger the independence of lawyers, the privacy of private citizens, and the rights of all Canadians to a free and just society.
12. Within the TOR Reports, lawyers have been denigrated as “black holes” in relation to the money laundering crisis. Solicitor-client privilege has been downplayed as something that “lawyers enjoy and zealously guard” without reference to the fact that it is an ancient and absolutely essential aspect of our legal system because it protects private citizens who seek the advice of lawyers for all manner of life decisions.
13. The TOR Reports appear critical of the decision of our nation’s highest court in *Canada (Attorney General) v. The Federation of Law Societies of Canada*, 2015 SCC 7, and its holding that the *PCMLTFA* regime should not apply to the legal profession. Underlying that criticism, in our respectful view, is a failure to recognize the nature and extent to which law societies and the ethical and legal obligation of trusted lawyers are a protective measure against money laundering.
14. Although the CBA-BC is open to consulting with the federal government on establishing ways to incorporate lawyers into existing anti-money laundering legislation in a manner which does not offend solicitor-client privilege, we contend that the current requirements under the Law Society rules are effective. Lawyers are precluded from asserting solicitor-client privilege during a Law Society audit or investigation already. This system does work – with about 250 investigations conducted annually in British Columbia by the Law Society.

LEGAL AND ETHICAL OBLIGATIONS OF LAWYERS

15. Lawyers in British Columbia are subject to the same Criminal Code obligations as the general public. Section 462.31 of the Code states:

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

(a) the commission in Canada of a designated offence; or

(b) an act or omission anywhere that, if it had occurred in Canada, would have constituted a designated offence.

16. Under the law, no lawyer can knowingly deal with any property that is the proceeds of crime, and if the lawyer is reckless in determining where the funds were obtained or derived, they can be charged under this section.
17. As well, members of the legal profession are obligated to adhere to strict legislation, regulations, rules and a Code of Professional Conduct as prescribed by our Law Society. As regulator of our profession, the Law Society monitors the potential risks to the public that we serve, and adjusts the rules and requirements to minimize any perceived or actual risks. The Law Society has standing in this Inquiry and will provide the Commission with the details of the many rules that all lawyers must follow, including careful identification of new clients, verification of that identity and ongoing monitoring of the relationship to ensure that any source of funds is legitimate. Lawyers are also not allowed to accept funds into trust accounts unless those funds relate to legal services that they are providing. The profession is held to the highest of standards and lawyers are required to step down and withdraw in circumstances where transactions or the source of funds is suspicious in nature. We would argue that the standards set by the Law Society in British Columbia (as well as the other provinces) are among the strictest of any profession that you will be considering in your Inquiry.
18. As any practicing lawyer will tell you, a failure to adhere to the rules set out by the Law Society will result in prompt review and investigation of the lawyer and their practice, often resulting in sanctions, penalties and restrictions on practice. Unlike many other professional regulators, the Law Society is very clear that their only mandate is to protect the public, not the lawyers who they license to serve the public.

19. Over the past twenty years, the national CBA has provided many submissions and comments on proposed legislative and regulatory changes which impact the legal profession and its ability to provide access to justice. Like the Federation of Law Societies of Canada, the CBA has intervened in cases that advanced and were heard by the Supreme Court of Canada. We will draw on the same expertise that lead to the development of those submissions in attempting to provide assistance in this forum.

OVERVIEW OF TOR REPORT RECOMMENDATIONS

20. With respect to the many recommendations contained within the TOR Reports that are the subject of this Inquiry, the CBA-BC and CDAS would like to take this opportunity to make the following initial comments concerning the recommendations:
- a. There is no evidence to suggest that the lack of disclosure for a lawyer's trust account and transactions is the reason that there is such a dismal rate of conviction and extensive money-laundering.
 - b. We believe that by disclosing financial records which would include the names of clients, lawyers would be in breach of its duty to maintain client confidentiality – unless that disclosure is to the Law Society which already has the authority to review such accounts.
 - c. There is no evidence to suggest that the ability of a British Columbia lawyer to act as a realtor has resulted in any money laundering in BC; again, the lawyer is under strict regulatory and professional requirements that arguably exceeds those of the real estate industry.
 - d. Legislation requiring disclosure of beneficial ownership of corporations should be developed after consultation with the CBABC to ensure that proposed solutions are consistent with the duty to maintain client confidentiality.
 - e. We are concerned that the unexplained wealth orders recommendation is too broad in nature and creates a presumption that shifts the burden to clients to prove any and all source of funds that they may have. There is already a civil remedy for forfeiture of property that is crime related, and this new proposal creates an unfair and unjustified burden on all citizens. The residents of British Columbia are still

entitled to some privacy, and this recommendation has far-reaching impact that could cause more harm than good.

- f. In order for British Columbia to refute the suggestion that it is a “safe haven” for money laundering, more effort needs to be focused on the actual prosecution of criminals who are found to be conducting this illegal activity. Currently, the rate of prosecution in Canada is among the lowest of all nations that have anti-money laundering legislation. The anti-money laundering legislation and reporting requirements are of little impact if criminals realize that they can continue operations without risk of actually being charged due to lack of police or prosecutorial resources to manage the large volume of information provided to FINTRAC and other tracking agencies.

CLOSING

21. In Closing, we at the CBA-BC and CDAS reaffirm that we are eager to join the endeavor of determining causes and seeking solutions for the problem of money laundering in British Columbia. We wholeheartedly welcome the TOR Reports. As mentioned we agree with the overall assessment that a crisis is afoot and also agree with many of the specific recommendations. We adamantly disagree with others. Despite this, we welcome the dialogue that will arise from our vociferous opposition to criminal, regulatory and administrative overreach during the course of these hearings. After all, it is the essence of a free and democratic society that we seek the truth, knowledge and enlightenment through an exchange of different ideas, argument and a willingness to listen to those we disagree with.
22. CBA-BC and CDAS fundamentally believe that all residents of British Columbia should have the opportunity to obtain legal advice in a confidential secure setting, without the fear of having their personal information shared with a national agency and we are concerned that an effort to damage the ancient and sacrosanct quality of the solicitor-client relationship would align with a broader, more disturbing trend of devaluing the role of the lawyer in a free and democratic society.

23. In the last two years, we have seen the government in British Columbia adopt the Civil Resolution Tribunal, and by doing so effectively removing the role of Canadian lawyers from a large proportion of legal disputes.
24. And now, in the spirit of promoting its new “no-fault insurance regime” we have heard our own provincial attorney general appear to point to British Columbia’s lawyers as the reason that the previous system was apparently ineffective.
25. We find this trend disturbing. We are organizations that seek to represent a strong and independent bar. We seek to stand up for the privacy rights of the private citizens of British Columbia and we seek to assist in educating the public at this inquiry as to why it is that the work of lawyers is so vital in promoting and ensuring justice, as opposed to frustrating it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Vancouver, British Columbia this 26th day of February, 2020



Kevin B. Westell, Pender Litigation
on behalf of
Criminal Defence Advocacy Society and
Canadian Bar Association, BC Branch