Commission of Inquiry into Money Laundering in British Columbia

Commissioner A. Cullen

SUBMISSIONS OF HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA IN RESPONSE TO REPORT OF THE HONOURABLE THOMAS CROMWELL, DATED FEBRUARY 9, 2021

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Submitted: November 4, 2021

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PART I – Overview

1. The Province of British Columbia (the "Province") provides the following submissions in response to the opinion of the Honourable Thomas Cromwell, dated February 9, 2021 (the "Cromwell Opinion").[1]

2. The Province will (a) address the scope of the Commission's mandate to address constitutional issues; (b) outline jurisdictional issues in respect of pre-proceeding disclosure orders in support of civil forfeiture or a similar processes; and (c) identify points of disagreement with the Cromwell Opinion.

PART II - Relationship Between the Mandate of the Commission and Issues of Constitutional Law

3. As stated in paragraphs 15 to 17 of its non-gaming sector reply submissions dated August 6, 2021, the Province submits that the Commission should decline to opine on constitutional issues.

4. The Commission has a mandate, pursuant to its Terms of Reference, to make recommendations it considers necessary and advisable, including proposals for provincial legislation. It would go beyond the Commission's mandate to determine – even on the basis of an opinion by as distinguished a former SCC judge as Mr. Cromwell – whether legislation it otherwise thinks is advisable would be upheld as constitutional.

5. If the Commission considers that a policy recommendation raises constitutional issues, it is open to the Commissioner to note that those constitutional issues remain unresolved and recommend an appropriate analysis prior to implementation.

6. If a proposal is advisable from a policy perspective, constitutional issues will have to be addressed first by the Attorney General of British Columbia in his role advising the executive in drafting the law, then by the Legislative Assembly and finally by the courts. A constitutional challenge will necessarily relate to specific legislation and develop a

[1] These submissions do not address policy issues and, in particular, do not address whether legislation similar to unexplained wealth orders ("UWO") in the United Kingdom, Australia or the Republic of Ireland should be enacted in British Columbia. These submissions are for the purposes of responding to the Cromwell Opinion only.

factual record for that purpose. It would be premature to foreclose that process except in the clearest of cases.

PART III - Framework for Analysis – Division of Powers

7. Federalism is a foundational principle of the Canadian Constitution.[2] The constitutional division of powers is a basic component of the principle of federalism.[3] As the final arbiters of the division of powers, the courts have developed specific doctrines. A division of powers analysis includes (a) whether the law is *valid*; (b) whether the law is *applicable* to entities regulated by the other level of government; and (c) in the case of provincial laws, whether the law is *operative* in light of alleged conflict with federal law.

8. ***Validity.*** This involves a *characterization* of the "matter" of the law, which is also referred to as its "dominant characteristic" or "pith and substance". Once the "matter" has been determined, it must be *classified* as being within a federal or provincial head of power. A law whose pith and substance falls within the jurisdiction of one level of government may affect matters beyond the legislature's jurisdiction. These "incidental" effects may be of significant practical importance. Moreover, some "matters" may not be possible to categorize under a single head of power and may have a "double aspect". Finally, even if the matter of a particular provision of a legislative scheme relates to a head of power within the jurisdiction of the other level of government, if the larger scheme is in relation to a head of power of the enacting government, it may be upheld as "ancillary".

9. ***Applicabiliity.*** Some laws, although valid, may in some applications impair the core of a head of power of the other level of government, in which case they may be subject to the doctrine of interjurisdictional immunity. However, this is a doctrine of limited application.

10. ***Operability.*** If a provincial law creates an "operational conflict" with a federal law by prohibiting an act or omission the federal law requires or by requiring an act or omission

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[2] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 55
[3] *Canadian Western Bank* at para. 22.

the federal law prohibits, it will be rendered inoperative by the doctrine of federal paramountcy. In addition, if the operation of the provincial law would "frustrate the purpose" of the federal law, it is also rendered inoperative. The doctrine of paramountcy must, however, be read narrowly in light of the principle of co-operative federalism.

11. Under sections 92(13) and 92(14) of the *Constitution Act, 1867,* the Provincial Legislature has the constitutional authority to make laws in relation to matters coming within "property and civil rights in the province"[4] and the "administration of justice in the province."[5] Criminal law, including criminal procedure, is a federal head of power.[6] Gaming and horse racing, real estate, trusts, securities, most financial instruments and regulation of professions, such as the legal and accounting professions are exclusively or largely provincially regulated. [7] Provinces and the federal government share jurisdiction over financial services and corporate law. [8]

12. "Property and civil rights" is a very broad power and includes (a) the regulation of industries, except to the extent the regulation addresses what makes them specifically within federal authority, (b) the determination of the legal effects of transactions occurring within the province, and (c) the determination of when a person loses rights to property within the province. The Supreme Court of Canada unanimously found that laws providing for forfeiture of property because they are tainted by crime outside the sentencing process are within provincial jurisdiction.[9] Laws in relation to property and civil rights in the province can – and often do – have "incidental" effects outside the province, so long as their dominant purpose and effect is to address matters in the province. In particular, the Province submits that provinces can make laws relating to the provenance of property and other assets in the province, even if the acts at issue occurred elsewhere.

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[4] *Constitution Act, 1867,* s. 92(13).
[5] *Constitution Act, 1867,* s. 92(14).
[6] *Constitution Act,* s. 91(27).
[7] See *Canada (Attorney General) v. Law Society of B.C.*, [1982] 2 SCR 307 (provincial authority over regulation of professions); *R. v. Furtney*, [1991] 3 SCR 89 (regulation of gaming activities has a clear provincial aspect); *Reference re Securities Act*, 2011 SCC 66 (provincial jurisdiction over securities).
[8] See *John Deere Plow Co. v. Wharton,* [1915] AC 330 (JCPC); *Securities Act Reference.*
[9] *Chatterjee*

13. Authority over the "administration of justice" includes authority over all aspects of the criminal justice system, not embraced by section 91(27) of the *Constitution Act, 1867*. Enforcement of criminal law – through policing and prosecution – has since Confederation been primarily provincial.[10]

PART IV - Framework for Analysis – *Canadian Charter of Rights and Freedoms*

14. The *Charter* guarantees the rights and freedoms in it subject to reasonable limits that are prescribed by law and can be demonstrably justified in a free and democratic society under section 1. It does not address property rights. As the Cromwell Opinion states, the *Charter* applies to all entities coming within the definition of "government" in section 32 of the *Charter,* but not all rights and freedoms apply to all government action.

15. In considering the protections against self-incrimination under sections 7 and 13 of the *Charter* and the protections against unreasonable search and seizure under section 8 of the *Charter,* it is necessary to distinguish four situations.

16. Information obtained in the course of a civil or administrative process and used in that process. There is no right against self-incrimination in such processes. Section 8 of the *Charter* applies to searches and seizures that infringe the reasonable expectations of privacy of individuals in thes processes, but (a) those expectations are not treated the same way as in criminal investigations and (b) what is "reasonable" is determined in the civil/regulatory context.

17. Information obtained in an investigation or prosecution of a criminal or *quasi*-criminal offence and used in *that* process. Targets of such investigations have rights against self-incrimination and searches or seizures are presumed to require authorization by a warrant or exigent circumstances.

18. Information obtained in the course of a civil or administrative process, and subsequently provided to those responsible for investigating a criminal or *quasi*-criminal offence. Section 13 of the *Charter* provides a use immunity for testimony in most

[10] *Di Iorio v Warden of the Montreal Jail,* [1978] 1 SCR 152 at p. 200, Dickson J.

subsequent criminal proceedings. Section 7 provides additional use immunities in some situations.

19. Information obtained in the investigation or prosecution of a criminal or quasi-criminal offence and provided to those responsible for a civil or administrative process. In this case, there is no distinct constitutional issue created by the sharing of the information. If the evidence was originally obtained contrary to the *Charter,* it may be excluded in the civil or administrative proceeding under section 24(2) of the *Charter*. The application of the factors relevant to whether the administration of justice will be brought into disrepute by the use of the evidence may be different depending on the proceeding in which it is intended to be used.

PART V - Submissions on Opinion of the Honourable Thomas Cromwell

20. The Province agrees with the Cromwell Opinion that the *Civil Forfeiture Act* is validly enacted provincial legislation under section 92(13) of the *Constitution Act, 1867.* The Province also agrees that it follows that legislation empowering the courts to require persons to provide pre-action disclosure of the source of their wealth if relevant to adjudication under the *Civil Forfeiture Act* would be within provincial jurisdiction.[11]

21. In general, statutory provisions requiring persons to provide information relevant to the statute are classified in relation to the same head of power as the underlying legislation or are considered ancillary powers.[12]

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[11] In *Chatterjee v. Ontario (Attorney General)*, 2009 SCC 19, the Supreme Court of Canada held that civil forfeiture laws – laws whose dominant effect is creating a property-based "authority to seize money and other things shown on a balance of probabilities to be tainted by crime" is within provincial competence where the purpose is to "take the profit out of crime and deter its present and would-be perpetrators. 17. As the Cromwell Opinion notes, one element of the definition of an "instrument of unlawful activity" under section 1 of the Civil Forfeiture Act was held to be unconstitutional in a decision that is now under appeal: *British Columbia (Director of Civil Forfeiture) v Angel Acres Recreation and Festival Property Ltd.*, 2020 BCSC 880. The Province agrees with the Cromwell Opinion that the resolution of this issue has nothing to do with the matters before the Commission.

[12] *Reference re Assisted Human Reproduction Act*, 2010 SCC 61 at para. 141, McLachlin CJC (in dissent, but not on this point)

22. The courts of equity developed applications for pre-action discovery, known as *Norwich* orders.[13] The availability of equitable orders is generally within provincial jurisdiction. These have been adopted in Canada in statutory contexts, such as patent litigation.[14]

23. If the dominant purpose of a court order requiring a person to disclose information is for the investigation of a criminal offence, it is in relation to criminal procedure and it would be up to Parliament to create the power. But if the dominant purposes of the order is to enforce a provincial offence, then the province has authority to create the power.

24. The Province respectfully disagrees with the analysis contained in the Cromwell Opinion on the implication of the division of powers on the availability of pre-action disclosure orders against "politically exposed persons", i.e., persons whose public functions have provided unusual opportunities to accumulate unlawful wealth.[15]

25. Liability of politically exposed persons to orders requiring them to explain the provenance of their property or other assets in British Columbia would reflect a legislative judgment that these persons are at greater risk of having property or other assets in British Columbia that are derived from unlawful activity. As *Chatterjee* establishes, provincial jurisdiction over that issue does not depend on where the unlawful activity took place, but where the property or other asset is located.

26. Where the validity of provincial legislation is challenged on the basis that it violates territorial limitations on provincial legislative competence, the analysis centres on the pith and substance of the legislation. If its pith and substance is in relation to matters falling within the field of provincial legislative competence, the legislation is valid. Incidental or ancillary extra-provincial aspects of such legislation are irrelevant to its validity.[16] In the case of tangible property, including real property, provincial jurisdiction is established by the

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[13] *Norwich Pharmacal Co. v. Customs & Excise Commissioners*, [1974] AC 133 (UKHL).
[14] *Glaxo Wellcome PLC v. M.N.R.*, [1998] 4 FC 439 (CA). There is an *obiter* discussion of the availability of *Norwich* orders in civil forfeiture in *British Columbia (Director of Civil Forfeiture) v. Hells Angels Motorcycle Corporation*, 2014 BCCA 207 at para. 26. *Norwich* orders have been obtained in forfeiture contexts in unreported cases.
[15] Cromwell Opinion, paragraph 87.
[16] *Imperial Tobacco* at para. 28

location of the property.[17] The incidental effect that this could assist other jurisdictions in enforcing corruption or other laws is consistent with provincial jurisdiction.[18]

27. If persons with prominent public functions in *any* jurisdiction use these positions to acquire illicit wealth and invest it in British Columbia, this distorts the market in British Columbia, causes other harms and is a legitimate issue of provincial concern.

28. The Province disagrees with the Cromwell Opinion's analysis of the relationship between the province's jurisdiction over "property and civil rights" under section 92(13) of the *Constitution Act, 1867* and Parliament's jurisdiction in relation to "Naturalization and Aliens" under section 91(25). The scope of the federal authority over "aliens" is limited to "their essential status" and is analogous to federal authority over federally-incorporated companies.[19] It is definitely not an immunity from generally applicable provincial laws. A law that has special provisions for non-Canadian nationals or a subclass of them is only "in relation to aliens" if it "trenches upon their capacity". [20] Even a provincial law that prohibited non-citizens from owning real property in the province was upheld by the Supreme Court of Canada.[21] A provision similar to the UWOs of the United Kingdom or Ireland enacted by a province in support of a civil forfeiture proceeding would not trench on the legal capacity of a politically exposed person who was a foreign national.

29. While the Federal Crown does have a prerogative power to enter into international relations with other states, this does not in itself change the division of legislative authority.[22] This is an *executive* authority and does not limit provincial *legislative* authority. A federal statute enacted under Parliament's authority over foreign relations might, in some cases, be paramount over provincial law, if there is an operational conflict or if the

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[17] *Imperial Tobacco* at para. 29.
[18] *Global Securities Corp. v. British Columbia (Securities Commission)*, [2000] 1 S.C.R. 494, 2000 SCC 21
[19] Li v. British Columbia, 2021 BCCA 256 at para. 66.
[20] *Li* at para. 68.
[21] *Morgan v. Prince Edward Island (Attorney General)*, [1976] 2 S.C.R. 349.
[22] *Attorney-General for Canada v. Attorney-General for Ontario*, [1937] A.C. 326 (P.C.) [*Labour Conventions Reference*], affirmed in *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48 at para. 66.

provincial law frustrates the federal purpose. However, no federal statute grants all politically exposed persons immunity from provincial law.[23]

The *Charter* and the Provision of Information in Civil and Administrative Proceedings

30. The Province agrees that if a person has a reasonable expectation of privacy in documents, a court order requiring that person to disclose those documents to a government official will be a "search" or "seizure" and therefore a law authorizing such compelled disclosure would have to be "reasonable" to comply with section 8 of the *Charter*. The Province also agrees that the stringent requirements of reasonableness in the criminal context would not apply in a civil or regulatory context. Whether a statutory power providing for a search or seizure is "reasonable" depends on whether in the particular situation covered by the law the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals.[24]

31. A court making this determination would consider whether the property owner is given notice of the application and, if not, what the circumstances are in which lack of notice is justified. It would consider the legal standard for granting the application. Outside the criminal context, there would *not* generally be a requirement of reasonable grounds to believe that the order will result in evidence of an unlawful act. Finally, it would consider the consequences if the person fails to abide by the order. While the Cromwell Opinion presumes that these would involve incarceration, if the consequences are purely financial and do not involve incarceration, an order power would be more likely to be found to be reasonable. Even in the administrative or civil context, a seizure of evidence can only be "reasonable" if its reliability can be tested. [25] However, if the information is used in an

[23] For example, the *State Immunity Act*, RSC 1985, c. S-18 provides certain immunities to foreign states and their agencies, but not in relation to commercial activities. In the Attorney General's view, it is unnecessary for the Commission to consider this kind of issue in making recommendations.
[24] *Hunter v. Southam* at pp. 159-60.
[25] *Goodwin v. British Columbia (Superintendent of Motor Vehicles),* 2015 SCC 46 at para. 67-68.

adversarial civil proceeding with full ability to call evidence to contextualize and challenge the evidence, then this should meet any constitutional reliability thresholds.

32. The Province respectfully disagrees with the comment at paragraph 142 of the Cromwell Opinion that "it is likely that forfeiture of property as proceeds of crime" is a "seizure" within the meaning of section 8. Such a holding would contradict decades of jurisprudence. It would have the effect of constitutionalizing property interests, even in a context where the common law itself would not, namely where the interest is obtained as a result of wrongdoing.[26] Despite footnote 169 of the Cromwell Opinion, the British Columbia courts have ruled that forfeiture and interim preservation under the *Civil Forfeiture Act* is *not* a "seizure" within the meaning of section 8.[27] This followed a decision by the Alberta Court of Appeal that expropriation is not a "seizure."[28] In the *Laroche* decision, relied on by the Cromwell Opinion, the Supreme Court of Canada cautioned against an overbroad reading of "seizure" in section 8 that would create a "constitutional guarantee of property rights which was deliberately not included in the *Charter.*"[29] The Court adopted and underlined the proposition that "where property is taken by governmental action for reasons other than administrative or criminal investigation a 'seizure' under the *Charter* has not occurred."[30] More recently, employing the analysis in *Laroche,* Justice Jackson held that freezing orders of assets under securities legislation do not constitute "seizures" within the meaning of section 8.[31] What is constitutionally guaranteed under section 8 is a protection against unreasonable violations of expectations of privacy, not property. The Province therefore submits that the forfeiture of property is not even arguably a "seizure" under section 8.

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[26] *Cleaver v. Mutual Reserve Fund Life Association* [1892] 1 Q.B. 147 (C.A.), followed in *Lundy v. Lundy* (1895), 24 SCR 650 (manslayer not eligible under will)
[27] *Fischer* at para. 32.
[28] *Becker v. Alberta*, 1983 ABCA 161, followed, in the civil forfeiture context, in *British Columbia (Director of Civil Forfeiture) v. Fischer,* 2010 BCSC 568 at para. 32-33.
[29] Quebec (Attorney General) v. Laroche, 2002 SCC 72 at para. 52.
[30] *Laroche* at para. 53, citing S. C. Hutchison, J. C. Morton and M. P. Bury, *Search and Seizure Law in Canada* (loose-leaf), at p. 2-5.
[31] *British Columbia (Attorney General) v BridgeMark Financial Corp.*, 2021 BCSC 1459

Information Sharing

33. The Province disagrees with the proposition that mixing law enforcement and civil or regulatory officials in a common organization is or could be *ultra vires* the province. Policing is generally provincial under the province's authority over the administration of justice under s. 92(14) of the *Constitution Act, 1867*. In many regulatory situations, there is a mix of administrative and investigatory functions within the same organization. Securities, environmental, competition and taxation regulators are examples. It is beyond the scope of this submission whether a similar approach would be desirable in addressing proceeds of unlawful activity, but it would not be outside the legislative jurisdiction of the province. This is clear from the fact that most policing and all civil forfeiture are within the jurisdiction of the province now.

34. The Province agrees with the Cromwell Opinion that information flowing from law enforcement to civil or administrative authorities, including civil forfeiture, does not raise *Charter* issues, but that information flowing from civil or administrative authorities to those investigating criminal or *quasi*-criminal offences must respect the principles laid out in *Jarvis*[32] and *Nolet*.[33] If there is sharing from a civil or administrative authority to criminal or *quasi*-criminal investigatory authorities, a delineation must be made between information obtained for the dominant purpose of civil or administrative liability and information obtained for the dominant purpose of penal liability. While these issues could be managed, they would need to be and an advantage of organizational independence is that the distinction is clearer. However, as the Cromwell Opinion notes, it is not *per se* contrary to the *Charter* for the same organization to fulfill both functions.

[32] *R. v. Jarvis*, 2002 SCC 73
[33] *R. v. Nolet*, 2010 SCC 24.

PART VI - Conclusion

35. As noted at the outset, this submission addresses constitutional issues only and does not take a position on whether laws analogous to the structure of UWOs in the United Kingdom or Ireland or integration of civil forfeiture functions within law enforcement would be good public policy. The Province agrees with the ultimate conclusion of the Cromwell Opinion that both would be constitutional, but that the integration proposal would give rise to needs to be careful about what information was shared and when.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 4th DAY OF NOVEMBER 2021

Counsel for Her Majesty the Queen in right of the Province of British Columbia:

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J. Gareth Morley