Part II
Legal and Regulatory Framework

Having considered the basics of money laundering – what it is, who is involved in it, and difficulties with quantifying it – I now turn to the legal and regulatory frameworks that are implicated when considering improvements to the anti–money laundering regime. In Chapter 6, I review the international framework, which centres largely on the Financial Action Task Force's 40 recommendations for an effective anti–money laundering and terrorist financing regime. Chapter 7 considers the Canadian framework – which is largely set out in the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, SC 2000, c 17 – as well as critiques that have been levelled at that regime. Finally, Chapter 8 discusses the provincial framework, which is not centralized in the same way as the foregoing two and is instead spread out among various economic sectors. Chapter 8 also introduces a key recommendation in this Report: the creation of an independent office of the Legislature, which I refer to as the AML Commissioner.

Chapter 6
The International Anti–Money Laundering Regime

Since at least the 1980s, the international community has recognized that money laundering does not respect borders. It is a problem that requires coordinated responses at the local, national, and international levels. For this reason, the anti–money laundering regime in Canada has been, and continues to be, heavily influenced and shaped by the international regime. Understanding the international regime is therefore crucial to understanding our domestic measures.

The international community has taken various steps to increase awareness of money laundering and to "promote the effective implementation of legal, regulatory and operational measures to combat the laundering of the proceeds of crime."[1] One of the key steps taken by the international community was the creation of the Financial Action Task Force (FATF), which is widely seen as the leading global authority on money laundering and anti–money laundering measures. FATF's work has not been without criticism. However, it plays a vital role in identifying and providing guidance to its member countries on emerging money laundering risks and best practices for addressing those risks. For example, its list of 40 recommendations is the foundation of most modern anti–money laundering regimes and has heavily influenced and shaped the development of the Canadian regime over the past 25 years.

In what follows, I review the history and evolution of international efforts to address money laundering, including the creation of FATF and the development of its list of 40 recommendations. I then discuss FATF's current activities, with a particular focus on the "mutual evaluation process" it has adopted to evaluate the anti–money laundering measures put in place by its member countries. I conclude with a discussion of Canada's performance in the mutual evaluation process to date, along with some brief comments on other international efforts to address money laundering.

1 Exhibit 19, Report of Professor William Gilmore, May 2020, p 5, para 4.

Treaties and Declarations

Actions that could be considered money laundering today have occurred for centuries. Over 2,000 years ago, merchants took steps such as sending money abroad or purchasing assets to conceal acquired wealth from government, and moneylenders used various methods to conceal illegally obtained interest.[2] In the early 20th century, the concept of money laundering started to gain prominence in the United States because of concerns about international banks moving funds to evade tax, the use of cash-intensive businesses to conceal the origins of proceeds of crime, and practices by which gangsters such as Al Capone would attempt to conceal their "ill-gotten gains."[3] It appears that the first use of the term "money laundering" can be traced to 1973, when it was used during the Watergate scandal in relation to the "laundering" of President Richard Nixon's illegal campaign funds.[4]

Similar concerns arose on the international stage because of the significant expansion of the illegal drug trade, a fear that attempts to mask the illicit origins of proceeds were leading to large amounts of capital being transferred between jurisdictions (with tax consequences), and a perception that money laundering was posing a considerable threat to the integrity and stability of legitimate financial systems.[5] In the late 1980s, the international community began taking concrete steps to address money laundering as a problem in its own right. Arguably, the most important of these steps were the *United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*[6] (Vienna Convention) and a 1989 G7 Economic Declaration.[7]

The Vienna Convention

The Vienna Convention was the culmination of extensive international efforts to address global concerns about drug trafficking. These efforts included the *Single Convention on Narcotic Drugs, 1961*,[8] and the 1971 *Convention on Psychotropic Substances*.[9] The Vienna Convention was adopted on December 20, 1988, and came into force on November 11, 1990.[10] Article 2 sets out its purpose:

2 Exhibit 218, Katie Benson, "The Facilitation of Money Laundering by Legal and Financial Professionals: Roles, Relationships and Response" (DPhil, University of Manchester, School of Law, 2016) [unpublished], p 26.

3 Ibid.

4 Ibid.

5 Ibid, pp 26–27.

6 20 December 1988, 1582 United Nations *Treaty Series* (UNTS) 95 (entered into force 11 November 1990), online: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VI-19&chapter=6&clang=_en.

7 G7 Economic Declaration, Paris, 16 July 1989, online: http://www.g8.utoronto.ca/summit/1989paris/communique/index.html.

8 30 March 1961, 520 UNTS 557 (entered into force 13 December 1964), online: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VI-15&chapter=6.

9 21 February 1971, 1019 UNTS 175 (entered into force 16 August 1976), online: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VI-16&chapter=6&clang=_en.

10 United Nations General Assembly (UNGA) Res 39/141, UNGA Res 42/111; Peter German, *Proceeds of Crime and Money Laundering* (Toronto: Thomson Reuters, 1998) (loose-leaf updated 2019, release 3), 1A-5.

> The purpose of this Convention is to promote co-operation among the Parties so that they may address more effectively the various aspects of illicit traffic in narcotic drugs and psychotropic substances having an international dimension. In carrying out their obligations under the Convention, the Parties shall take necessary measures, including legislative and administrative measures, in conformity with the fundamental provisions of their respective domestic legislative systems.

The Vienna Convention was a milestone in international efforts to tackle money laundering because of its recognition that money laundering is a problem in its own right requiring distinct measures to address. The preamble states that "illicit traffic generates large financial profits and wealth enabling transnational criminal organizations to penetrate, contaminate and corrupt the structures of government, legitimate commercial and financial business, and society at all its levels." It also notes the parties' determination "to deprive persons engaged in illicit traffic of the proceeds of their criminal activities and thereby eliminate their main incentive for so doing."

The Vienna Convention requires parties – that is, countries that have signed and ratified the treaty – to establish certain offences. Most of these relate to the production, sale, possession, transport, etc., of narcotic drugs and psychotropic substances (see arts 3(1)(a)(i)–(iv), 3(2)). However, it also requires parties to criminalize the following:

- the organization, management, or financing of specified offences (art 3(1)(a)(v));
- the conversion or transfer of property known to be derived from specified offences for the purpose of concealing or disguising its illicit origin (art 3(1)(b)(i)); and
- the concealment or disguise of various aspects of property, such as its true nature, source, or ownership, knowing that it is derived from specified offences (art 3(1)(b)(ii)).

Article 5 requires the parties to adopt measures for confiscating proceeds of crime and property derived from it (arts 5(1)(a), 5(2)), confiscating the substances themselves (art 5(1)(b)), and seizing financial records (art 5(3)). The Convention also deals with extradition (art 6), mutual legal assistance (art 7), and international co-operation and training (art 9).

Canada signed the Vienna Convention on December 20, 1988, and ratified it on July 5, 1990.[11] It is implemented primarily through the *Controlled Drugs and Substances Act*, SC 1996, c 19, and the *Criminal Code*, RSC 1985, c C-46. Consistent with the Vienna Convention's commitment to criminalize money laundering, Canada enacted section 462.31 of the *Criminal Code*, which prohibits laundering the proceeds of crime. Specifically, it is an offence to use, transfer possession of, or otherwise deal with property with the intent to conceal or convert it knowing that the property derives from

11 20 December 1988, 1582 UNTS 95 (entered into force 11 November 1990), online: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VI-19&chapter=6&clang=_en.

a designated offence. Similarly, section 354(1) of the *Criminal Code* makes it an offence to possess any property that is derived from the commission of a designated offence (defined below).

The G7 Economic Declaration and Creation of the Financial Action Task Force

In 1989, a year after the Vienna Convention was adopted, the G7 met in Paris and released an economic declaration stating that the "drug problem has reached devastating proportions" and calling for urgent action, including two concrete measures:

- concluding further treaties and supporting initiatives and co-operation to facilitate the identification, tracing, freezing, seizure, and forfeiture of drug crime proceeds; and
- convening a financial action task force with a mandate to "assess the results of cooperation already undertaken in order to prevent the utilization of the banking system and financial institutions for the purpose of money laundering, and to consider additional preventive efforts in this field."[12]

Consistent with the second call to action, FATF was established following the G7's 1989 summit meeting. I elaborate on the task force below.

Since the Vienna Convention, various other treaties have refined the international approach to money laundering. A few are worth highlighting for our purposes. The *Council of Europe Convention on Laundering, Search, Seizure, and Confiscation of the Proceeds of Crime*[13] is notable in that it did not limit money laundering to drug-related offences.[14] The *United Nations Convention Against Transnational Organized Crime*[15] came into force in 2003 and importantly requires states to:

- institute a comprehensive domestic regulatory and supervisory regime for banks, non-bank financial institutions, and other bodies susceptible to money laundering, emphasizing customer identification, record keeping, and the reporting of suspicious transactions; and

12 *Economic Declaration*, G7, para 53 (Paris, July 16, 1989), online: http://www.g8.utoronto.ca/summit/1989paris/communique/index.html.

13 Council of Europe *Treaty Series* (CETS) 141.

14 This approach was highlighted once more in the *United Nations Convention Against Corruption*, 2349 UNTS 41, which came into force in 2005. Article 23(2)(a) specifies that money laundering offences should be applied to "the widest range of predicate offences." Further, the non-binding Legislative Guide to the Convention encourages parties to ensure that money laundering offences are not contingent on convictions for predicate offences: United Nations Office on Drugs and Crime, *Legislative Guide for the Implementation of the United Nations Convention Against Corruption*, 2nd ed (New York: United Nations, 2012), para 248, online: https://www.unodc.org/documents/treaties/UNCAC/Publications/LegislativeGuide/UNCAC_Legislative_Guide_E.pdf.

15 2225 UNTS 209, online: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=X-VIII-12&chapter=18&clang=_en.

- ensure that administrative, regulatory, law enforcement, and other authorities have the ability to co-operate and exchange information and, to that end, consider establishing a financial intelligence unit to serve as the national centre for the collection, analysis, and dissemination of information regarding potential money laundering.[16]

A final important development was the G20's High-Level Principles on Beneficial Ownership Transparency,[17] adopted by the G8 following its 2013 Annual Meeting Final Communiqué.[18] These principles address concerns surrounding a lack of knowledge about who ultimately controls, owns, and profits from companies and legal arrangements. I address beneficial ownership in Chapters 23 and 24.

The Financial Action Task Force

As Professor William Gilmore put it, FATF is "without doubt, the most influential body in terms of the formulation of anti–money laundering policy and in the mobilisation of global awareness of the complex issues involved in countering this sophisticated form of criminality."[19] It was created in 1989 with a mandate to consider the adequacy of international efforts to address drug trafficking and the very substantial proceeds derived from it. The G7 asked experts in their member countries to consider these issues and deliver a report at the next G7 meeting. The resulting report contained 40 recommendations relating to anti–money laundering and confiscation of proceeds of crime.[20] These recommendations have come to represent the gold standard in the international fight against money laundering and have played a key role in the development of Canada's domestic regime.

Initially envisioned as having a limited term, FATF's mandate was extended a few times, and it has now become an established institution.[21] Its objectives are "to protect financial systems and the broader economy from threats of money laundering and the financing of terrorism and proliferation, thereby strengthening financial sector integrity and contributing to safety and security."[22]

16 Ibid, art 7(1).

17 "G20 High-Level Principles on Beneficial Ownership Transparency," Brisbane, Australia, 2014, online: http://www.g20.utoronto.ca/2014/g20_high-level_principles_beneficial_ownership_transparency.pdf.

18 "G8 Lough Erne Leaders Communiqué," Lough Erne, Northern Ireland, UK, June 18, 2013, online: http://www.g7.utoronto.ca/summit/2013lougherne/lough-erne-communique.html.

19 Exhibit 19, Report of Professor William Gilmore, May 2020, p 4, para 2.

20 Evidence of W. Gilmore, Transcript, June 3, 2020, p 13.

21 Ibid, pp 13–14.

22 As articulated in its open-ended mandate approved April 12, 2019: Financial Action Task Force, *Mandate*, April 12, 2019, p 4(I)(2) available online: https://www.fatf-gafi.org/media/fatf/content/images/FATF-Ministerial-Declaration-Mandate.pdf.

At the time of writing, the task force had 37 member jurisdictions and two regional organizations.[23] Canada was one of the 16 founding members.[24] Professor Gilmore explained that several jurisdictions that are not currently members would like to be part of FATF, given its important standard-setting function; in other words, countries "wish to be inside the tent rather than outside the tent."[25] Similarly, UK money laundering expert Simon Lord testified that, although there are only 39 official members of FATF, "virtually all countries in the world comply with FATF's recommendations. Less so, Iran, and not so, North Korea."[26]

There are nine "associate members" of FATF known as FATF-style regional bodies. These are separate and independent regional entities that have accepted FATF's 40 recommendations and agreed to monitor their implementation using their common methodology.[27] They also participate in the development of the task force's standards, guidance, and other policy relating to money laundering and terrorist financing.[28] Their associate member status allows them to attend FATF meetings and intervene on policy and other matters. They cover the following regions: Asia/Pacific, the Caribbean, Council of Europe members, Eurasia, Eastern and Southern Africa, Latin America, West Africa, the Middle East and North Africa, and Central Africa.[29]

The Council of Europe body, known as MONEYVAL,[30] is among the oldest, most firmly established, and best known of the FATF-style regional bodies.[31] Canada is a member of the Asia/Pacific Group and is a "coordinating and supporting nation" of the Caribbean Group.

FATF's 40 Recommendations

FATF's 40 recommendations were promulgated in 1990 to "set standards and promote the effective implementation of legal, regulatory and operational measures to combat

23 The member jurisdictions are Argentina, Australia, Austria, Belgium, Brazil, Canada, China, Denmark, Finland, France, Germany, Greece, Hong Kong, Iceland, India, Ireland, Israel, Italy, Japan, Republic of Korea, Luxembourg, Malaysia, Mexico, Netherlands, New Zealand, Norway, Portugal, Russia, Saudi Arabia, Singapore, South Africa, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States. The regional organizations are the European Commission and the Gulf Co-operation Council. See Financial Action Task Force, "FATF Members and Observers" (2019) online: https://www.fatf- gafi.org/about/membersandobservers/.

24 Financial Action Task Force, Countries, "Canada", online: https://www.fatf-gafi.org/countries/#Canada.

25 Transcript, June 3, 2020, p 16.

26 Transcript, May 28, 2020, p 45.

27 Exhibit 19, Report of Professor William Gilmore, May 2020, p 18, para 30; Evidence of W. Gilmore, Transcript, June 3, 2020, pp 46–47.

28 See FATF's open-ended mandate at p 6, paras 9–12: Financial Action Task Force, *Mandate* April 12, 2019, online: https://www.fatf-gafi.org/media/fatf/content/images/FATF-Ministerial-Declaration-Mandate.pdf.

29 Financial Action Task Force, "Members and Observers," online: https://www.fatf-gafi.org/about/membersandobservers/.

30 Its full name is the "Council of Europe Committee of Experts on the Evaluation of Anti–Money Laundering Measures and the Financing of Terrorism."

31 Exhibit 19, Report of Professor William Gilmore, May 2020, p 19, para 31.

the laundering of the proceeds of crime."[32] As Mr. Lord explained, "the idea ... is to make sure that everyone has a more or less coordinated approach to the way in which money laundering and terrorism financing is addressed in terms of legislation, operational response and all the other ways."[33]

Initially, the recommendations had three central strands. The first called for the strengthening of domestic criminal justice systems, with an emphasis on the development of legislative and enforcement techniques, such as the confiscation of the proceeds of crime, designed to undermine the financial power of trafficking networks and similar crime groups.[34] Countries were to criminalize drug-related money laundering and provide for confiscation or forfeiture of proceeds of crime, which relatively few countries had done at the time.[35]

The second strand called for the mobilization of participants in the financial sector to assist in the prevention and detection of money laundering through measures such as customer identification and verification, record-keeping, and reporting. Professor Gilmore describes these measures as an "innovative" and "bold" attempt to move beyond the normal range of criminal justice actors in an attempt to address what was seen as a criminal justice problem.[36] I agree that these measures were a novel and creative approach to addressing money laundering. They depart significantly from a more traditional criminal law response of criminalizing conduct and instead require private actors to be actively engaged in identifying suspicious behaviour and to proactively collect information that may assist with future investigations. In Canada, the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, SC 2000, c 17 (*PCMLTFA*) imposes these measures on a range of private actors including financial institutions, insurance brokers, securities dealers, money services businesses, accountants, real estate professionals, and casinos.[37]

The third strand of the recommendations recognized that the success of any strategy to combat money laundering would depend, to a significant extent, on the range, scope, and quality of international co-operation. It contains recommendations aimed at improving such co-operation.[38]

In 1996, FATF conducted a "major stocktaking" of the recommendations, which led to two significant changes: (a) the extension of predicate offences beyond drug trafficking; and (b) the expansion of preventive measures to cover non-financial businesses. Suspicious transaction reporting was also made mandatory rather than permissive.[39]

32 Ibid, p 5, para 4.

33 Transcript, May 28, 2020, p 47.

34 Exhibit 19, Report of Professor William Gilmore, May 2020, p 5, para 4.

35 Evidence of W. Gilmore, Transcript, June 3, 2020, pp 20–21.

36 Exhibit 19, Report of Professor William Gilmore, May 2020, p 5, para 4; Transcript, June 3, 2020, pp 21–22.

37 *PCMLTFA*, s 5. See Chapter 7 for a more detailed explanation of the Canadian regime.

38 Exhibit 19, Report of Professor William Gilmore, May 2020, pp 5–6, para 4; Evidence of W. Gilmore, Transcript, June 3, 2020, p 21.

39 Exhibit 19, Report of Professor William Gilmore, May 2020, p 6, paras 5–6.

Following 9/11, FATF's mandate was expanded to include the prevention, detection, and suppression of terrorist financing. FATF added eight "special recommendations" relating to terrorist financing in 2001 and a ninth in 2004.[40] It also did a thorough review of the recommendations in 2002–3.[41] A key change from that review was the concept of a financial intelligence unit,[42] which, as discussed below, was envisioned as a national financial intelligence centre that would review suspicious transaction reports and gather other information relevant to money laundering and terrorist financing.

Another key change was applying customer due diligence and reporting requirements to "designated non-financial businesses and professions," which comprise casinos; real estate agents; dealers of precious metals and stones; accountants; lawyers, notaries, and independent legal professionals; and trust and company service providers.[43] Professor Gilmore described these changes as a "bold and a controversial extension of the remit of the imposition of obligations on non-governmental actors."[44] As I discuss further in Chapter 27, the extension of requirements to legal professionals in particular has not been without controversy and has led to difficulties because of issues like solicitor-client privilege.[45] There has also been pushback from some industry groups as they become subject to reporting obligations.[46]

In 2012, the recommendations were revised again to fully integrate the nine special recommendations adopted after 9/11 and to incorporate a further extension to FATF's mandate in 2008 relating to the proliferation of weapons of mass destruction.[47] In October 2020, FATF made two additional modifications relating to the proliferation of weapons of mass destruction.[48] I set out some key recommendations below.

Recommendation 1

Recommendation 1 states that countries should adopt a "risk-based approach" to their anti–money laundering and terrorist financing measures.[49] In basic terms, a risk-based approach requires each country to "identify, assess, and understand" the money

40 Evidence of W. Gilmore, Transcript, June 3, 2020, pp 22–23.

41 Exhibit 19, Report of Professor William Gilmore, May 2020, p 7, para 8.

42 Evidence of W. Gilmore, Transcript, June 3, 2020, pp 24–25.

43 Ibid, p 24; Exhibit 4, Overview Report: FATF, Appendix E, *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations* (Updated June 2019) [*FATF Recommendations 2019*], pp 116–17, "General Glossary".

44 Transcript, June 3, 2020, p 24.

45 Ibid, pp 51–52.

46 Ibid, p 51.

47 Exhibit 19, Report of Professor William Gilmore, May 2020, p 9.

48 *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations* (Updated March 2022), Annex 2, p 138, online: https://www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-recommendations.html.

49 The risk-based approach is distinct from the "standards-based" and "rules-based" approaches, which describe different ways regulators can address issues such as money laundering. A standards-based approach gives registrants a set of high-level objectives to achieve, but with flexibility as to how to do so. In contrast, a rules-based approach involves setting prescriptive requirements that all registrants must follow.

laundering and terrorist financing risks arising in its jurisdiction and take action to ensure that measures to prevent or mitigate money laundering are commensurate with the risks identified.

Former executive director of Europol Sir Robert Wainwright testified that the premise of a risk-based approach is to direct "your control efforts … to the best effect … to bring maximum impact on identifying and reducing the problem of money laundering … [It] implies … that you are indeed being a bit more laser-like about where you should really focus your attention on rather than trying to cover everything with everyone."[50]

Although not specifically required, countries often conduct "national risk assessments" to demonstrate their identification, assessment, and understanding of money laundering risks (see Chapter 2 for a discussion of Canada's 2015 risk assessment).[51] Professor Peter Reuter testified that these assessments are useful exercises in that they bring together the various sectors involved in anti–money laundering, allowing them to build expertise and a community that improves communication among stakeholders.[52]

Risk is generally understood as a function of the level of threat, the vulnerability, and the consequences of money being laundered.[53] Messrs. Levi, Reuter, and Halliday explain the relationship between these concepts as follows:

> Risk is seen as the intersection of threats, vulnerabilities and consequences. A particular sector (banks, casinos, accountants) might be seen as high risk if it faced serious threats (many efforts to launder money), had weak controls and/or the consequences of a money laundering violation in that sector had particularly serious consequences.[54]

Although these assessments provide a useful starting point, the lack of quantitative data in the money laundering and terrorist financing field makes it difficult to conduct a reliable risk assessment. For example, there is a danger that risk assessment relying heavily on available quantitative information may be biased toward risks that are easier to measure and discount than those for which quantitative information is not readily available.[55]

50 Transcript, June 15, 2020, p 43.

51 Evidence of W. Gilmore, Transcript, June 4, 2020, p 14. FATF has produced a guidance document to assist countries with these assessments. Professor Reuter explained that this document is properly non-prescriptive, as risk assessments often need to be adapted to the specific phenomenon and institutional setting: Evidence of P. Reuter, Transcript, June 8, 2020, p 4. Risk-based approaches are also applied within specific industries (such as the gaming industry) to ensure that the relevant actors understand the risks arising in that sector and take measures to prevent or mitigate those risks.

52 Evidence of P. Reuter, Transcript, June 8, 2020, pp 15–16.

53 Ibid, pp 4–5.

54 Exhibit 26, Michael Levi, Peter Reuter, and Terence Halliday, "Can the AML System Be Evaluated Without Better Data?" (2018) 69 *Crime, Law and Social Change,* p 321.

55 Financial Action Task Force, *Guidance: National Money Laundering and Terrorist Financing Risk Assessment* (February 2013), p 17, online: http://www.fatf-gafi.org/media/fatf/content/images/National_ML_TF_Risk_Assessment.pdf.

Adding to the difficulties of accurately measuring money laundering risk, countries have used different kinds of data. Some rely only on expert opinion, while others use suspicious activity reports, prosecutions for money laundering, and/or vignettes. Although these are all legitimate sources of data, countries do not, in Professor Reuter's view, sufficiently explain their methodology or the nature and limitations of the experts' expertise.[56]

Recommendation 3

Recommendation 3 requires[57] countries to criminalize money laundering and to apply the crime of money laundering "to all serious offences, with a view to including the widest range of predicate offences." The interpretive note explains that the criminalization of money laundering can be done in different ways: on an all-crimes basis, on a threshold basis linked to a category or serious offences or penalties, to a list of predicate offences, or a mix of these.[58] At a minimum, however, the offence should apply to the "designated categories of offences," which are listed in the glossary and include offences such as participation in organized crime, terrorism, human trafficking, drug trafficking, fraud, and tax crime.[59]

In Canada, the *Criminal Code* attaches the crime of money laundering to all designated offences, which are defined to include most offences punishable by indictment.[60]

Recommendation 4

Recommendation 4 requires countries to adopt measures for freezing, seizing, and confiscating proceeds of crime and illicit property. Notably, it states that countries should either adopt measures allowing for such confiscation without requiring a criminal conviction or consider measures requiring an offender to demonstrate the lawful origin of the property.

In Canada, various statutes provide for forfeiture of offence-related property and the proceeds of crime, including the *Criminal Code*; the *Controlled Drugs and Substances Act*; the *Fisheries Act*, RSC 1985, c F-14; the *Excise Act*, RSC 1985, c E-14; the *Customs Act*, RSC 1985, c 1 (2nd Supp); the *Cannabis Act*, SC 2018, c 16; and the *Immigration and Refugee Protection Act*, SC 2001, c 27. I return to the topic of asset forfeiture in Chapters 42 and 43.

56 Transcript, June 8, 2020, pp 11–14, and 18. See also Exhibit 26, Michael Levi, Peter Reuter, and Terence Halliday, "Can the AML System Be Evaluated Without Better Data?" (2018) 69 *Crime, Law and Social Change,* pp 322–23.

57 Professor Gilmore highlighted that the use of "should" in the Recommendations is to indicate a mandatory requirement, as "should" is defined in the glossary to mean "must": Exhibit 19, Report of Professor William Gilmore, May 2020, p 10, para 12.

58 See Exhibit 4, Appendix E, *FATF Recommendations 2019*, beginning at p 29, for all the interpretive notes.

59 Exhibit 4, Appendix E, *FATF Recommendations 2019*, "General Glossary," pp 115–16.

60 *Criminal Code*, s 462.3(1), "designated offence."

Recommendations 10, 11, and 22

Recommendations 10 and 11 deal with customer due diligence and record-keeping requirements for financial institutions. By virtue of Recommendation 22, these also apply to designated non-financial businesses and professions.

Recommendations 24 and 25

Recommendations 24 and 25 relate to the transparency and beneficial ownership of legal persons and arrangements. Countries should take measures to prevent the misuse of legal persons and arrangements for money laundering. There should also be adequate, accurate, and timely information on beneficial ownership and control that can be obtained by competent authorities.

I discuss beneficial ownership in Chapters 23 and 24.

Recommendations 20, 23, and 29

Recommendations 20 and 23 require financial institutions and designated non-financial businesses and professions to report suspicious transactions to the central financial intelligence unit. The latter is contemplated by Recommendation 29, which states:

> Countries should establish a financial intelligence unit (FIU) that serves as a national centre for the receipt and analysis of: (a) suspicious transaction reports; and (b) other information relevant to money laundering, associated predicate offences and terrorist financing, and for the dissemination of the results of that analysis. The FIU should be able to obtain additional information from reporting entities, and should have access on a timely basis to the financial, administrative, and law enforcement information that it requires to undertake its functions properly.[61]

Recommendation 29 is accompanied by an interpretative note that provides additional guidance with respect to the mandate and operation of the financial intelligence unit. Among other things, it states that:

- The receipt of suspicious transaction reports is a minimum; the unit should also receive and analyze the other documents contemplated by national legislation.[62]
- The unit's analysis should "add value" to the information that it receives and holds. Specifically, it should conduct:
    - **operational analysis** to identify specific targets, follow the trail of activities and transactions, and identify links between targets, possible proceeds, money laundering, predicate offences, or terrorist financing; and

61 Exhibit 4, Appendix E, *FATF Recommendations 2019*, "Operational and Law Enforcement: Financial Intelligence Units," p 24, Recommendation 29.

62 Interpretive note 2 to Recommendation 29, Exhibit 4, Appendix E, *FATF Recommendations 2019*, p 97.

    - **strategic analysis** to identify trends, patterns, threats, and vulnerabilities related to money laundering and terrorist financing and to establish policies and goals for the unit and/or other entities in the regime.[63]

- The unit should "be able to disseminate, spontaneously and upon request, information and the results of its analysis to relevant competent authorities."[64]
- Countries should consider whether it is feasible and useful to require financial institutions and designated non-financial businesses and professions to report all domestic and international currency transactions above a fixed amount.[65]

Recommendation 30

Recommendation 30 relates to the role of a country's law enforcement and investigative authorities. Countries must ensure that these authorities have responsibility for investigating money laundering and terrorist financing. Importantly, these authorities should consider these issues proactively while investigating predicate offences:

> At least in all cases related to major proceeds-generating offences, these designated law enforcement authorities should develop a pro-active parallel financial investigation when pursuing money laundering, associated predicate offences and terrorist financing. This should include cases where the associated predicate offence occurs outside their jurisdictions …

A "parallel investigation" is defined in interpretive note 3 to Recommendation 30 as "conducting a financial investigation alongside, or in the context of, a (traditional) criminal investigation into money laundering, terrorist financing and/or predicate offence(s)." I consider this recommendation to be essential to the effective investigation and disruption of money laundering. Unfortunately, it has become apparent to me throughout the Commission process that, in British Columbia, money laundering offences have not been regularly investigated alongside predicate offences, with the result that money laundering offences are rarely charged in British Columbia and law enforcement agencies have secured very few convictions. I return to this subject in Part XI.

Criticisms of the 40 Recommendations

Although the 40 recommendations have been generally well received, they are not without their critics. In his testimony, Professor Reuter explained that there has been a "heated dialogue" at times at FATF as to whether members must follow all the rules or if they can be judged by their results – in other words, whether members can adopt other

63 Interpretive note 3 to Recommendation 29, ibid.

64 Interpretive note 4 to Recommendation 29, ibid, p 98.

65 Interpretive note 14 to Recommendation 29, ibid, p 99.

measures to achieve the desired results. FATF has typically responded that its rules are mandatory. In Professor Reuter's view, there is some value in allowing for some flexibility, though within limits:

> [I]n an area where nobody knows what works, which is true of AML [anti–money laundering] – no one knows whether they have a good AML system or a bad one – you'd want to encourage experiments rather than lay down a set of arbitrary rules. I think the response to that is, it's too dangerous to allow experiments. There are countries, and certainly are governments which, if given any discretion, would abuse it. I mean, there are kleptocratic regimes that would love nothing better than to run awful AML regimes. There are some that actually, under the guise of conforming with the set FATF rules, do run awful AML regimes, and regimes that go after their enemies and not after their friends, et cetera.
>
> So I understand why they emphasize rules, but I think that they could allow … responsible governments that have demonstrated responsibility, to experiment with different ways of approaching a problem. And I think it's fair to say that FATF has been quite discouraging of that.[66]

I agree that FATF has, at times, been slow to adapt to evolving money laundering techniques and can be seen to impose a singular approach to money laundering when it can often be addressed in multiple ways. However, it is equally clear that FATF is committed to reviewing its recommendations regularly and, as I discuss next, has also been prolific in producing typologies and guidance documents for its members. It is also important to recall that the creation of FATF was a true turning point in the international fight against money laundering and one without precedent. I fully expect that FATF will continue to adapt to new and evolving money laundering threats and continue its important work in rallying its members to do the same.

FATF Typologies and Best Practice Papers

In addition to its 40 recommendations, FATF also produces typologies and best practice papers to guide its members. Typologies are "exercises through which the FATF has sought to chart the sophistication, complexity and professionalism of money laundering options in particular sectors."[67] They address practical concerns about money laundering methods in a particular sector or industry or with particular attributes. They tend to be led by governments with a background or interest in the subject matter, and they often involve contributions from law enforcement and

66 Transcript, June 8, 2020, pp 54–55.

67 Exhibit 19, Report of Professor William Gilmore, May 2020, p 12, para 16.

regulatory and supervisory authorities. Topics have ranged from money laundering in casinos to the sports industry to the diamond trade.[68]

Mr. Lord testified that the creation of typologies is an "entirely collaborative process" in which FATF member countries can work with each other and with FATF-style regional bodies.[69] The drafting process can involve distributing questionnaires, soliciting case examples, and analyzing various sources of data.[70] These typologies are supplemented by guidance and best practice papers, which are "intended to assist national authorities, relevant private sector actors and other interested bodies with the implementation of FATF standards and expectations." FATF also produces reports intended to assist authorities and private sector actors on applying the risk-based approach.[71]

The Mutual Evaluation Process

FATF initially monitored its members' implementation of the recommendations through a self-assessment process – essentially a questionnaire. In recent years, however, it has adopted a process known as the "mutual evaluation process," which is essentially a peer-review system evaluating member countries' adherence to the recommendations:

> FATF mutual evaluations are in-depth country reports analysing the implementation and effectiveness of measures to combat money laundering and terrorist financing. Mutual evaluations are peer reviews, where members of different countries assess another country. A mutual evaluation report provides an in-depth description and analysis of a country's system for preventing criminal abuse of the financial system as well as focused recommendations to the country to further strengthen its system.[72]

The evaluation process involves a form of on-site examination, which is done by an interdisciplinary team of experts drawn from FATF members. In many cases, it also involves members from the regional FATF body.[73]

FATF has completed three rounds of mutual evaluations, and the fourth is currently ongoing.[74] Before the third round of evaluations, FATF developed a new methodology

68 Evidence of W. Gilmore, Transcript, June 3, 2020, p 30. See also Exhibit 4, Overview Report: FATF, Appendices O to XX, for reports by FATF on money laundering in various settings, including casinos, real estate, securities, currency exchange, the illicit tobacco trade, the football industry, the diamond industry, and many others.

69 Transcript, May 28, 2020, p 51.

70 Ibid, pp 51–53.

71 Exhibit 19, Report of Professor William Gilmore, May 2020, p 12, para 16.

72 Financial Action Task Force, "Mutual Evaluations," online: https://www.fatf-gafi.org/publications/mutualevaluations/documents/more-about-mutual-evaluations.html.

73 Evidence of W. Gilmore, Transcript, June 3, 2020, pp 32, 48; Exhibit 19, Report of Professor William Gilmore, May 2020, pp 12–13, para 17.

74 Canada was evaluated early in the fourth round. I discuss its evaluation below.

with the intention of producing reports that are more objective and accurate, and easier to compare.[75] This methodology involves producing two reports:

- a **technical compliance assessment**, which considers whether the member has formally complied with each recommendation and assigns a rating ranging from "compliant" (no shortcomings) to "non-compliant" (major shortcomings); and
- an **effectiveness assessment**, which considers how effectively the standards are being implemented.[76]

Professor Gilmore explained the difference between these as follows:

> [T]he basis for both of these assessments is somewhat different. The technical compliance assessment is, in essence, largely a technical question, to what extent have these requirements been met, and only thereafter, to what extent, if at all, [are] some of these negative outcomes within the criteria of an individual technical compliance recommendation [important in terms of context and materiality, which] I suppose, [goes] to judgment rather than technical assessment.
>
> The effectiveness considerations are quite different. The 11 immediate outcomes identify what the FATF regards as the key components of an effectively operating AML system … [W]ithin the methodology the evaluators are required to look at a range of core issues … for each of those immediate outcomes and to apply their background experience and judgment to an assessment of the extent to which the country subject to assessment meets the expectations set out in the methodology for that particular immediate outcome. So there is more of a subjective judgment element inherent in the effectiveness assessment component.[77]

In theory, the two reports are meant to provide an "integrated view" of the jurisdiction. In practice, however, it appears that the FATF Plenary[78] affords a greater

75 Exhibit 19, Report of Professor William Gilmore, May 2020, p 13, para 19.

76 Ibid, p 14, para 20; Evidence of W. Gilmore, Transcript, June 3, 2020, p 39. As Mr. Lord explains, with the addition of the effectiveness assessment, "you're talking about not only the extent to which your money laundering law, for example, complies with the recommendations, but the extent to which you actually apply it in practice, so whether you are actually prosecuting people for that type of thing": Transcript, May 28, 2020, p 47.

77 Transcript, June 4, 2020, pp 12–13.

78 The FATF Plenary consists of member jurisdictions and organizations. It is the decision-making body of FATF, and its decisions are made by consensus. It is responsible for matters such as appointing the president, vice-president, and steering group; approving FATF's work program and budget; adopting standards, guidance, and reports prepared by FATF; deciding on membership, status of FATF-style regional bodies, and observer status; and establishing working groups as necessary. All members have the right to attend plenary meetings, which happen at least three times a year: see FATF's open-ended mandate approved April 12, 2019, at paras 18–25, available online: https://www.fatf-gafi.org/media/fatf/content/images/FATF-Ministerial-Declaration-Mandate.pdf.

focus to the effectiveness review.[79] Professor Gilmore explained in his testimony that he was not keen on the shift to rating compliance on a scale (from highly compliant to non-compliant), noting that this has led to members focusing, especially in plenary meetings, on the ratings that were received rather than more productive discussions of how the country got into its good or poor position and how to move forward.[80]

A member that receives a poor technical compliance score on a particular recommendation will likely receive a low effectiveness score as well; however, the reverse is not necessarily true. For example, a member may criminalize money laundering (addressing Recommendation 3), "tick all the boxes" required by that recommendation, and therefore receive a good technical compliance rating. However, if the jurisdiction does not, in practice, investigate money laundering offences because it does not prosecute potential offenders and secures no convictions, then the effectiveness rating would likely be low.[81]

The effectiveness review involves looking at 11 **immediate outcomes**, "each of which is said to represent one of the key goals which an effective anti–money laundering scheme should achieve."[82] Members can receive one of four "grades" that range from "high level of effectiveness" to "low level of effectiveness."[83] The immediate outcomes consider questions such as money laundering risk, policy, and coordination (immediate outcome 1); international co-operation (2); supervision (3); and preventive measures (4).[84]

Depending on the outcome of a mutual evaluation, members are usually placed on either the "regular" or "enhanced" follow-up stream.[85] Regular follow-up is the "default monitoring mechanism for all countries." It requires the country to report back to the Plenary after three years from the adoption of the mutual evaluation. Meanwhile, enhanced follow-up applies to members with "significant deficiencies (for technical compliance or effectiveness) in their [anti–money laundering / combating the financing of terrorism] systems" and requires more frequent reporting to the Plenary, as well as possible other compliance measures.[86]

The fourth round of evaluations introduced follow-up assessments for the first time. Countries under both the regular and enhanced review process receive a follow-up assessment after five years.[87] Follow-up assessments were introduced in recognition of the fact that countries can suffer reputational damage from their mutual evaluations

79 Exhibit 19, Report of Professor William Gilmore, May 2020, p 16, para 24.

80 Transcript, June 3, 2020, pp 35–36.

81 Evidence of W. Gilmore, Transcript, June 4, 2020, pp 13–14.

82 Exhibit 19, Report of Professor William Gilmore, May 2020, pp 14–15, para 21.

83 Ibid, p 15, para 22.

84 Evidence of W. Gilmore, Transcript, June 3, 2020, p 42.

85 Exhibit 19, Report of Professor William Gilmore, May 2020, p 16, para 26.

86 Exhibit 4, Overview Report: FATF, Appendix G, *Procedures for the FATF Fourth Round of AML/CFT Mutual Evaluations* (Paris: 2019), paras 84, 88–91.

87 Ibid, para 85.

being posted on the FATF website and from the lengthy gap between evaluations.[88] Failure to make satisfactory progress in addressing deficiencies can lead to a suspension or termination of membership.[89]

Countries can also request a "re-rating" for technical compliance with recommendations for which they received a "non-compliant" or "partially compliant" rating before or after the follow-up assessment. FATF's expectation is that countries will have addressed most if not all technical compliance deficiencies by the end of the third year and the effectiveness shortcomings by the time of the follow-up assessment.[90]

FATF also has a separate process for countries it considers to suffer from strategic anti–money laundering or terrorist financing system deficiencies. These countries are subject to enhanced review by the International Co-operation Review Group.[91] There are several routes through which a country can become subject to that group's review, the most common being particularly poor ratings in either the technical compliance or effectiveness assessments.[92] Such countries are also publicly placed on "grey" or "black" lists: the former includes countries who are actively working with FATF to address deficiencies, while the latter is used to advise members that they should apply enhanced due diligence to transactions in which listed countries are involved and introduce other specified countermeasures.[93] At the time of writing, 23 jurisdictions were on the grey list,[94] while two (North Korea and Iran) were on the black list.[95]

Critiques of the Mutual Evaluation Process

Although the mutual evaluation process has great potential to ensure that countries continually evaluate their anti–money laundering approaches, stay up to date on developing money laundering techniques, and implement new measures to address new risks, it has been subject to some important critiques.

To begin with, the evaluations are not always done by expert assessors. Instead, they are completed by individuals who may not be experts in such risk assessments but are trained in the methodology. As a result, there is "a considerable variation in the backgrounds and strengths of assessment teams and not all variations or weaknesses in

88 Exhibit 19, Report of Professor William Gilmore, May 2020, pp 16–17, para 27.

89 Ibid, p 22, para 40.

90 Exhibit 4, Overview Report: FATF, Appendix G, *Procedures for the FATF Fourth Round of AML/CFT Mutual Evaluations* (Paris: 2019), para 86.

91 Exhibit 19, Report of Professor William Gilmore, May 2020, p 17, para 28.

92 Ibid, para 29.

93 Ibid.

94 Financial Action Task Force, "Jurisdictions under Increased Monitoring – March 2022," online: http://www.fatf-gafi.org/publications/high-risk-and-other-monitored-jurisdictions/documents/increased-monitoring-march-2022.html.

95 Financial Action Task Force, "High-Risk Jurisdictions subject to a Call for Action – 21 February 2020," online: https://www.fatf-gafi.org/publications/high-risk-and-other-monitored-jurisdictions/documents/call-for-action-february-2020.html.

the resulting reports can or will be addressed through the quality control mechanisms which have been put in place."[96]

Professor Reuter adds that many assessors do not have expertise in crime statistics and therefore use them inexpertly. For example, they might compare the number of drug offences with robbery offences, without accounting for the reality that whereas there is every incentive to report robberies, nobody reports drug offences, and as such, the drug statistics come almost exclusively from arrests.[97]

Messrs. Levi, Reuter, and Halliday also have significant concerns about the data used in mutual evaluations. In their article entitled "Can the AML System Be Evaluated Without Better Data?" they note that there are significant difficulties in obtaining useful data:

> For AML, relevant quantitative data on serious crimes for gain is rare, though administrative and criminal justice data on AML processing have improved over time. The ideal evaluation would take some measure of the target activity, such as the total amount of money laundered, and estimate how much that has been reduced by the imposition of AML controls. However, as frequently repeated in [mutual evaluation reports] and other documents, there are no credible estimates of the total amount of money laundered, either globally or nationally … Nor are there any clear international or even national measures of most of the harms that AML aims to avert, such as frauds or drugs/human trafficking. The ultimate targets of FATF itself, as articulated in its 2012 Goals and Objectives[,] appear to be to strengthen financial sector integrity and to contribute to safety and security (i.e. to reduce the harms from crime and terrorism), but these are goals on which progress is hard to assess …[98]

Professor Reuter also noted a related problem in his testimony. He explained that, in the third round of mutual evaluations, predicate offences were not dealt with consistently. Evaluators took whatever data was available, such that they could be comparing homicide statistics in one country with cannabis-growing offences in another. Similarly, they failed to consider that some countries have better reporting rates than others; for example, a country like Germany that does very well in reporting may falsely appear to have a higher crime rate than a developing country with worse reporting records.[99]

Mutual evaluations have also been criticized for failing to take account of the fact that countries can use different approaches to address a problem. Professor Reuter

96 Exhibit 19, Report of Professor William Gilmore, May 2020, p 24, para 45.

97 Transcript, June 5, 2020, p 65.

98 Exhibit 26, Michael Levi, Peter Reuter, and Terence Halliday, "Can the AML System Be Evaluated Without Better Data?" (2018) 69 *Crime, Law and Social Change,* p 310.

99 Transcript, June 5, 2020, pp 64–65; see also Exhibit 26, Michael Levi, Peter Reuter, and Terence Halliday, "Can the AML System Be Evaluated Without Better Data?" (2018) 69 *Crime, Law and Social Change,* pp 315–17.

provided an example relating to suspicious transaction reporting. He noted that some countries, such as Germany and Switzerland, require financial institutions to do a preliminary investigation before submitting their suspicious transaction reports. This practice led to Germany being criticized by FATF for having far fewer reports (around 7,000) than the United Kingdom (around 200,000), when it simply used a different approach.[100] Professor Levi similarly noted that evaluators should be aware of the information to which financial intelligence units have access. Some are police intelligence units and have access to a fair bit of criminal intelligence information; others are civilian units and may not have access to any criminal intelligence, although they may have access to commercial data.[101]

Professor Gilmore states that there have been some critiques about the available effectiveness ratings. Specifically, the ratings and their descriptors have been criticized for being "inadequate for the range and complexity of circumstances which are encountered."[102] He also explained that the role of plenary bodies in the ultimate rating might be open to criticism:

> One [criticism] could also go to issues surrounding the role of the plenary bodies in the ultimate determination of ratings in cases where the change, even a minor change in one rating on effectiveness, can have a profound impact on the subsequent treatment of that jurisdiction in follow-up and related kinds of terms.
>
> And again, impressionistically, a case could be made but probably couldn't be proved, that on occasion, voting patterns in these bodies on some of those particularly problematic issues may not have been entirely influenced by technical considerations. The sort of Eurovision Song Contest group. But, so there is a space for non-technical considerations to come into play in any such body. I'm not saying it happens all the time. I'm not saying it happens systematically. But one is sometimes left with a feeling that broadening the considerations beyond the technical may be the only way of fully understanding the decision which has just been made.[103]

On the whole, Professor Gilmore suggests that mutual evaluations should be approached with some caution, as they are not perfect. He notes, however, that the continued use of the evaluations by countries suggests that they find them to be a credible snapshot of the country's position at a particular time. He also believes that the efforts to improve the quality and establish consistent processes are promising, even though they have not eliminated the issues.[104]

100 Evidence of P. Reuter, Transcript, June 5, 2020, pp 57–58. See also Exhibit 26, Michael Levi, Peter Reuter, and Terence Halliday, "Can the AML System Be Evaluated Without Better Data?" (2018) 69 *Crime, Law and Social Change,* pp 319–20.

101 Transcript, June 5, 2020, p 59.

102 Exhibit 19, Report of Professor William Gilmore, May 2020, pp 24–25, para 45.

103 Transcript, June 3, 2020, p 53.

104 Ibid, pp 53–54.

I agree with Professor Gilmore that mutual evaluations should be approached with caution but not completely discounted. Although it is clear that there is much room for improvement and refinement in the mutual evaluation process, it is important that countries have an incentive to continually evaluate and improve their anti–money laundering measures.

Canada's Mutual Evaluations

Canada's first evaluation was done in 1992–93. In that evaluation, Canada was held to be substantially in compliance with the recommendations and did especially well on criminalizing money laundering, introducing confiscation and forfeiture legislation, international co-operation, and the introduction of preventive measures.[105]

Canada's second evaluation was similarly positive. It was found to be substantially compliant with almost all the recommendations and was praised for the scope and implementation of penal legislation and international co-operation. However, it received some criticisms with respect to its suspicious transaction reporting regime, the scope of coverage for non-bank financial institutions, and measures relating to legal persons and beneficial owners.[106]

The third round of evaluations was based on heavily modified standards from 2003 and the nine special recommendations. It also involved, as noted above, the new ratings ranging from "compliant" to "non-compliant." Canada was found to be largely compliant with most standards; however, its performance in 19 of 49 recommendations was found to be suboptimal. Particular concerns were raised about customer due diligence[107] and the role of the financial intelligence unit[108] – in this country, the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC). However, the methodology that existed at the time did not allow the assessors to take account of the fact that several measures had been enacted but had not yet come into force.[109]

FATF conducts mutual evaluations in cycles – that is, a certain number of countries per year.[110] Canada's fourth round evaluation came early in the cycle, which led to it

105 Evidence of W. Gilmore, Transcript, June 3, 2020, p 33.

106 Ibid, pp 33–34.

107 Among other issues, the assessors expressed concerns that customer due diligence requirements did not extend to all financial institutions; that there was no requirement to conduct due diligence when there was only a suspicion of money laundering or doubts about the veracity or accuracy of documentation; and that there were no requirements for ongoing due diligence throughout the business relationship: Exhibit 4, Overview Report: FATF, Appendix L, *Third Mutual Evaluation on Anti–Money Laundering and Combating the Financing of Terrorism: Canada* (Paris: 2008), pp 142–43. Further, the assessors were concerned that not all reporting entities (including lawyers) were subject to customer due diligence: ibid, p 224.

108 Among other concerns, the assessors noted that FINTRAC has insufficient access to intelligence information from administrative and other authorities (including CRA, CSIS, and Customs), that it had insufficient staff, and that, so far, very few convictions had resulted from FINTRAC's disclosures to law enforcement: ibid, p 90.

109 Evidence of W. Gilmore, Transcript, June 3, 2020, pp 37–38.

110 Exhibit 4, Overview Report: FATF, Appendix G, FATF, *Procedures for the FATF Fourth Round of AML/CFT Mutual Evaluations* (Paris: 2019), para 5.

being evaluated against the 40 recommendations as updated in February 2012 rather than the more recent amendments. The evaluation was discussed and adopted by the FATF Plenary[111] in June 2016.[112]

Professor Gilmore explained that Canada's technical compliance scores in its fourth evaluation were mixed. Some areas of strength included anti–money laundering and terrorist financing policies and coordination (Recommendations 1 and 2), money laundering and confiscation legislation (3 and 4), and international co-operation (36 to 40).[113] However, it received "non-compliant" and "partially compliant" ratings in 11 areas, including "preventive measures" (Recommendations 9 to 23), "powers and responsibilities of competent authorities and other institutional measures" (26 to 35), and "transparency and beneficial ownership of legal persons and arrangements" (24 and 25).[114] Although there were some improvements from 2008, all but one recommendation that received a non-compliant or partially compliant rating in 2016 were also areas of weakness in 2008.[115]

Although Canada improved in suspicious transaction reporting, moving from "low compliance" in 2008 to "partially compliant" in 2016, this is one of the key recommendations in which a negative rating leads to enhanced follow-up.[116] The report noted a "[m]inor deficiency that financial leasing, finance, and factoring companies are not required to report suspicious activities to FINTRAC" and a "lack of a prompt timeframe for making reports."[117]

On effectiveness, Canada received six out of 11 ratings that were "moderate" or "low." These ratings were with respect to preventive measures (i.e., the recommendations relating to reporting entities and their obligations); transparency of legal persons and arrangements (measures to determine beneficial ownership); financial intelligence (the use of financial information by FINTRAC and law enforcement); money laundering investigation and prosecution; confiscation of proceeds of crime; and financial sanctions related to proliferation.[118] This result was likely disappointing to officials, in Professor Gilmore's view, as it was just shy of requiring enhanced follow-up on

111 The mutual evaluation process is lengthy, requiring an initial stage where the evaluated country provides information to the evaluators, who conduct a "desk review" based on that information. Later, the evaluators conduct on-site visits in the country, involving further information gathering and meetings. The mutual evaluation team then prepares a report, which is ultimately discussed and adopted at a plenary meeting: ibid, app 1. See also Evidence of S. Lord, Transcript, May 28, 2020, pp 50–51.

112 Exhibit 19, Report of Professor William Gilmore, May 2020, p 25, para 47.

113 Ibid, p 27, para 51.

114 Ibid, pp 27 and 29 at paras 52 and 57.

115 Ibid, pp 27–28, paras 54–55. I am mindful of Professor Gilmore's caution about comparing the 2008 and 2016 reports, given that the FATF standards were both restructured and amended in 2012 and that the current evaluations are now split into technical and effectiveness evaluations. I agree with him, however, that there is still value in comparing the results: ibid, p 27 at para 53.

116 Exhibit 19, Report of Professor William Gilmore, May 2020, pp 28–29, paras 56–57.

117 Exhibit 4, Overview Report: FATF, Appendix N, *Anti–Money Laundering and Counter-Terrorist Financing Measures, Fourth Round Mutual Evaluation Report: Canada* (Paris: 2016), p 206.

118 Exhibit 19, Report of Professor William Gilmore, May 2020, p 31, app.

effectiveness (which occurs with seven low or moderate ratings).[119] Canada received five ratings indicating a "substantial level of effectiveness," demonstrating that the immediate outcome has been achieved "to a large extent" and that "moderate" improvements are needed.[120] It received no "high level of effectiveness" ratings. However, in Professor Gilmore's estimation, a rating of substantial effectiveness is "clearly above the line, and impressionistically, is the positive rating most frequently given"; he did not find the lack of high effectiveness ratings surprising.[121]

Professor Gilmore states that the "single most important negative feature" of the report was Canada's failure to mitigate risks relating to the legal profession following the Supreme Court of Canada's decision in *Canada (Attorney General) v Federation of Law Societies of Canada*, 2015 SCC 7, which held that several provisions of the *PCMLTFA* were unconstitutional insofar as they applied to lawyers.[122] The report explained:

> 50. The legal profession in Canada is especially vulnerable to misuse for ML/TF [money laundering / terrorist financing] risks, notably due to its involvement in activities exposed to a high ML/TF risk (e.g. real estate transactions, creating legal persons and arrangements, or operation of trust accounts on behalf of clients). Following a 13 February 2015 Supreme Court of Canada ruling legal counsels, legal firms and Quebec notaries are not required to implement [anti–money laundering / counterterrorist financing] measures, which, in light of the risks, raises serious concerns.[123]

As Professor Gilmore puts it, the weaknesses relating to legal professionals had a "cascading effect" on other parts of the evaluation. In particular, it had effects on ratings for supervision and preventive measures.[124] I address the topic of lawyers and the *PCMLTFA* in detail in Chapter 27.

Another notable area in which Canada received a low rating was the investigation and prosecution of money laundering offences. The report stated:

> 21. LEAs [Law Enforcement Agencies] have adequate powers and cooperation mechanisms to undertake large and complex financial investigations. This has notably resulted in some high-profile successes in neutralizing ML [money laundering] networks and syndicates. However, current efforts are mainly aimed at the predicate offenses, with inadequate focus on the main ML risks other than those emanating

119 Transcript, June 4, 2020, p 12.

120 Exhibit 19, Report of Professor William Gilmore, May 2020, p 31, para 61.

121 Transcript, June 4, 2020, p 11.

122 Exhibit 19, Report of Professor William Gilmore, May 2020, p 34, para 66.

123 Exhibit 4, Overview Report: FATF, Appendix N, *Anti–Money Laundering and Counter-Terrorist Financing Measures, Fourth Round Mutual Evaluation Report: Canada* (Paris: 2016), p 15.

124 Exhibit 19, Report of Professor William Gilmore, May 2020, pp 34–35, para 67; Transcript, June 4, 2020, p 16. In addition to the critiques in the 2016 mutual evaluation, Canada has received significant criticism from other sources for a perceived "gap" in its money laundering regime as it applies to legal professionals. I return to this topic in Chapter 27.

> from drug offenses, i.e. standalone ML, third-party ML and laundering of proceeds generated abroad. Some provinces, such as Quebec, appear more effective in this respect. LEAs' prioritization processes are not fully in line with the findings of the NRA [national risk assessment] and LEAs generally suffer from insufficient resources and expertise to pursue complex ML cases. In addition, legal persons are not effectively pursued and sanctioned for ML, despite their misuse having been identified in the NRA as a common ML typology. Criminal sanctions applied are not sufficiently dissuasive. The majority of natural persons convicted for ML are sentenced in the lower range of one month to two years of imprisonment, even in cases involving professional money launderers.[125]

I agree with FATF's view that there has been a dearth of law enforcement action with respect to money laundering in British Columbia and return to this topic in Part XI.

On the whole, Professor Gilmore characterizes the evaluation as a "suboptimal outcome" that was likely a "cause of disappointment both within the Canadian delegation and among the wider FATF membership" given that Canada was an original member of FATF.[126] Some of Canada's results led to a requirement for enhanced follow-up. However, Professor Gilmore notes that enhanced follow-up is not unusual, especially given the new evaluation system.[127]

The United States had a similar result to Canada, with 10 suboptimal technical compliance ratings (compared to 11 for Canada) and is also subject to enhanced follow-up.[128] At the same time, the United States performed better in its effectiveness evaluation than Canada did, and the United Kingdom and Italy had outcomes that were "substantially better" than Canada's on both technical compliance and effectiveness.[129]

Canada received its first regular follow-up report and technical compliance re-rating in October 2021.[130] The evaluators concluded that Canada had made progress to address some technical compliance deficiencies identified in the fourth mutual evaluation report. Among other things, Canada saw improvements in relation to Recommendation 20, which deals with the promptness of suspicious transaction reporting (moving from "partially compliant" to "largely compliant"),[131]

125 Exhibit 4, Overview Report: FATF, Appendix N, *Anti–Money Laundering and Counter-Terrorist Financing Measures, Fourth Round Mutual Evaluation Report: Canada* (Paris: 2016), pp 5–6.

126 Exhibit 19, Report of Professor William Gilmore, May 2020, p 29, para 57.

127 Transcript, June 4, 2020, p 6.

128 Ibid, p 7.

129 Ibid, pp 6–7.

130 Exhibit 1061, FATF, *Anti–Money Laundering and Counter-Terrorist Financing Measures, Canada, 1st Regular Follow-up Report and Technical Compliance Re-Rating* (October 2021).

131 Ibid, p 3.

and Recommendation 22, which deals with customer due diligence measures for designated non-financial businesses and professions (moving from "non-compliant" to "partially compliant").[132] However, the evaluators again noted the fact that lawyers and Quebec notaries are not covered by the *PCMLTFA* regime, which "affects the overall outcome."[133]

The re-rating also noted with approval that Canada had brought virtual asset service providers into the *PCMLTFA* regime and had imposed obligations on other reporting entities that deal with virtual assets. Canada was accordingly re-rated as "largely compliant" with Recommendation 15.[134] I discuss the virtual asset regime further in Chapter 35.

Other International Efforts to Address Money Laundering

It is important to recognize that FATF is not the sole forum in which money laundering is addressed on the international stage. FINTRAC is a member of the Egmont Group of Financial Intelligence Units, which comprises financial intelligence units from 164 jurisdictions and seeks to foster communication and improve the exchange of information, intelligence, and expertise on money laundering and terrorist financing.[135]

Similarly, the Five Eyes Law Enforcement Group comprises the main law enforcement bodies from the "Five Eyes" countries – Canada, the USA, the United Kingdom, Australia, and New Zealand. As Mr. Lord explained, "[e]ssentially it's a forum whereby the practitioners from those groups can come together, share information about financial crime, talk about ways to tackle it, and … leverage each other's capabilities in tackling transnational problems."[136]

Finally, it is important to note that international non-profits also take an interest in anti–money laundering initiatives. For example, Transparency International advocates for legal and policy reform on issues such as whistle-blower protection, public procurement, corporate disclosure, and beneficial ownership, with an overall mandate targeting anti-corruption.[137]

The presence of these other entities on the international stage is encouraging and reinforces the importance of international anti–money laundering initiatives.

132 Ibid.

133 Ibid.

134 Ibid, p 5.

135 Opening statement of the Government of Canada, Transcript, February 24, 2020, p 50.

136 Transcript, May 28, 2020, p 7.

137 Opening statement of Mr. J. Cohen (Transparency International, informally known as the "End Snow Washing" Coalition), Transcript, February 26, 2020, pp 2–3.

Conclusion

The international anti–money laundering regime has heavily shaped and influenced the Canadian regime – and continues to do so. The international regime has developed significantly since its beginnings in the 1980s. The international community now appreciates that money laundering can occur through a myriad of offences (beyond drug trafficking) and that it is crucial to stay current on new and emerging techniques.

The Vienna Convention and the creation of FATF were watershed moments in the international fight against money laundering. Although the task force has not been free of criticism, notably with respect to its mutual evaluation process, it remains an important source of guidance for countries in developing their anti–money laundering regimes and for holding countries accountable for their actions to combat money laundering. Other international actors apart from FATF also contribute to this global network.

Although a strong international anti–money laundering regime is important, it is not a substitute for dedicated resources and efforts to combat money laundering at the local level. As I elaborate throughout this Report, a strong anti–money laundering regime requires efforts from both the federal government – given its jurisdiction over criminal law and the inherently transnational and international aspects of money laundering – and the provincial governments. Both levels of government should continue to draw inspiration from the international regime as they refine their approaches to anti–money laundering regulation.

Chapter 7
The Canadian Anti–Money Laundering Regime

Over the past two decades, the federal government has enacted increasingly complex legislation aimed at addressing money laundering activity. The *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, SC 2000, c 17 (*PCMLTFA*) is the centrepiece of the federal anti–money laundering regime. Broadly speaking, it creates mandatory record-keeping and reporting requirements for financial institutions and other non-financial businesses and professions and establishes a financial intelligence unit – the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC) – which is responsible for receiving and analyzing that information.[1] However, a number of legitimate questions have been raised about the effectiveness of the federal regime. One highly qualified international expert suggested it is "deficient," "unable to demonstrate an effective impact relative to the likely scale of economic crime" and "very costly to implement."[2]

In what follows, I review the key components of the federal anti–money laundering regime, including the *PCMLTFA* and associated Regulations. This review is detail-oriented, but an understanding of the federal regime is, in my view, necessary to understand how money laundering activity in British Columbia has, to date, been addressed. Having described the federal regime, I then discuss some of the criticisms of that regime. While I appreciate that constitutional constraints

1 Note, however, that there are other relevant statutes that form part of the federal anti–money laundering regime, for example, among others, the *Criminal Code*, RSC 1985, c C-46; the *Privacy Act*, RSC 1985, c P-21; the *Canada Business Corporations Act*, RSC, 1985, c C-44; the *Immigration and Refugee Protection Act*, SC 2001, c 27; the *Income Tax Act*, RSC 1985, c 1 (5th Supp); and the *Seized Property Management Act*, SC 1993, c 37. For a full review of the federal anti–money laundering regime, including the various statutes and agencies making up that regime, see Exhibit 1019, Affidavit #1 of Lesley Soper, affirmed May 11, 2021, exhibit B, pp 8–15.

2 Exhibit 411, Nicholas Maxwell, Future of Financial Intelligence Sharing Briefing Paper – Canada in Context (January 5, 2021, updated December 11, 2021), p 12.

prevent me from making recommendations with respect to the internal management and administration of federal entities, it is important to understand the gaps and weaknesses in the federal regime in order to make effective recommendations to the Province concerning the measures that must be taken to address money laundering in British Columbia.

The *PCMLTFA*

The *PCMLTFA* was enacted on June 29, 2000, to deter and detect money laundering and, later, terrorist financing activities. The stated objectives of that legislation are:

> a) to implement specific measures to detect and deter money laundering and the financing of terrorist activities, and to facilitate the investigation and prosecution of money laundering offences and terrorist activity financing offences[;]
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> ...
>
> b) to respond to the threat posed by organized crime by providing law enforcement officials with the information they need to deprive criminals of the proceeds of their criminal activities, while ensuring that appropriate safeguards are put in place to protect the privacy of persons with respect to personal information about themselves;
>
> c) to assist in fulfilling Canada's international commitments to participate in the fight against transnational crime, particularly money laundering, and the fight against terrorist activity; and
>
> d) to enhance Canada's capacity to take targeted measures to protect its financial system and to facilitate Canada's efforts to mitigate the risk that its financial system could be used as a vehicle for money laundering and the financing of terrorist activities.[3]

The *PCMLTFA* is divided into six parts. It is supplemented by various regulations made by the Governor in Council, which include the *Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations*, SOR/2002-184 (*PCMLTF Regulations*); the *Cross-Border Currency and Monetary Instruments Reporting Regulations*, SOR/2002-412; the *Proceeds of Crime (Money Laundering) and Terrorist Financing Administrative Monetary Penalties Regulations*, SOR/2007-292; the *Proceeds of Crime (Money Laundering) and Terrorist Financing Registration Regulations*, SOR/2007-121; and the *Proceeds of Crime (Money Laundering) and Terrorist Financing Suspicious Transaction Reporting Regulations*, SOR/2001-317.

3 *PCMLTFA*, s 3.

Record-Keeping, Client Identification, and Reporting

Part 1 of the *PCMLTFA* creates client identification, record-keeping, and reporting requirements for various businesses and professions that are susceptible to money laundering. These businesses and professions are often referred to as "reporting entities" and include:

- financial institutions such as banks, savings and credit unions, and trust and loan companies;
- life insurance companies, brokers, and agents;
- securities dealers;[4]
- money services businesses;[5]
- accountants and accounting firms;
- the provincial government or provincial government entity responsible for the conduct and management of lottery schemes within the province;[6]
- notary corporations and notaries public;
- real estate brokers or sales representatives;
- real estate developers; and
- dealers in precious metals, stones, and jewellery.

While the precise obligations imposed by the *PCMLTFA* vary from industry to industry, there are three main duties imposed by that legislation.[7] First, reporting entities are required to take certain measures to verify the identity of their clients before opening an account or otherwise processing a financial transaction on their behalf. The primary purpose of this requirement is to ensure that those seeking to launder illicit funds cannot open an account in a fictitious name in order to avoid scrutiny. Typically, reporting entities will confirm the identify of a client by examining government-issued photo identification; however, there are many other methods of verification.[8]

4 Securities dealers are defined as persons and entities authorized to engage in the business of dealing in securities or any other financial instruments, or to provide portfolio management or investment advising services, other than persons who act exclusively on behalf of such an authorized person or entity.

5 Money services businesses are defined as persons and entities that are engaged in the business of providing at least one of the following services: (a) foreign exchange dealing; (b) remitting funds or transmitting funds by any means or through any person, entity, or electronic funds transfer network; (c) issuing or redeeming money orders, traveller's cheques, or other similar negotiable instruments, except for cheques payable to a named person or entity; (d) dealing in virtual currencies; or (e) any other prescribed service.

6 Section 7 of the *Gaming Control Act*, SBC 2002, c 14, provides that the BC Lottery Corporation is responsible for the conduct and management of gaming in British Columbia.

7 The *PCMLTF Regulations* set out the special measures that must be taken in section 157. Part 1 of the *PCMLTFA* also contains a number of specific provisions aimed at certain sectors, such as the requirement that money services businesses register with FINTRAC (s 11.1).

8 Section 105 of the *PCMLTF Regulations* sets out the various ways a reporting entity can verify a person's identity.

Second, the *PCMLTFA* requires reporting entities to maintain certain records relating to the services it provides to its customers. For example, the *PCMLTF Regulations* require financial institutions such as banks and credit unions to maintain detailed records concerning the accounts they open and the transactions conducted through those accounts. Such records include:

- signature cards;
- a record of each account holder and every other person who is authorized to give instructions in respect of the account – containing their name, address, date of birth, and the nature of their business or occupation;
- if the account holder is a corporation, a copy of the part of its official corporate records that contain any provision relating to the power to bind the corporation in respect of the account or transaction;
- a record that sets out the intended use of the account;
- a record of every application in respect of the account;
- every operating agreement that is created or received in respect of the account;
- a deposit slip in respect of every deposit made into the account;
- with one exception, every debit and credit memo that is created or received in respect of the account;
- a copy of every statement sent to the account holder;
- with certain exceptions, every cleared cheque that is drawn on, and a copy of every cleared cheque that is deposited into the account;
- a foreign currency exchange transaction ticket in respect of every foreign exchange currency transaction;
- records relating to the issuance of traveller's cheques, money orders, or similar negotiable instruments of $3,000 or more – including the person's name, date of birth, address, and occupation, the amount, and whether the funds are received or redeemed in virtual currency (among other things);
- records relating to international electronic funds transfers of $1,000 or more – including the person's name, date of birth, address, occupation, the amount of the transfer, and the name and address of each beneficiary (among other things);
- records relating to the transfer of virtual currency in an amount of $1,000 or more – including the person's name, date of birth, address, and occupation, the amount of the transfer, and the transaction identifier.[9]

9 *PCMLTF Regulations,* s 12. Note that the list set out above is intended to provide an overview of the types of record-keeping requirements imposed by the *PCMLTFA* and that the actual record-keeping requirements are considerably more detailed.

As part of their record-keeping and client identification requirements, reporting entities are required to determine whether they are dealing with a politically exposed person, the head of an international organization, or a family member of or a person closely associated with a politically exposed person or head of an international organization.[10] Where a reporting entity determines that it is dealing with such a person, it is required to take enhanced measures to mitigate the attendant money laundering risk.[11]

Third, the *PCMLTFA* requires that reporting entities file reports with FINTRAC in certain prescribed circumstances. These reports include:

- **suspicious transaction reports**, which must be filed where there are reasonable grounds to suspect that a transaction is related to the commission or the attempted commission of a money laundering or terrorist financing offence;[12]
- **large cash transaction reports**, which must be filed when a reporting entity receives an amount of $10,000 or more in cash in the course of a single transaction, or when it receives two or more cash amounts totaling $10,000 or more in a 24-hour period;[13]
- **electronic funds transfer reports**, which must be filed when certain reporting entities, such as financial institutions and money services businesses, process an international electronic funds transfer of $10,000 or more in the course of a single transaction or in two or more transactions in a 24-hour period;[14] and
- **casino disbursement reports**, which must be filed when a casino makes a disbursement of $10,000 or more in the course of a single transaction or in two or more transactions within a 24-hour period.[15]

In order to ensure that they comply with their obligations under these provisions, every reporting entity is required to establish and implement a compliance program. The program must include "the development and application of policies and procedures for the person or entity to assess, in the course of their activities, the risk of a money laundering or terrorist activity financing offence."[16]

Ministerial Directives

The *PCMLTFA* also gives the federal Minister of Finance the authority to issue a directive to any reporting entity requiring them to take "any measure specified in the directive with respect to any financial transaction … originating from or bound for any foreign

10 *PCMLTFA*, s 9.3.

11 *PCMLTF Regulations*, ss 121–23, 157. Politically exposed persons are discussed in Chapter 3.

12 *PCMLTFA*, s 7; Exhibit 733, *FINTRAC Annual Report 2019–20*, p 39.

13 *PCMLTFA*, s 9; Exhibit 733, *FINTRAC Annual Report 2019–20*, p 39.

14 *PCMLTFA*, s 9; Exhibit 733, *FINTRAC Annual Report 2019–20*, p 39.

15 *PCMLTFA*, s 9; Exhibit 733, *FINTRAC Annual Report 2019–20*, p 39.

16 *PCMLTFA*, s 9.6(2).

state or entity" where there are concerns about the effectiveness or adequacy of the foreign state's (or entity's) anti–money laundering or anti–terrorist financing measures.[17] The Minister of Finance may only issue a directive in certain circumstances, including where he or she is of the opinion "there could be an adverse impact on the integrity of the Canadian financial system or a reputational risk to that system."[18] The measures specified in such a directive may include:

- the verification of the identity of any person or entity;
- the exercise of customer due diligence, including ascertaining the source of funds in any financial transaction, the purpose of any financial transaction, or the beneficial ownership or control of any entity;
- the monitoring of any financial transaction or account;
- the keeping of any records;
- the reporting of any financial transaction to FINTRAC; and
- compliance with the client identification, record-keeping, and reporting requirements in Part 1 of the *PCMLTFA*.[19]

Part 1.1 also allows the Governor in Council, on the recommendation of the Minister of Finance, to make regulations that limit or prohibit a reporting entity from entering into or facilitating any financial transaction originating from or bound for any foreign state or entity.[20]

Importation and Exportation of Currency and Monetary Instruments

Part 2 of the *PCMLTFA* deals with the importation or exportation of currency or monetary instruments. Section 12(1) requires that every person who is importing or exporting currency or monetary instruments equal to or in excess of $10,000 to report that fact to a customs officer. It provides, in relevant part:

> **12 (1)** Every person or entity referred to in subsection (3) shall report to an officer, in accordance with the regulations, the importation or exportation
>
> of currency or monetary instruments of a value equal to or greater than the prescribed amount.
>
> **...**

17 Ibid, s 11.42.

18 Ibid.

19 Ibid.

20 Ibid, s 11.49.

> **(3)** Currency or monetary instruments shall be reported under subsection (1)
>
> **(a)** in the case of currency or monetary instruments in the actual possession of a person arriving in or departing from Canada, or that form part of their baggage if they and their baggage are being carried on board the same conveyance … ;
>
> **(b)** in the case of currency or monetary instruments imported into Canada by courier or as mail, by the exporter of the currency or monetary instruments or, on receiving notice under subsection 14(2), by the importer;
>
> **(c)** in the case of currency or monetary instruments exported from Canada by courier or as mail, by the exporter of the currency or monetary instruments;
>
> **(d)** in the case of currency or monetary instruments, other than those referred to in paragraph (a) or imported or exported as mail, that are on board a conveyance arriving in or departing from Canada, by the person in charge of the conveyance; and
>
> **(e)** in any other case, by the person on whose behalf the currency or monetary instruments are imported or exported.[21]

Section 12(5) of the *PCMLTFA* requires that any reports received by the Canadian Border Services Agency under that provision be forwarded to FINTRAC. Moreover, a customs officer has the power to search any person who has recently arrived in Canada – or is about to leave the country – where the customs officer has reasonable grounds to suspect that the person is carrying cash or monetary instruments in excess of $10,000.[22]

Where a person has not complied with section 12(1), the officer may "seize as forfeit" the currency or monetary instrument.[23] However, the currency or monetary instrument *must* be returned to the individual, upon payment of a penalty, unless the customs offer has reasonable grounds to suspect it is proceeds of crime within the meaning of section 462.31(1) of the *Criminal Code*.[24] The customs officer who seizes the currency or monetary instrument must report the seizure to FINTRAC without delay.[25]

21 Ibid, ss 12(1) and (3).

22 Ibid, s 15(1).

23 Ibid, s 18(1).

24 Ibid, s 18(2).

25 Ibid, s 20.

The *PCMLTFA* also contains an appeal mechanism for the return of currency or monetary instruments seized by a customs officer under these provisions.[26]

Section 36 of the *PCMLTFA* governs the circumstances in which information obtained by a customs officer, while exercising his or her duties under Part 2, may be disclosed to law enforcement.[27] A customs officer may disclose any such information to the appropriate police force where he or she has reasonable grounds to suspect that it would be relevant to the investigation or prosecution of a money laundering or terrorist financing offence.[28]

A customs officer can also disclose that information to FINTRAC where he or she has reasonable grounds to suspect that it would be of assistance to FINTRAC in the detection, prevention, or deterrence of money laundering or terrorist financing activity.[29]

FINTRAC

Part 3 of the *PCMLTFA* establishes FINTRAC and governs the use and disclosure of the information it receives from reporting entities and other sources. Unlike many countries, where the central financial intelligence unit is part of the enforcement arm of government, FINTRAC is part of the federal Ministry of Finance and significant efforts have been made to ensure it remains independent from law enforcement. Section 40 provides that the object of Part 3 is to establish a financial intelligence unit that:

- acts at arm's length and is independent from law enforcement agencies and other entities to which it is authorized to disclose information;
- collects, analyzes, assesses, and discloses information in order to assist in the detection, prevention, and deterrence of money laundering and of the financing of terrorist activities;
- ensures that personal information under its control is protected from unauthorized disclosure;
- operates to enhance public awareness and understanding of matters related to money laundering and the financing of terrorist activities; and
- ensures compliance with Parts 1 and 1.1 of the *PCMLTFA*.[30]

In order to balance these competing objectives, Part 3 contains a detailed regime that governs the collection and disclosure of information to law enforcement.

26 Ibid, ss 24–35.

27 While not entirely clear, it appears that section 36 is broader than section 12(5) insofar as it applies not only to information contained in a section 12(1) report but also to other information obtained by the Canada Border Services Agency for the purposes of Part 2.

28 *PCMLTFA*, s 36(2).

29 Ibid, s 36(3).

30 Ibid, s 40.

Sections 54(1)(a) and (b) contain a list of the information that can be collected by FINTRAC in performing its intelligence functions. That information includes:

- reports made by reporting entities under sections 7, 7.1, 9, 12, or 20 (e.g., suspicious transaction reports and large cash transaction reports);
- information provided to FINTRAC by agencies of other countries that have powers and duties similar to those of FINTRAC;
- information provided to FINTRAC by law enforcement agencies and other government institutions and agencies;
- information voluntarily provided to FINTRAC;
- information that is publicly available, including information in commercially available databases; and
- information stored in databases maintained by the federal government, a provincial government or by the government of a foreign state, or an international organization provided that FINTRAC has entered into a contract, memorandum of understanding, or other agreement with that government or organization.[31]

Any identifying information contained in a report submitted to FINTRAC (other than publicly available information or information stored in databases maintained by the federal government, a provincial government, the government of a foreign state, or an international organization) must be destroyed 15 years after the day on which the report was received, unless the report was disclosed to law enforcement under sections 55(3), 55.1(1), or 56.1(1) or (2) (discussed below).[32]

FINTRAC is also required to destroy any information contained in a report submitted under sections 7, 7.1, 9, 12, or 20 where it determines that it relates to a financial transaction or circumstance that is not required to be reported (e.g., where the transaction is below the monetary threshold for filing a report). It is also required to destroy information voluntarily submitted to FINTRAC where it determines that it is not about suspicions of money laundering or the financing of terrorist activities.[33]

Use and Disclosure of Information

Sections 55 to 61 govern the use and disclosure of the information received by FINTRAC. Section 55(3) governs the disclosure of *tactical* information to law enforcement for use in the investigation and prosecution of money laundering and terrorist financing offences. In basic terms, tactical information is specific information about individuals or entities (such as their name, date of birth, and

31 Ibid, ss 54(1)(a) and (b).

32 Ibid, s 54(1)(e).

33 Ibid, s 54(2).

activities). It is often contrasted with strategic information, which is generally understood as high-level information about money laundering typologies and trends.

Under section 55(3), FINTRAC must disclose certain "designated" information to law enforcement agencies if, on the basis of its analysis and assessment of that information, it has reasonable grounds to suspect that the information would be relevant to the investigation or prosecution of a money laundering or terrorist financing offence.[34] A list of the "designated information" that must be provided to law enforcement is set out in section 55(7) and includes information such as the name of any person or entity that is involved in the transaction, the name and address of the place of business where the transaction occurred, and the amount and type of currency or monetary instruments involved in the transaction.[35]

Section 56.1 allows FINTRAC to disclose information to an institution or agency of a foreign state or international organization that has powers and duties similar to FINTRAC, where it has reasonable grounds to suspect the information would be relevant to the investigation or prosecution of a money laundering offence and there is an information sharing agreement in place.[36]

I pause here to note that the "reasonable suspicion" requirement contained in these sections is one of the key safeguards included in the *PCMLTFA* to ensure the regime complies with section 8 of the *Canadian Charter of Rights and Freedoms*, which protects against state interference with privacy rights and will be engaged whenever law enforcement conducts a search that interferes with a recognized privacy interest.[37]

At the same time, it has been a source of consternation for many law enforcement officials, who argue they would be able to conduct more efficient and effective money laundering investigations if given direct and real-time access to information in the FINTRAC database (a common occurrence in many other countries, including the US). [38]

I return to the tension between privacy rights and the effective investigation of money laundering offences later in this chapter.

Section 60 contains an alternative mechanism for law enforcement to gain access to tactical information in the possession of FINTRAC. Under that provision, the Attorney

34 Section 55(3) includes a long list of law enforcement agencies that can receive FINTRAC disclosures, including police forces, the Canada Revenue Agency, the Canada Border Services Agency, the Communications Security Establishment, the Competition Bureau, and provincial securities commissions.

35 Section 55.1(1) contains a similar provision for the disclosure of information relevant to threats to the security of Canada.

36 *PCMLTFA*, s 56.1(1).

37 *Canadian Charter of Rights and Freedoms* [*Charter*], s 8.

38 Evidence of J. Simser, Transcript, April 9, 2021, pp 102–3. See also Evidence of C. Hamilton, Transcript, May 12, 2021, pp 71–72. Other witnesses also testified that it would be of great use to law enforcement to have real–time access to financial data: see, for example, Evidence of M. Heard, Transcript, March 30, 2021, pp 79–80.

General of a province or his deputy may, for the purposes of an investigation in respect of a money laundering or terrorist financing offence, bring an application for the disclosure of information relevant to the offence being investigated. The application must be in writing and be accompanied by an affidavit that includes, among other things, facts that justify (a) a belief, on reasonable grounds, that a money laundering or terrorist financing offence has been committed; and (b) that the information requested is "likely to be of substantial value" to an investigation.[39]

Law enforcement agencies can also prompt FINTRAC to disclose relevant information by voluntarily submitting information relating to an ongoing investigation (such as the name of a target) through something known as a voluntary information record. FINTRAC will review that information and determine whether it is in possession of any additional information that could assist with the investigation. If so, it will disclose that information to investigators *provided the statutory conditions for disclosure are satisfied*.[40]

In addition to the disclosure of tactical information to law enforcement, FINTRAC is empowered to use the information collected under section 54 to generate *strategic* intelligence concerning "trends and developments … and improved ways of detecting, preventing and deterring money laundering."[41]

FINTRAC's 2019–20 annual report describes its strategic intelligence functions in the following terms:

> With the information that FINTRAC receives from its regime partners and businesses across the country, the Centre [FINTRAC] is able to produce valuable strategic intelligence in the fight against money laundering and terrorist activity financing. Through the use of analytical techniques, FINTRAC is able to identify emerging characteristics, trends and tactics used by criminals to launder money or fund terrorist activities. The goal of the Centre's strategic intelligence is to inform the security and intelligence community, regime partners and policy decision-makers, Canadians and international counterparts about the nature and extent of money laundering and terrorist activity financing in Canada and throughout the world.[42]

39 Ibid, s 60(3).

40 See, for example, Evidence of P. Payne, Transcript, April 16, 2021, p 149; Evidence of M. Heard, Transcript, March 30, 2021, p 78; Evidence of B. Baxter, Transcript, April 8, 2021, pp 12–13; Exhibit 828, Christian Leuprecht, Jeff Simser, Arthur Cockfield, and Garry Clement, *Detect, Disrupt and Deter: Domestic and Global Financial Crime – A Roadmap for British Columbia* (March 2021) [Leuprecht Report], p 22. While the statute refers to the voluntary disclosure of information by law enforcement, in reality, voluntary information requests are used to trigger the disclosure of information about specific targets by FINTRAC ***to*** law enforcement. I return to the use of voluntary information records later in this chapter.

41 *PCMLTFA*, s 58(1)(b).

42 Exhibit 733, *FINTRAC Annual Report 2019–20*, pp 13–14.

Compliance

As part of its core mandate, FINTRAC administers what it describes as a comprehensive, risk-based compliance program to ensure that reporting entities fulfill their obligations under Part 1 of the *PCMLTFA* and that FINTRAC receives the information it needs to generate tactical and strategic intelligence with respect to money laundering. There are three pillars of that compliance program: assistance, assessment, and enforcement.

Assistance

Section 58(1)(c) of the *PCMLTFA* expressly authorizes FINTRAC to take measures to inform the public, reporting entities and law enforcement bodies. This includes informing them about their obligations under the regime; the nature and extent of money laundering activities inside and outside Canada; and measures taken to detect, prevent, and deter money laundering activities.[43]

In accordance with this provision, FINTRAC has undertaken various outreach activities to assist reporting entities in understanding and complying with their reporting obligations under the *PCMLTFA*. These activities include:

- online publications;
- conferences and teleconferences;
- working groups;
- presentations to businesses and other stakeholders;
- training sessions and meetings;
- policy interpretations; and
- responses to enquiries.[44]

In British Columbia, many of these outreach activities have been focused on the real estate sector.[45] In 2019–20, for example, FINTRAC was able to negotiate a new memorandum of understanding with the Real Estate Council of British Columbia (now part of the BC Financial Services Authority), which establishes a framework for these agencies to share compliance-related information, enhance the knowledge and expertise of each agency regarding new and evolving trends in the real estate sector, and develop anti–money laundering training modules for real estate professionals.[46] However, there remain significant concerns about the low number of suspicious

43 *PCMLTFA*, s 58(1)(c).

44 Exhibit 733, *FINTRAC Annual Report 2019–20,* pp 17–21. See also evidence of D. Achimov, Transcript, March 12, 2021, p 34.

45 Exhibit 733, *FINTRAC Annual Report 2019–20,* p 19.

46 Ibid.

transaction reports submitted by reporting entities in that sector. In 2019–20, for example, reporting entities in the British Columbia real estate sector submitted a *total* of 37 suspicious transaction reports to FINTRAC, which gives rise to serious concerns about the quality and comprehensiveness of the information in the FINTRAC database.[47]

Assessment

FINTRAC also has a number of assessment tools in place to ensure that reporting entities are complying with their obligations under the *PCMLTFA*.

Section 62 allows an authorized representative of FINTRAC to "examine the records and inquire into the business and affairs of any person or entity referred to in section 5 for the purpose of ensuring compliance with Part 1 or 1.1."[48]

FINTRAC can also serve notice requiring a reporting entity to provide "any document or other information relevant to the administration of Part 1 or 1.1 in the form of electronic data, a printout or other intelligible output."[49]

Section 63 allows a justice of the peace to issue a warrant authorizing an authorized representative of FINTRAC to enter a home (whether a house or an apartment), if the justice is satisfied that:

- there are reasonable grounds to believe that there are records in the premises that are relevant to ensuring compliance with Part 1 or Part 1.1;
- entry to the home is necessary for any purpose that relates to ensuring compliance with Part 1 or Part 1.1; and
- entry to the home has been refused or there are reasonable grounds for believing that entry will be refused.[50]

FINTRAC's 2019–20 annual report indicates that the compliance examinations conducted in accordance with these provisions are the "primary instrument" used to assesses the compliance of reporting entities.[51] It also indicates that FINTRAC uses a risk-based approach to select the businesses that will be examined each year. The current focus is on businesses that "report large numbers of transactions or that are at a higher risk of being deficient or exploited by money launderers or terrorist financiers."[52]

47 Evidence of D. Achimov, Transcript, March 12, 2021, p. 94. Indeed, it appears that 90 percent of reports filed with FINTRAC come from major financial institutions: Evidence of B. MacKillop, Transcript, March 12, 2021, p 96. A full discussion of the low level of reporting among realtors can be found in Chapter 16.

48 *PCMLTFA*, ss 62(1) and (2).

49 Ibid, s 63.1(1).

50 Ibid, s 63(2).

51 Exhibit 733, *FINTRAC Annual Report 2019–20*, p 22.

52 Ibid.

In 2019–20, FINTRAC conducted 399 compliance examinations across Canada. The real estate sector was the focus of the largest number of examinations (146), followed by money services businesses (114), and securities dealers (58).[53]

FINTRAC has also assumed primary responsibility for assessing the compliance of federally regulated financial institutions such as chartered banks.[54]

Enforcement

Where FINTRAC uncovers evidence of non-compliance by a reporting entity, it has a number of tools at its disposal to change the non-compliant behaviour. One such tool is follow-up examinations, which are used to determine if a business has addressed previous instances of non-compliance.[55] In 2019–20, FINTRAC conducted 44 follow-up examinations and identified improvement in compliance behaviour in more than 88 percent of cases.[56]

FINTRAC can also impose administrative monetary penalties on reporting entities that have failed to comply with their obligations under the *PCMLTFA*. Such penalties are intended to encourage compliance with the *PCMLTFA* rather than punish the harm done by the violation.[57] The maximum penalty for a violation is $100,000 if committed by an individual and $500,000 if committed by a business.[58]

Where an individual or entity receives a Notice of Violation, the person is entitled to make representations to the Director, who must decide, on a balance of probabilities, whether the person or entity committed the violation.

Subject to any regulations made under section 73.1(1), the Director can also impose the penalty imposed, a lesser penalty, or no penalty.

Section 73.16 also allows an individual or entity to enter into a compliance agreement with FINTRAC whereby it agrees to comply with the provision to which the violation relates and pays a reduced penalty for the violation.

In 2019–20, FINTRAC issued two administrative monetary penalties (one in the real estate sector and the other in the money services business sector).[59]

Finally, the *PCMLTFA* creates a number of criminal penalties for the violation of certain provisions of that statute. For example, section 74(1) makes it a criminal offence to knowingly contravene a long list of statutory provisions including sections 6 and 6.1 (which impose record-keeping and client identification requirements on

53 Ibid.

54 Ibid.

55 Ibid, p 23.

56 Ibid.

57 *PCMLTFA*, s 73.11. See also Exhibit 733, *FINTRAC Annual Report 2019–20,* p 23.

58 *PCMLTFA*, s 73.1(2).

59 Exhibit 733, *FINTRAC Annual Report 2019–20,* p 24.

reporting entities). Where the matter is prosecuted by way of summary conviction, the person is liable to a fine of not more than $250,000 or to imprisonment to a term of not more than two years less a day. Where the matter is prosecuted by indictment, the person is liable to a fine of not more than $500,000 or to imprisonment to a term of not more than five years.[60]

Effectiveness of the Federal Regime

While the enactment of the *PCMLTFA* and the obligations it imposes on reporting entities may have a significant deterrent effect on those seeking to launder illicit funds, a number of legitimate concerns have been raised about the effectiveness of the federal regime in responding to the money laundering threats facing the Province of British Columbia. These concerns include a lack of strategic vision, the inability of FINTRAC to get actionable intelligence into the hands of law enforcement, the absence of a legislative framework for the exchange of tactical information concerning money laundering activity, and a lack of law enforcement resources to investigate and prosecute money laundering offences. Given the importance of an effective federal regime to address money laundering activity in the province, I will address each of these in turn.

Limited Strategic Vision

One of the key criticisms of the federal anti–money laundering regime is the lack of strategic vision at the federal level. The United Kingdom, the United States and the Netherlands have each developed a comprehensive and cross-governmental economic crime strategy to guide the development of anti–money laundering policy and evaluate the effectiveness of the anti–money laundering measures that have been put in place.

The UK's *Economic Crime Plan* is a particularly good example of the strategic vision required to make a meaningful difference in the fight against money laundering. While recognizing the significant progress the UK has made in recognizing and prioritizing the threat posed by economic crime, the report acknowledges that the threat "remains high and is constantly evolving."[61] Accordingly, it identifies seven key objectives (or "strategic priorities") aimed at improving and strengthening the UK's response to economic crime. These objectives include:

60 *PCMLTFA*, s 74(1). Other such provisions include s 75, which makes it a criminal offence to knowingly contravene sections 7, 7.1 and 11.49(1), s 76, which makes it a criminal offence to knowingly contravene s 8, s 77(1) which makes it a criminal offence to contravene subsections 9(1) or (3), and s 77(2), which makes it a criminal offence to contravene s 11.43 insofar as it relates to any required reporting measure contemplated by paragraph 11.42(2)(e) and specified in a directive issued under subsection 11.42(1).

61 UK Finance, *Economic Crime Plan 2019–22* (July 2019), p 8. A copy of the *Economic Crime Plan* can be found online: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/816215/2019–22_Economic_Crime_Plan.pdf.

- developing a better understanding of the threat posed by economic crime and the UK's performance in combatting economic crime;
- pursuing better sharing and usage of information to combat economic crime within and between the public and private sectors;
- ensuring that the powers, procedures, and tools of law enforcement, the justice system, and the private sector are as effective as possible;
- strengthening the capabilities of law enforcement, the justice system, and the private sector to detect, deter, and disrupt economic crime;
- building greater resilience to economic crime by enhancing the management of economic crime risk in the private sector and the risk-based approach to supervision;
- improving systems for transparency of ownership of legal entities and legal arrangements; and
- delivering an ambitious international strategy to enhance security, prosperity and the UK's global influence.[62]

The UK plan goes on to identify a number of action items within each priority area. For example, the action items within the first priority area include:

- expanding public-private threat assessments to improve the evidence base upon which national risk assessments are conducted, and to inform the government's policy response to money laundering and financial crime;
- developing a fully operational performance system to measure what works in combatting financial crime;
- conducting new national risk assessments on money laundering using the public-private threat assessments noted above;
- better understanding the threat and performance in combatting public-sector fraud; and
- resolving evidence gaps through a long-term research strategy.[63]

With respect to the last action item the UK's *Economic Crime Plan* states that "[a]n important part of building our capacity to respond is improving our evidence base. Good quality and robust research is fundamental to ensuring a comprehensive understanding of the threat and the most effective and efficient targeting of resources."[64] It goes on to state

62 Ibid, p 9.

63 Ibid, pp 23–25.

64 Ibid, p 25.

that the long-term research strategy will seek to map existing work, prioritize evidence gaps that will deliver the greatest "value-add" in understanding the threat, and improve awareness of the nature, extent and threat posed by economic crime.[65]

When strategic priorities and action items are identified in this manner, government agencies are able to take coordinated action in response to economic crime and money laundering threats. For example, the UK Home Office and National Crime Agency have developed a National Serious and Organized Crime Performance Framework that is informed by the strategic priorities identified in the UK's *Economic Crime Plan* and assesses the UK's response to economic crime against the following criteria:

- How comprehensive is our understanding of economic crime threats and vulnerabilities?
- How effectively are we pursuing serious and organized economic criminals in the UK, online, and overseas?
- How effectively are we building resilience in the public and private sectors against economic crime?
- How effectively are we supporting those impacted by economic crime?
- How effectively are we deterring people from involvement in economic crime?
- How effectively are we developing core capabilities to address emerging economic crime threats?
- How effectively and efficiently are we managing our resources in countering economic crime?[66]

Regulators, reporting entities, and other public- and private-sector stakeholders can also tailor their anti–money laundering efforts to the threats and vulnerabilities identified in the UK's *Economic Crime Plan* in order to focus on measures that will have the greatest impact on money laundering activity.

The US *National Strategy for Combating Terrorist and Other Illicit Financing* and the Dutch "Joint Action Plan" also contain a number of useful lessons for Canada, particularly insofar as they make a greater effort to set priorities for financial institutions and other reporting entities (as opposed to following the historic international practice of "outsourcing" that work to individual reporting entities). Nicholas Maxwell, founding director of NJM Advisory, a boutique research consultancy firm focused on anti–money laundering issues and one of the world's leading experts on public-private information sharing partnerships, testified that:

65 Ibid.

66 Evidence of N. Maxwell, Transcript, January 14, 2021, pp 80–81; Exhibit 411, Nicholas Maxwell, Future of Financial Intelligence Sharing Briefing Paper – Canada in Context (January 5, 2021, updated December 11, 2021), p 13.

> [I]t does tend to be the US, the Netherlands and the UK who are at the forefront of having a cross-government strategy with a performance management framework and, in particular, setting priorities, which is a relatively new idea. Canada … will be in a reasonable position to say that [it is] following the historic international practice, which is to just outsource the understanding of priorities to each individual regulated entity through what is known as the "risk-based approach," and the risk-based approach obviously does provide a lot of flexibility when a government doesn't understand what threats perhaps are out there and what interest they have. Then they just want the regulated sector to discover the unknown unknowns. But when you have known unknowns, so known threats but an unknown … reports of the actual incidents of the threats, then there is a place for priorities. And the US has been particularly prominent in establishing that type of framework or proposing that type of framework, as has the UK through its National Economic Crime Centre and the Dutch action plan, and then the cross-government coordination has been evident in those three jurisdictions.[67]

In Canada, there is no comprehensive economic crime strategy, no real understanding of the money laundering threats facing the country, and no meaningful evaluation of the effectiveness of the anti–money laundering measures put in place by the federal government. Mr. Maxwell remarked that Canada does well at supporting cross-government dialogue and bringing together different parts of government but none of those efforts are tied to a clear economic crime strategy in which targets are set and performance is measured. He states:

> Canada does well at supporting cross-government dialogue, various operational committees, often co-chaired by public safety and Department of Finance. There is a lot of activity which is aimed at bringing different parts of government together, and there's new activity announced 2019, 2020. There's almost a proliferation of initiatives which try and bring stakeholders together. But the problem is this doesn't exist within a clear cross-government economic crime strategy which is directing all of that activity set within a framework at which targets are set and performance is measured. There have been some great points that we should recognize, including … in 2019 the joint special meeting of federal, provincial, territorial finance ministers and ministers responsible for AML [anti–money laundering] to agree to joint priorities. That's good. But those joint priorities [are] … vague, you could say. So there is a real need for clarity on an economic crime strategy that can inform this direction of this huge amount of resources being spent in the private sector to achieve something which the Canadian

67 Evidence of N. Maxwell, Transcript, January 14, 2021, pp 83–84. A copy of the US *National Strategy for Combating Terrorist and Other Illicit Financing* (2020) can be found online: https://home.treasury.gov/system/files/136/National–Strategy–to–Counter–Illicit–Financev2.pdf.

> government wants it to achieve and then measure if it's being achieved. And that's missing.[68]

While the federal government periodically conducts a national risk assessment, the current risk assessment is more than five years out of date, and concerns have been raised that it "is only produced for [the Financial Action Task Force's] benefit and doesn't have a regular role in Canadian society and policy making."[69] Moreover, the absence of a national economic crime strategy means that reporting entities are required to report "everything under the sun" without being aware of the priorities that really make a difference. Mr. Maxwell described the impact on reporting entities as follows:

> So individual regulated entities, reporting entities are required to identify risk by themselves and to report everything from a $20 million suspicious transaction and in effect put the same resources into a $20 suspicious transaction, and they must report those $20 transactions and that does take time, resources and people. So there's no effort to prioritize the capabilities and the resources in reporting entities from the perspective of government. So one, there's no identification of national economic crime threats as there is, for example, in the UK or in the new US proposed rule [which] makes it very clear that FinCEN [the Financial Crimes Enforcement Network][70] wants reported entities to prioritize based on national economic crime threats because they want to see expertise, processes developed in response to those threats and they want to see action on those threats.
>
> That doesn't happen in Canada. Reporting entities are adrift to report everything under the sun and to not be aware of the priorities that really make a difference to Canada. Obviously that can be achieved through the existing public / private partnership project initiatives, and to a certain extent that's helped. But from a broader perspective, there are no national economic crime threat priorities in Canada, and there is no consistent way in which priorities are meant to steer the resources in reporting entities.[71]

While the absence of a national economic crime / money laundering strategy is a significant shortcoming in the federal regime, I was encouraged to hear that the Province has started developing a provincial anti–money laundering strategy, and I urge it to continue developing and refining that strategy.

I note, however, that the provincial anti–money laundering strategy will be considerably more effective if it is developed alongside a national economic crime strategy and strongly encourage the Province to explore ways of engaging the federal government on this important issue.

68 Evidence of N. Maxwell, Transcript, January 14, 2021, pp 62–63.

69 Ibid, p 49.

70 The Financial Crimes Enforcement Network (FinCEN) is the US equivalent of FINTRAC.

71 Ibid, pp 65–67.

The AML Commissioner recommended in Chapter 8 may be in a position to monitor efforts to develop a national economic crime strategy and provide information, support, and assistance in the creation of a national strategy.

FINTRAC

A second criticism of the federal regime relates to the high volume of information collected by FINTRAC as compared with the low number of disclosures made to law enforcement. In 2019–20, reporting entities in Canada submitted a total of 31,417,429 individual reports to FINTRAC.[72] In comparison, reporting entities in the United States submitted a total of 21,683,802 reports, and reporting entities in the United Kingdom submitted a total of 573,085 reports.[73] Per head of population, that corresponds to 12.5 times more reports in Canada as compared with the US and 96 times more reports as compared with the UK.[74] Mr. Maxwell testified that the large number of reports submitted to FINTRAC is the product of a "defensive" reporting regime.[75] He also emphasized the huge financial burden that places on private-sector reporting entities (which is estimated to be in the range of $6.8 billion per year).[76]

Despite the huge volume of information collected under the federal regime, FINTRAC made only 2,057 "unique" disclosures to law enforcement bodies in 2019–20[77] and only 1,582 of these disclosures were directly related to money laundering (with 296 related to "terrorism financing and threats to the security of Canada" and 179 related to "money laundering, terrorism financing and threats to the security of Canada").[78]

Law enforcement agencies in British Columbia *received* only 335 disclosures that year (though a large number of disclosures were provided to national headquarters, which may have been used to support investigations in this province).[79]

Even more concerning is the fact that FINTRAC received 2,519 voluntary information records from law enforcement agencies across the country in the 2019–20

72 Exhibit 828, Leuprecht Report, Appendix 3, p 2 (Table 5).

73 Evidence of N. Maxwell, Transcript, January 14, 2021, pp 71–72. See also https://www.fincen.gov/reports/sar–stats and https://www.nationalcrimeagency.gov.uk/who–we–are/publications/480–sars–annual–report–2020/file.

74 Evidence of N. Maxwell, Transcript, January 14, 2021, p 73.

75 Ibid, pp 65–66, 72–73.

76 Ibid, pp 53–54, 59. Note that these numbers are an estimate of the total amount spent by reporting entities in complying with their obligations under the *PCMLTFA*. FINTRAC's annual expenditures are in the range of $55 million: Exhibit 733, *FINTRAC Annual Report 2019–20*, p 35.

77 Exhibit 828, Leuprecht Report, Appendix 3, pp 2–3 (Table 6). It is my understanding that "unique" disclosures represent the number of distinct reports disclosed, as opposed to the total number, as in some cases the same report is sent to multiple law enforcement agencies: ibid, p 2 (Table 6), footnote 4. See also Evidence of C. Leuprecht, Transcript, April 9, 2021, pp 138–39.

78 Exhibit 733, *FINTRAC Annual Report 2019–20*, p 8.

79 Ibid, p 9.

fiscal year.[80] While there is limited evidence before me concerning the number of FINTRAC disclosures made in response to voluntary information records, it seems likely that most of the 2,057 "unique" disclosures made to law enforcement in 2019–20 were made in response to these requests. If so, the number of *proactive* disclosures (i.e., disclosures that were not prompted by voluntary information requests) would be smaller than the 2,057 unique disclosures referenced in FINTRAC's 2019–20 annual report. The issue is important because proactive disclosures may prompt the commencement of a new investigation (or assist in identifying a new target), whereas voluntary information records are typically made to support an investigation already underway. If the number of proactive disclosures is small, it suggests that FINTRAC is not able to effectively identify and report money laundering activity in the absence of such prompting.

While I appreciate there are a number of legal and constitutional issues that limit the circumstances in which FINTRAC can disclose information to law enforcement bodies, I have concluded that law enforcement bodies in this province cannot count on FINTRAC to produce timely, actionable intelligence with respect to money laundering threats, and that the Province must take steps to develop its own intelligence capacity in order to better identify and respond to money laundering activity in British Columbia. A full discussion of these issues, as well as my recommendations for the creation of a new money laundering intelligence and investigation unit, can be found in Chapters 39 to 41.

Information-Sharing

While the federal anti–money laundering regime has achieved notable success in the development of strategic information-sharing partnerships (i.e., the exchange of knowledge and insight with respect to money laundering typologies and indicators of money laundering activity), the absence of a legal gateway for the exchange of *tactical* information has been a source of significant criticism. Mr. Maxwell testified that Canada is the only common law country that does not allow for tactical information-sharing between public- and private-sector entities, and that the absence of a legal gateway for the exchange of such information creates a "hard limit" on the effectiveness of the federal regime.[81] One aspect of the problem is that reporting entities – which are primarily responsible for the collection of intelligence concerning

80 Ibid, p 10. As set out above, voluntary information records are used by law enforcement to prompt FINTRAC to provide information relevant to ongoing investigations. Investigators provide FINTRAC with information relating to an ongoing investigation, such as the name of a target. FINTRAC will review that information and determine whether it is in possession of any information that could assist with the investigation. If the statutory preconditions are met (i.e., if FINTRAC has reasonable grounds to suspect that the information would be relevant to the investigation or prosecution of a money laundering or terrorist financing offence), it will disclose that information to the relevant law enforcement agency. Although initiated by a voluntary disclosure by investigators, it is really a request for records and information from FINTRAC: see, for example, Evidence of P. Payne, Transcript, April 16, 2021, p 149; Evidence of M. Heard, Transcript, March 30, 2021, p 78; Evidence of B. Baxter, Transcript, April 8, 2021, pp 12–13; Exhibit 828, Leuprecht Report, p 22.

81 Evidence of N. Maxwell, Transcript, January 14, 2021, pp 85–88.

money laundering threats – do not receive any guidance from law enforcement officials that inform the collection process. Mr. Maxwell explained:

> [F]undamentally … reporting entities are part of the AML/ATF [anti–money laundering / anti–terrorist financing] system, they are required to identify crime, so if you don't assist them in that process then they are going to be less effective. And when crimes are priorities and you have particular crimes of concern, money laundering issues of concern in British Columbia, … there isn't a process for those priorities to inform the collection process. At the strategic level we talked about prioritization, but at a tactical level, your law enforcement officers who are working on serious organized crime in British Columbia should be able to understand for intelligence purposes what the financial intelligence AML/ATF system has in terms of relevant information to their investigation. That's the whole point of the AML/ATF regime, that it provides useful information to law enforcement. *But your law enforcement officers are not able to request any specific information. They are not able to — outside of a production order for evidence where they must already know that the financial institution holds the account. They are not able to share tactical information with specific financial institutions or other reporting entities to allow those reporting entities to be responsive to the law enforcement collection requirements, so that is why the flow of information is so disjointed, and ultimately the effectiveness and challenges that we see in terms of the lack of ability for the Canadian regime to demonstrate effective results in a large part are due to this lack of information sharing and lack of a cycle that really is fit for purpose.* [Emphasis added.][82]

Another aspect of the problem is that FINTRAC is unable to follow up with reporting entities to collect additional information concerning money laundering activity. For example, it cannot seek additional information from a financial institution concerning accounts that are linked to suspicious activity (or accounts opened in other financial institutions by the same person). Mr. Maxwell described these limitations as follows:

> I think … the enforcement and FINTRAC staff work hard every day to make the most out of the legal environment that they have to disrupt crimes which they are pursuing, but you know, a "low ceiling" would be a polite way of framing it because the Canadian regime is incapable of supporting a real-time understanding of financial crime as it's occurring to enforcement agencies. There's significant time lag in disclosures eventually getting through to enforcement agencies … and FINTRAC's limitations on being able to go back to the regulated entity to ask for more information. "We were interested in what you said here, but we're also interested in these accounts that are linked."

82 Ibid, pp 92–93.

> *So the reporting is happening in the blind, without guidance from public agencies outside of their strategic project initiatives. And therefore Canada cannot achieve a real-time and responsive use of the regulated community, and those 30,000-plus reporting entities and that $5.1 billion US of [spending] is not being responsive to tactical level interests from public agencies.* [Emphasis added.][83]

While I have little doubt that the creation of a legal gateway for tactical information sharing would have immense benefits for the investigation of money laundering offences, it is important to understand that there are a number of legal impediments to the exchange of tactical information within the Canadian constitutional framework.

The BC Civil Liberties Association made a submission that tactical information sharing is contrary to established constitutional principles insofar as it allows law enforcement to access private information without authorization or oversight. It submits that the *PCMLTFA* is already controversial insofar as it allows law enforcement bodies to access private financial information without obtaining prior judicial authorization.[84] While FINTRAC's role as an intermediary that can disclose financial information to law enforcement only where there are reasonable grounds to suspect that the information would be of assistance in investigating or prosecuting an offence somewhat reduces the constitutional vulnerability of the scheme, any proposal that would allow two-way information sharing would undermine these safeguards and allow law enforcement to engage in suspicion-less searches without prior authorization.[85]

The BC Civil Liberties Association also submits that public-private information sharing partnerships such as Project Athena have the effect of undermining constitutionally protected rights, insofar as they invite financial institutions to act as an extension of the state in the collection of private financial information for use in criminal proceedings.[86] Project Athena was a public-private information sharing partnership spearheaded by RCMP Sergeant Ben Robinson in response to the increased use of anonymous bank drafts at Lower Mainland casinos following the implementation of measures designed to curtail the use of unsourced cash. The concern was that anonymous bank drafts could be purchased by an account holder at a major financial institution and then passed to a casino patron, thus circumventing the requirement that casino patrons complete a source-of-funds declaration whenever they make large cash buy-ins in excess of $10,000. Because most bank drafts did not include any identifying information on their bank drafts, it was difficult, if not impossible, for the casino to tell whether the patron purchased the bank draft himself or received it from an underground service provider.

One of the primary goals of Project Athena was to increase awareness of the issue among financial institutions (an excellent example of strategic information sharing). However, there was also a tactical component: financial institutions were provided with

83 Ibid, pp 85–86. See also ibid, pp 90–91.

84 Closing submissions, BC Civil Liberties Association, para 53.

85 Ibid, para 54.

86 Ibid, paras 56–59.

a list of gamblers who had used anonymous bank drafts issued by that institution and asked to confirm whether the gambler had a bank account at that institution. If not, it could be a sign that the gambler had received the bank draft in furtherance of a money laundering scheme perpetuated by a professional money laundering operation.[87]

While it is unclear if law enforcement ever used that information to commence an investigation, there is evidence that many financial institutions conducted their own investigations with a view to filing suspicious transaction reports with FINTRAC (see Chapter 20).

The BC Civil Liberties Association submits that requiring financial institutions to confirm whether a particular gambler holds an account with the institution violates established privacy rights, and that financial institutions may have been acting as agents of the state by investigating clients brought to their attention by law enforcement.[88]

While it is not my role, as Commissioner, to decide these issues, I share the BC Civil Liberties Association's concern about the potential for tactical information-sharing partnerships – such as Project Athena – to circumvent the requirements of section 8 of the *Charter* and undermine established constitutional rights. At the same time, it strikes me that the constitutional issues that arise in this context are highly context specific, and that there may be ways for law enforcement to guide the collection of tactical intelligence without infringing on constitutional rights. For example, the constitutional concerns that arise in this context may be attenuated where law enforcement provides tactical information about particular typologies and targets to reporting entities and those entities respond by filing reports with FINTRAC (rather than communicating directly with the police). In those circumstances, the relevant privacy concerns are mediated by the requirements of the *PCMLTFA*, which allows FINTRAC to disclose information to law enforcement only where it has reasonable grounds to suspect that the designated information would be relevant to the investigation or prosecution of a money laundering or terrorist financing offence.

In subsequent chapters of this Report, I recommend that the designated provincial money laundering intelligence and investigation unit recommended in Chapter 41 take an incremental and sector-specific approach to the development of tactical information-sharing partnerships, which takes into account the immense value of these partnerships in the fight against money laundering as well as the important constitutional concerns that arise in this context. As much as possible, the provincial money laundering intelligence and investigation unit should ensure that the exchange of tactical information (if any) in each sector of the economy is governed by written policies and procedures that clearly set out the permissible flow of information and the process by which that occurs. Moreover, it should ensure that it seeks and obtains legal advice with respect to the specific constitutional issues that arise in each sector.

87 For an example see Exhibit 460, Email from Melanie Paddon, re Project Athena June 2018, (August 14, 2018) (redacted). A full discussion of Project Athena can be found in Chapter 39.

88 Closing submissions, BC Civil Liberties Association, para 59.

The AML Commissioner (discussed in Chapter 8) may also be able to assist in the development of strategic and tactical information-sharing initiatives by conducting research on the constitutional issues that arise in this context and assisting with the development of information-sharing agreements in various sector of the economy.

Law Enforcement Resources

While the primary focus of this chapter is the legal and regulatory framework enacted by the federal government to address money laundering and terrorist financing activity, it is important to note that even the most comprehensive anti–money laundering regime will be ineffective if there are no law enforcement officials available to use the intelligence generated by the financial intelligence unit to conduct money laundering investigations.

I review the resources dedicated to money laundering investigations at the federal, provincial, and municipal level in Chapter 39. My conclusion is that the federal government has not dedicated sufficient resources to the investigation of money laundering offences and that the creation of a designated provincial intelligence and investigation unit is the best way to ensure the province is able to mount an efficient and effective law enforcement response.

Conclusion

In this chapter, I have reviewed the federal anti–money laundering regime and some of the critiques that have been levelled at that regime. While constitutional constraints prevent me from making recommendations concerning federal institutions and legislation, it is vital to understand the gaps and weaknesses in the federal regime in order to understand and address money laundering risks arising in this province.

Chapter 8
The Provincial Framework and the Need for an AML Commissioner

Over the past five years, the Government of British Columbia has made laudable efforts to understand and respond to the money laundering threats facing this province. It has commissioned expert reports on money laundering activity in various sectors of the economy.[1] It has also implemented a number of new anti–money laundering measures, including the introduction of source-of-funds verification in the gaming industry; the enactment of the *Land Owner Transparency Act,* SBC 2019, c 23; and an amendment to the *Business Corporations Act,* SBC 2002, c 57, to require private companies to maintain records of beneficial owners.

I am encouraged by these developments. However, given the historic lack of attention money laundering has received in this jurisdiction, the complexity and ever-evolving nature of money laundering, and the challenges in combatting it, more is required. I believe that provincial anti–money laundering efforts would benefit from the creation of an independent office of the Legislature to provide strategic oversight of the provincial response to money laundering and report to the Legislature regularly. In what follows, I outline what I consider to be the essential functions of that office, which I refer to throughout this Report as the Anti–Money Laundering Commissioner (AML Commissioner). Although I refer to the AML Commissioner as a single person throughout this Report, it will quickly become apparent that the nature and quantity

1 Terms of Reference, s 4(2)(b); Exhibit 330, Maureen Maloney, Tsur Somerville, and Brigitte Unger, "Combatting Money Laundering in BC Real Estate," Expert Panel, March 31, 2019 [Maloney Report]; Exhibit 832, Peter German, *Dirty Money: An Independent Review of Money Laundering in Lower Mainland Casinos Conducted for the Attorney General of British Columbia* [*Dirty Money 1*]; Exhibit 833, Peter M. German, *Dirty Money, Part 2: Turning the Tide – An Independent Review of Money Laundering in B.C. Real Estate, Luxury Vehicle Sales & Horse Racing*, March 31, 2019 [*Dirty Money 2*]; Exhibit 607, Dan Perrin, *Real Estate Regulatory Structure Review* (2018).

of work I am envisioning for this commissioner are such that he or she will require assistance from teams focused on different aspects of the commissioner's mandate, as well as sufficient resourcing from the Province.

I also recommend that the Anti–Money Laundering Deputy Ministers' Committee and the Anti–Money Laundering Secretariat be continued. The Province should also implement a requirement that all government agencies, law enforcement bodies, and regulators with a money laundering mandate designate an anti–money laundering liaison officer, who would be the primary point of contact for improved inter-agency collaboration and information sharing.

The Provincial Anti–Money Laundering Regime

In Chapters 6 and 7, I describe the international anti–money laundering framework set out by the Financial Action Task Force[2] and the federal regime – the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, SC 2000, c 17 (*PCMLTFA*) – administered by the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC). The international and federal regimes are important pieces of the puzzle when considering how the Government of British Columbia should tackle money laundering. Indeed, money laundering has inherent international and federal dimensions, and the federal government has a crucial role to play given its jurisdiction over criminal law, banking, taxation, international trade, and other key areas touching on financial crime.

At present there is no centralized or coordinated provincial anti–money laundering "regime" in British Columbia in the same way as there is at the federal level with the Financial Action Task Force–based and *PCMLTFA* frameworks. The provincial regime is spread out among various economic sectors. Indeed, the bulk of this Report centers on key economic sectors under provincial jurisdiction, including casinos, real estate, professional services, corporations, and provincial financial institutions.

As I elaborate in subsequent chapters of this Report, anti–money laundering regulation in these sectors varies dramatically. Some regulators have been proactive, engaged, and eager to implement anti–money laundering measures. Others have taken the view that FINTRAC is responsible for all anti–money laundering regulation. Still other sectors do not have regulators at all.[3] History teaches us that criminals will target the "weakest link" – the sector where there is less regulation or awareness of money laundering risks, or where gaps have not been identified or closed. Further, there is a great deal we do not know about money laundering: subsequent parts of this Report highlight significant gaps in our understanding of how often money laundering occurs in certain sectors or how. There is a pressing need for continuing research and study in these areas.

2 Exhibit 4, Overview Report: Financial Action Task Force, Appendix E, FATF, *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations* (Paris: FATF, 2019).

3 For example, many luxury goods sectors are not regulated: see Chapter 34.

In order to build a strong, coordinated, and effective anti–money laundering regime in British Columbia, it is essential that there be a clear allocation of responsibility for both the identification of money laundering risks and the implementation of measures designed to address those risks.[4] For this reason, I am recommending that the Province establish the office of the AML Commissioner.

Recommendation 1: I recommend that the Province establish an independent office of the Legislature focused on anti–money laundering, referred to throughout this Report as the Anti–Money Laundering (AML) Commissioner. The AML Commissioner should be responsible for:

- producing a publicly available annual report on money laundering risks, activity, and responses, as well as special reports on specific issues;
- undertaking, directing, and supporting research on money laundering issues in order to develop expertise on money laundering issues, including emerging trends and responses, informed by an understanding of the measures taken internationally;
- issuing policy advice and recommendations to government, law enforcement, and regulatory bodies concerning money laundering issues;
- monitoring, reviewing, auditing, and reporting on the performance of provincial agencies with an anti–money laundering mandate; and
- leading working groups and co-operative efforts to address money laundering issues.

The Need for an AML Commissioner

An overarching theme that emerged through the course of this Inquiry is that money laundering is rarely afforded the priority it requires. Because it operates in the shadows, it often goes unnoticed. Because the damage it causes is not as visible or as immediately apparent as that caused by some other crimes (such as violent crime), it is often afforded less priority and attention.

For many organizations and government agencies, if anti–money laundering is identified as a priority at all, it is as one in a long list of priorities. It is in the middle (or at the bottom) of the list. It is easy to see how anti–money laundering can be neglected. The topic area is complex and often not intuitive. The methods used to launder funds are varied and constantly changing. Expertise in the field is hard to come by. For many regulators and

4 Indeed, British Columbia's current anti–money laundering strategy notes the need to identify "a governing body with overarching responsibility for [anti–money laundering]" and raises the prospect of creating an "independent body of government to oversee and coordinate [anti–money laundering] activities": Exhibit 46, Provincial Anti–Money Laundering Strategy (January 30, 2020), Strategy 1.1.1, p 6.

agencies, there may be no meaningful expertise within that organization. Furthermore, the consequences of anti–money laundering efforts may be opaque or unknown – they are likely to be hard to see and quantify (see Chapter 4). Consequently, those working to combat money laundering do not get the sort of feedback they get in other domains, where the results of their efforts are obvious and rewarding. Given these considerations, when anti–money laundering is one of many competing priorities, it is easy for it to get lost in the mix. As busy regulators and public agencies carry on their duties in an increasingly complex time, it is simply too easy for anti–money laundering to fall by the wayside.

Unlike many government priorities, anti–money laundering does not fit nicely into one sector or ministry. For this reason, among others, anti–money laundering historically has not been the dedicated responsibility of any one minister and has not received sufficient attention or priority by government. It has similarly been largely neglected in this province by law enforcement, which has, when faced with competing priorities, paid little attention and dedicated few resources to the fight against money laundering (see Chapters 39–41).

A large part of the rationale for an AML Commissioner is to change this trend – and change it permanently. The creation of a new office of the Legislature with an *exclusive* focus on anti–money laundering will counteract and overcome the neglect that this topic has faced for too long. Such a commissioner can give anti–money laundering pre-eminent attention, in a public and accountable way, so that the people of British Columbia and the government have accurate, current, and reliable information about how public agencies, law enforcement, and government are doing in coming to grips with and responding to money laundering in British Columbia. Having a commissioner focused solely on anti–money laundering will ensure that attention is given to this area on an ongoing basis.

An additional rationale for the creation of such a commissioner is to create a centre of expertise in British Columbia, as well as a resource that is available to consult and advise. Given the complexity of money laundering and the realistic challenges for most regulatory agencies dealing with it in-house, the AML Commissioner will, I expect, be a welcome partner (and leader) in the fight against money laundering. This commissioner will also be available to educate and advise government in order to assist the Province in responding to this constantly evolving threat. Finally, the AML Commissioner will, as and when appropriate, monitor law enforcement efforts in the province in order to track and report to government on whether law enforcement is affording the priority and resources required to address money laundering.

Put simply, despite a relatively long history of mounting evidence regarding the evolution and extent of this problem – and despite a public discourse revealing that money laundering is an issue of concern for British Columbians – government, law enforcement, and regulatory agencies have, for many years, failed to grasp the nature and extent of this growing problem. They have failed to afford it the priority and resources that are required.

I am satisfied that the only way to reverse this unsatisfactory state of affairs is to vest one office with the responsibility to support, oversee, and monitor the provincial response to money laundering.

Role and Responsibilities of the AML Commissioner

Having explained the need for an AML Commissioner, I now turn to key components of the commissioner's office – its independence, mandate, functions, powers, staffing, and budget.

Independence

The AML Commissioner should be an independent office of the Legislature rather than an executive agency. The creation of an independent office will provide stability (given that executive agencies can be created and dismantled fairly easily) as well as necessary independence from the executive, whose anti–money laundering policies and efforts will be reported on by the commissioner.

Independent offices of the Legislature are typically created where the executive branch needs an independent body to monitor and advise on issues that impact numerous ministries or where there is a need to impartially administer public services, or to review the manner in which public services are delivered. At present, there are 10 such offices in British Columbia:

- the Office of the Auditor General;
- the Office of the Conflict of Interest Commissioner;
- Elections BC;
- the Office of the Human Rights Commissioner;
- the Office of the Information and Privacy Commissioner;
- the Office of the Registrar of Lobbyists;
- the Office of the Merit Commissioner;
- the Office of the Ombudsperson;
- the Office of the Police Complaint Commissioner; and
- the Office of the Representative for Children and Youth.

Each of these offices has its own legislative framework tailored to the specific role being carried out by the commissioner or lead officer, and his or her team. While a detailed review of the various offices is beyond the scope of this chapter, I highlight a few aspects that are relevant to the role of the proposed AML Commissioner.

The AML Commissioner's role is perhaps most analogous to that of the BC Human Rights Commissioner, albeit with a very different subject matter. The BC Human Rights Commissioner is a relatively new office, established in 2019, whose broad mandate is to "promote and protect human rights" by doing any or all of the following:

- identifying and promoting the elimination of discriminatory practices, policies, and programs;
- developing resources, policies, and guidelines to prevent and eliminate discriminatory practices, policies, and programs;
- publishing reports, making recommendations, or using other means to prevent or eliminate discriminatory practices, policies, and programs;
- developing and delivering public information and education about human rights;
- undertaking, directing, and supporting research respecting human rights;
- examining the human rights implications of any policy, program, or legislation, and making recommendations where there may be inconsistencies with the *Human Rights Code*, RSBC 1996, c 210;
- consulting and co-operating with individuals and organizations in order to promote and protect human rights;
- establishing working groups for special assignments respecting human rights;
- promoting compliance with international human rights obligations;
- intervening in human rights complaints under the *Human Rights Code*;
- approving an employment equity program under the *Human Rights Code*; and
- initiating inquiries into matters referred by the Legislative Assembly or matters that, in her opinion, would promote or protect human rights.[5]

The BC Human Rights Commissioner must submit an annual report to the Legislative Assembly and is empowered to submit special reports to the Legislature on particular human rights issues.[6] When conducting inquiries into matters referred by the Legislative Assembly or on his or her own initiative, the commissioner has a number of powers to compel information.[7]

In many ways, the functions of the Human Rights Commissioner are analogous to those I have in mind for the AML Commissioner. Like human rights issues, money laundering is an issue that impacts numerous ministries, and there is a strong interest in having an individual with specialized knowledge and expertise to work proactively

5 *Human Rights Code*, RSBC 1996, c 210, s 47.12.

6 Ibid, ss 47.23, 47.24.

7 Ibid, ss 47.13, 47.16, 47.19.

to prevent money laundering activity. There is also a strong interest in having a commissioner conduct research on emerging trends,[8] promote compliance with international standards, and establish working groups with respect to specific issues (such as information sharing).

The AML Commissioner's role also has strong parallels to aspects of the Auditor General's mandate. As the title suggests, the Auditor General is responsible for auditing over 150 government departments and ministries.[9] The office conducts **financial audits**, which ensure that financial statements are presented fairly, accurately, and free of material misstatements, as well as **performance audits**, which consider whether an entity is achieving its objectives effectively, economically, and efficiently.[10] The Auditor General has a number of powers to compel the information and records necessary to complete his or her duties.[11]

As I elaborate below, one of the key functions I have in mind for the AML Commissioner is conducting audits of provincial agencies and regulators that have anti–money laundering mandates. While I appreciate that the Auditor General already conducts performance audits of provincial agencies, I believe it is important that the anti–money laundering audits be done by the AML Commissioner for two reasons. First, the Auditor General's office (properly) has discretion as to which offices or departments it audits. I consider it necessary that there be regular audits focused on *anti–money laundering* specifically, and it would be problematic to interfere with the Auditor General's independence by requiring that office to focus on a particular topic or sector on a regular basis. Second, I expect that the AML Commissioner's office will develop particular expertise in anti–money laundering, rendering it well suited to conduct the audits.

The anti–money laundering audits I am envisioning have some parallels to the work done by the BC Representative for Children and Youth. The Representative has a four-part mandate:

- supporting, assisting, informing, and advising children and their families about government-funded services and programs;

8 The BC Human Rights Commissioner has conducted research in a number of areas, including determining whether "social condition" and "Indigeneity" should be included as prohibited grounds of discrimination in the *Human Rights Code*: British Columbia's Office of the Human Rights Commissioner, "Key Issues: Discrimination," online: https://bchumanrights.ca/key-issues/discrimination/. Research of this kind can clearly be of great benefit to government when it is deliberating whether to amend legislation or introduce new policies.

9 Office of the Auditor General of British Columbia, "About Us – What We Do," online: https://www.bcauditor.com/about-us/what-we-do.

10 Office of the Auditor General of British Columbia, "About Us – Financial Audits," online: https://www.bcauditor.com/about-us/what-we-do/financial-audits; Office of the Auditor General of British Columbia, "About Us – Performance Audits," online: https://www.bcauditor.com/about-us/what-we-do/performance-audits.

11 *Auditor General Act*, SBC 2003, c 2, ss 16–17.

- supporting, assisting, informing, and advising "included adults"[12] and their families about government-funded services and programs;
- monitoring, reviewing, auditing, and conducting research on these services and programs for the purpose of making recommendations to improve their effectiveness and responsiveness; and
- conducting independent reviews and investigations into critical injuries or deaths of children receiving government services.[13]

The Representative's function of monitoring, reviewing, auditing, and conducting research on government-funded services and programs, and making recommendations about their effectiveness, parallels in a number of respects what I have in mind for the AML Commissioner's audits. These audits will, I expect, ensure that the anti–money laundering efforts of government institutions remain current, effective, and responsive to emerging trends.

While I appreciate that the creation of another statutory office could be seen as an additional layer of bureaucracy, I believe that the AML Commissioner will play an important role in ensuring that the anti–money laundering regime in this province remains current, responsive, and effective. Further, I expect that the presence of the AML Commissioner will assist in ensuring the provincial and federal governments follow through on commitments they have made during the present Commission's process.

Mandate and Functions

Broadly speaking, the AML Commissioner's mandate would be to oversee and monitor the provincial response to money laundering by carrying out the following functions:

- producing a publicly available annual report on money laundering risks, activity, and responses, as well as special reports on specific issues;
- undertaking, directing, and supporting research on money laundering issues in order to develop expertise on money laundering issues, including emerging trends and responses, informed by an understanding of the measures taken internationally;
- issuing policy advice and recommendations to government, law enforcement, and regulatory bodies concerning money laundering issues;
- monitoring, reviewing, auditing, and reporting on the performance of provincial agencies with an anti–money laundering mandate; and
- leading working groups and co-operative efforts to address money laundering issues.

12 "Included adult" is defined as an adult under 27 years of age who (a) is receiving or is eligible to receive community living support under the *Community Living Authority Act*, or (b) received, as a child, a reviewable service: *Representative for Children and Youth Act*, SBC 2006, c 29, s 1.

13 *Representative for Children and Youth Act*, s 6.

In what follows, I expand on each of these proposed functions and comment on some of the statutory powers that will be needed to carry them out.

Producing Annual and Special Reports on the State of Money Laundering in BC

A key function of the AML Commissioner would be producing an annual report on the state of money laundering risks and anti–money laundering efforts in the province. The report would be tabled in the Legislature and made publicly available,[14] such that British Columbians can be aware of the money laundering risks in this province, the steps being taken to combat them, and any shortfalls that need to be addressed.

The content of the report would stem from the other functions of the AML Commissioner's office, which I elaborate on below. The report would discuss key risks and vulnerabilities that the AML Commissioner has identified through his or her research function. It would also discuss the results of anti–money laundering audits the commissioner had undertaken in the previous year. If applicable, it would contain recommendations or policy advice, in order to address gaps in the Province's anti–money laundering response.

While the AML Commissioner would not be in a position to audit or recommend improvements to federal agencies, he or she should not be reticent to identify gaps and weaknesses in the federal regime to the extent they affect anti–money laundering efforts within the province. For example, the federal government has recently made a commitment to increase the number of RCMP officers assigned to money laundering and has given assurances that it will continue to prioritize money laundering investigations (see Chapter 39). The AML Commissioner should take all reasonable steps to monitor these efforts. If it appears that the federal government has not followed through on those commitments, the AML Commissioner should advise the provincial government and, if appropriate, the public, and recommend measures that the provincial government can take to address any gaps. While the Province cannot compel the federal government to invest in the fight against money laundering, it is essential that the citizens of British Columbia understand the efforts being made by the federal government to address the issue and that the provincial government be in a position to respond to gaps and weaknesses in the federal regime.

The AML Commissioner should also be given a mandate to file special reports with the Legislature on specific issues (for example, new areas of vulnerability or new money laundering typologies). The publication of these reports will increase awareness of the issue within government and allow regulators and private-sector entities to respond by updating their anti–money laundering protections (or where appropriate, filing reports with FINTRAC). I expect these reports will be public, unless there is sound reason to depart from that practice.

14 There may be sound reasons for aspects of the report to not be publicly available. In general, it is my view that issuing public reports should be a priority, as it ensures accountability and visibility into the progress made (or not made) in combatting money laundering in the province.

Undertaking, Directing, and Supporting Research

In various chapters of this Report, I point to areas where money laundering risks are not well understood. For example, in Chapter 22, I note that there is a live debate as to whether or not white-label ATMs pose a money laundering risk. Similarly, in Chapter 34, I discuss significant gaps in our understanding of money laundering through luxury goods markets and the need for the Province to promptly implement a reporting regime for all transactions of over $10,000 in cash, with the goal of understanding what is occurring in that sector.

I also discuss in Chapters 2 and 3 some gaps in Canada's national identification of money laundering risks. In particular, the federal government's 2015 national risk assessment[15] has been criticized for being outdated (now over seven years old) and is considered by some to be "only produced for [the Financial Action Task Force's] benefit and [lacking] a regular role in Canadian society and policy making."[16] Similarly, as I elaborate in Chapter 3, a 2019 report produced by Criminal Intelligence Service Canada on the activity of organized crime groups in Canada has a number of shortcomings, including that over a thousand organized crime groups operating in Canada were not assessed, that the numbers and techniques discussed therein are not specific to British Columbia, that much money laundering activity is not reported and thus not captured by the data used, and that the data does not discuss the *volume* of illicit funds being laundered through each sector of the economy.

One of the rationales for an AML Commissioner is to create a centre of expertise on money laundering issues. As such, the AML Commissioner will be well placed to lead efforts to better understand money laundering vulnerabilities in this province. While it would be unrealistic to expect the AML Commissioner (or a single province) to conduct the same kind of comprehensive risk assessment that the national risk assessment is meant to provide, the AML Commissioner's office could help fill the gaps left by federal inaction by focusing on key money laundering risks and vulnerabilities in this province.

I am therefore recommending that the AML Commissioner be empowered to undertake, direct, and support research on money laundering issues of concern to British Columbia. The money laundering risks and vulnerabilities identified by the commissioner would inform his or her annual and special reports on the state of money laundering in this province, as well as advice to government.

In carrying out these research functions, the AML Commissioner should make efforts to identify current knowledge gaps and develop a research strategy to fill those gaps. While traditional tools such as Financial Action Task Force publications will undoubtedly provide a good starting point for that work, it is important to recognize that money laundering threats and activity vary regionally. As such, I would encourage the AML Commissioner to go beyond those sources and consider other ways of assessing money laundering risks, especially insofar as they are specific to British Columbia.

15 Exhibit 3, Overview Report: Documents Created by Canada, Appendix B, Department of Finance, *Assessment of Inherent Risks of Money Laundering and Terrorist Financing in Canada, 2015* (Ottawa: 2015).

16 Evidence of N. Maxwell, Transcript, January 14, 2021, p 49.

The AML Commissioner should work with the Province to develop and gain access to information and data that will assist him or her in conducting research and gaining insight into local trends and advising government.

Issuing Policy Advice and Recommendations to Government

While I believe that government (rather than the AML Commissioner) should have primary responsibility for the study and implementation of specific measures designed to identify, deter, and prevent money laundering activity, I believe there is a role for the AML Commissioner – whose office will be charged with developing and maintaining an understanding of the money laundering risks facing the Province and developments with respect to those risks – to issue policy advice and recommendations to government concerning specific issues. For example, the AML Commissioner may be able to provide policy advice to government on the success (or lack thereof) of specific measures in other countries, or on the creation of new information-sharing pathways between the private sector, regulators, and law enforcement. Such policy advice could be given directly to government, be included in the commissioner's annual report, or form the basis of special reports filed with the Legislature.

Monitoring, Auditing, and Reporting on AML Activity of Provincial Bodies

The AML Commissioner should be given a mandate to monitor, review, audit, and report on the performance of provincial bodies with an anti–money laundering mandate to ensure that they properly understand the money laundering risks arising in their sectors and take appropriate steps to respond to those risks.

The UK's Office for Professional Body Anti–Money Laundering Supervision (OPBAS) has developed a sound model for the evaluation of anti–money laundering efforts of government bodies.[17] OPBAS is essentially a "regulator of regulators" that oversees and evaluates the anti–money laundering efforts of 25 accounting and legal supervisors[18] (referred to as "professional body supervisors"). It was created following the UK's 2017 national risk assessment and comments in the Financial Action Task Force's 2018 mutual evaluation of the UK to provide better oversight of the legal and accountancy sectors.[19] It has two key objectives:

17 OPBAS, *Sourcebook for Professional Body Anti–Money Laundering Supervisors* (January 2018, addendum added February 2021) [OPBAS Sourcebook], online: https://www.fca.org.uk/publication/opbas/opbas-sourcebook.pdf.

18 As I understand it, the supervisors are analogous to regulators or professional associations in this country. The professional body supervisors include the Association of Accounting Technicians; the Association of Chartered Certified Accountants; the Institute of Certified Bookkeepers; the law societies of England, Northern Ireland, and Scotland; and several others: OPBAS Sourcebook, para 2.1.

19 OPBAS, *Anti–Money Laundering Supervision by the Legal and Accountancy Professional Body Supervisors: Themes from the 2018 OPBAS Anti–Money Laundering Supervisory Assessments* (March 2019), online: https://www.fca.org.uk/publication/opbas/themes-2018-opbas-anti-money-laundering-supervisory-assessments.pdf [OPBAS 2019 Report], paras 1.2, 1.4. The mutual evaluation identified significant inconsistencies in the way that legal and accountancy professional body supervisors conducted their anti–money laundering supervision and noted that understanding of money laundering risks was uneven among them: ibid, para 1.4.

1. ensuring a robust and consistently high standard of supervision by the professional body supervisors overseeing the legal and accountancy sectors; and
2. facilitating collaboration and information and intelligence sharing between professional body supervisors, statutory supervisors, and law enforcement agencies.[20]

OPBAS evaluates professional body supervisors in eight key areas set out in its sourcebook:

- **governance:** whether the professional body supervisor:
  - clearly allocates responsibility for managing its anti–money laundering supervisory activity;
  - demonstrates that senior management is actively engaged with their approach to anti–money laundering supervision;
  - has appropriate reporting and escalation arrangements promoting effective decision-making; and
  - keeps its advocacy and regulatory functions separate.[21]
- **risk-based approach:** whether the professional body supervisor:
  - adopts a risk-based approach, focusing efforts and resources on the highest risks;
  - ensures that measures to reduce money laundering are proportionate to the risks;
  - regularly reviews the risks relating to their sector; and
  - supports its members' adoption of a risk-based approach.[22]
- **supervision:** whether the professional body supervisor:
  - effectively monitors its members;
  - uses the risk profiles it prepares to decide the frequency and intensity of on-site and off-site supervision; and
  - prepares guidance and communications for its members.[23]

20 Financial Conduct Authority, "Office for Professional Body Anti–Money Laundering Supervision" (modified September 20, 2021), online: https://www.fca.org.uk/opbas.

21 OPBAS Sourcebook, paras 3.1–3.4.

22 Ibid, paras 4.2–4.14.

23 Ibid, paras 5.1–5.4.

- **information sharing between supervisors and public authorities:** whether the professional body supervisor:
    - co-operates and co-ordinates activities with other supervisors and law enforcement entities to counter money laundering and terrorist financing threats;
    - has a single point of contact responsible for liaison with other supervisory, law enforcement, and overseas authorities; and
    - has mechanisms in place, such as a whistle-blowing regime, to encourage members of its sector to report breaches of the anti–money laundering regulations.[24]

- **information and guidance for members:** whether the professional body supervisor:
    - makes up-to-date information on money laundering and terrorist financing available to its members, including through typologies and guidance materials; and
    - communicates its expectations to its membership effectively.[25]

- **staff competence and training:** whether the professional body supervisor:
    - employs people with appropriate qualifications, integrity, and professional skills to carry out its anti–money laundering functions; and
    - considers whether to require formal anti–money laundering qualifications.[26]

- **enforcement:** whether the professional body supervisor:
    - makes arrangements to ensure that members are liable to effective, proportionate, and dissuasive disciplinary action;
    - has sufficient information-gathering and investigative powers to effectively monitor and assess compliance;
    - seeks to remove the benefits of non-compliance and deter future non-compliance; and
    - makes enforcement action related to non-compliance with the anti–money laundering regime public.[27]

24 Ibid, paras 6.1–6.8.
25 Ibid, paras 7.1–7.8.
26 Ibid, paras 8.1–8.4.
27 Ibid, paras 9.1–9.5.

- **record-keeping and quality assurance:** whether the professional body supervisor:
    - keeps written records of the actions it has taken, including instances where it has not acted;
    - subjects its supervisory work and decision-making to quality assurance testing; and
    - submits an annual questionnaire to OPBAS.[28]

At the time of writing, OPBAS has produced three annual reports.[29] It is useful to consider how its approach and findings have shifted from the first to third annual report. The first report found "a variable quality" of anti–money laundering and counterterrorist financing among the professional body supervisors, with 80 percent of them lacking appropriate governance arrangements, 91 percent not fully applying a risk-based approach to supervision, and 23 percent undertaking no anti–money laundering supervision.[30] The 2020 report found "strong improvement across both the legal and accountancy sectors" in their anti–money laundering supervision, while noting that some supervisors continued to lag behind their peers.[31] The 2021 report moved from a focus on the more *technical* aspects of supervisors' anti–money laundering measures towards a focus on the *effectiveness* of anti–money laundering supervision and controls, "highlighting examples of good practice as well as areas of concern, instead of only seeking to evaluate technical compliance."[32] It found that although there had been considerable progress by supervisors in terms of *technical* compliance with the UK's money laundering regulations, there were "differing levels of achievement and some significant weaknesses" in terms of *effectiveness*.[33]

The foregoing demonstrates that OPBAS has been successful in moving professional body supervisors toward a more consistent approach to money laundering supervision. It appears that significant progress occurred in technical compliance between the 2019 and 2021 reports, and it seems likely that OPBAS will similarly be able to help supervisors improve the effectiveness of their anti–money laundering measures.

In my view, a variation on the OPBAS model should be adopted in British Columbia. As I elaborate throughout this Report, the level of anti–money laundering regulation and supervision in this province varies dramatically, and it would be useful to have

28 Ibid, paras 10.1–10.5.

29 OPBAS 2019 Report; OPBAS, *Anti–Money Laundering Supervision by the Legal and Accountancy Professional Body Supervisors: Progress and Themes from 2019* (March 2020) [OPBAS 2020 Report], online: https://www.fca.org.uk/publication/opbas/supervisory-report-progress-themes-2019.pdf; OPBAS, *Anti–Money Laundering Supervision by the Legal and Accountancy Professional Body Supervisors: Progress and Themes from our 2020/21 Supervisory Assessments* (September 2021) [OPBAS 2021 Report], online: https://www.fca.org.uk/publication/opbas/supervisory-assessments-progress-themes-2020-21.pdf.

30 OPBAS 2019 Report, paras 2.1, 2.3–2.5.

31 OPBAS 2020 Report, para 2.1.

32 OPBAS 2021 Report, para 2.4.

33 Ibid, para 2.6.

oversight of various regulators and government agencies to ensure that those who lag behind are identified and changes are implemented. That said, I do not propose that the AML Commissioner be tasked with auditing *all* government agencies and regulators annually (as OPBAS does for legal and accountant regulators) – this would be an enormous task that would be impractical on a yearly basis. Instead, the AML Commissioner should focus on high-risk sectors, regulators that have not been sufficiently engaged with anti–money laundering regulation, or regulators identified by the AML Commissioner as requiring scrutiny. For example, the AML Commissioner may choose in his or her first year to focus on a particular regulator that has not been active in its anti–money laundering regulation and assess whether improvements have been made. In subsequent years, the AML Commissioner could shift focus to other regulators, but he or she could equally choose to return to the same regulator if of the view that insufficient progress has been made or the sector remains high risk.

While I appreciate that the OPBAS model was created to evaluate the anti–money laundering efforts of professional governing bodies, it strikes me that the model could apply more broadly to most government bodies and regulators that have an anti–money laundering mandate in this province. This would include (but not be limited to) the Gaming Policy and Enforcement Branch, the BC Lottery Corporation, the BC Financial Services Authority, the Society of Notaries Public of British Columbia, and the Chartered Professional Accountants of British Columbia.

The Law Society of British Columbia stands in a slightly different position, given the complications that may arise in relation to solicitor-client privilege. However, I see no reason in principle why it should not be subject to this type of evaluation, so long as it does not undermine privilege. Indeed, given the exclusion of lawyers from the *PCMLTFA* regime and the difficulties that would be involved in designing a reporting regime for lawyers (see Chapter 27), the AML Commissioner's engagement with and review of the Law Society's anti–money laundering policies would help offset the gap created by FINTRAC's lack of visibility into the activity of lawyers.

While adjustments would be necessary to avoid interfering with active investigations and files, I see no reason why the AML Commissioner could not review activity by the Civil Forfeiture Office and the designated provincial money laundering intelligence and investigation unit (recommended in Chapter 41). The commissioner could consider, for example, how many cases are initiated by the Civil Forfeiture Office or referred to it by law enforcement, the value of assets seized or restrained, the value of assets forfeited, and the distribution of funds received by the office as a result of sale of those assets. Similarly, the commissioner could consider the number of sworn members assigned to the designated provincial money laundering intelligence and investigation unit; the number of arrests made by it; and the number of investigations that have resulted in charges being recommended, approved, and successfully prosecuted.

Working Groups, Special Assignments, and Co-operative Efforts

I envision a role for the AML Commissioner in the organization of strategic partnerships or working groups to address specific money laundering issues as they arise. Examples include the negotiation of information-sharing agreements among government agencies, regulators, and the private sector; the collection and analysis of data across federal and provincial agencies to allow for a better understanding of money laundering threats in specific sectors of the economy; and the development of approaches to quantification. The AML Commissioner may be particularly well suited to organize and coordinate working groups in areas of shared federal-provincial jurisdiction.

As I noted above, one of the objectives of OPBAS is to facilitate "collaboration and information and intelligence sharing between [professional body supervisors], statutory supervisors and law enforcement agencies."[34] OPBAS and the UK's National Economic Crime Centre have established Intelligence Sharing Expert Working Groups for the legal and accountancy sectors, whose terms of reference speak to both strategic and tactical information sharing between supervisors and law enforcement agencies.[35] (As I explain in Chapter 7, *strategic* information sharing refers to broader information such as typologies and general indicators of suspicion, whereas *tactical* information relates to specific individuals and entities.) As of March 2020, OPBAS had held and chaired five accountancy and two legal working group meetings.[36] Its 2020 report notes that despite observing improvements among professional body supervisors between June 2019 and its March 2020 report, there continued to be "stark differences" in how supervisors engaged with OPBAS and the working groups.[37] The 2021 report found some improvements in the supervisors' engagement with the working group, while still noting some "persistent differences" in engagement.[38]

In my view, the work that OPBAS is doing to bring together stakeholders and encourage better use of information-sharing pathways is important and should be emulated in British Columbia. Although it appears that professional body supervisors in the UK continue to take varying approaches to information sharing, there is, in my view, value in having a body like OPBAS that reports on these approaches and draws attention to those supervisors who are not progressing in the same way as their peers. As I have noted throughout this Report, information sharing is a key component of any anti–money laundering strategy, and there have been varying approaches to it in this province. Although, as I expand in Chapter 7, there are important constitutional considerations relating to the sharing of *tactical* information, these difficulties do not arise when sharing *strategic* information. The

34 Financial Conduct Authority, "Office for Professional Body Anti–Money Laundering Supervision," online: https://www.fca.org.uk/opbas.

35 Accountancy Sector Intelligence Sharing Expert Working Group, "Terms of Reference" (last updated August 2020), online: https://www.fca.org.uk/publication/opbas/accountancy-sector-isewg-terms-of-reference.pdf; Legal Sector Intelligence Sharing Expert Working Group, "Terms of Reference" (last updated August 2020), online: https://www.fca.org.uk/publication/opbas/legal-sector-intelligence-sharing-expert-working-group-terms-of-reference.pdf.

36 OPBAS 2020 Report, para 4.7.

37 Ibid, paras 4.9–4.12.

38 OPBAS 2021 Report, paras 4.9–4.14.

AML Commissioner would be well placed to create working groups, facilitate the sharing of strategic (and where appropriate, tactical) information, and report on the progress of information-sharing initiatives.

Role in Relation to Luxury Goods Sector

In Chapter 34, I set out a proposed role for the AML Commissioner in the luxury goods sector (as I define that sector in that chapter). I recommend there that the Province implement a reporting regime for all cash transactions of over $10,000, with the goal of better understanding the use of cash in the British Columbia economy and the associated money laundering risks. This recommendation aims to address a significant gap in our understanding of money laundering through luxury goods, a sector where there are few regulators, markets that do not collect records at all, little information gathered about suspicious activity, and often no one with anti–money laundering responsibilities to speak to. As I expand in Chapter 34, it is essential that the AML Commissioner have access to the reports generated by this reporting regime, such that he or she can develop an understanding of the money laundering risks in the luxury goods sector and recommend measures to address them. The commissioner will also need to engage in other efforts to collect information about luxury goods and markets, such as by consulting with industry and regulators, studying activity in specific markets or regions, and monitoring international money laundering trends.

I also describe in Chapter 34 a role for the AML Commissioner in advising the Province when he or she becomes aware of new and evolving money laundering threats in the luxury goods sector that require timely action. I recommend there that a particular minister be given the ability to implement timely measures to address such new and evolving risks, which may take the form of binding directives or regulations. It will be important for this minister to consult with and take advice from the AML Commissioner and be responsive to his or her suggestions.

Powers

In order to carry out the functions I have just laid out, the AML Commissioner must be given powers of examination and compulsion similar to those afforded to the Auditor General of British Columbia and other commissioners.[39] In certain cases, it may be necessary to carve out exceptions to these powers. For example, it may be inappropriate for the AML Commissioner to receive information concerning specific investigations undertaken by the designated provincial money laundering intelligence

39 See, e.g., *Auditor General Act*, SBC 2003, c 2, ss 16–17; *Human Rights Code*, RSBC 1996, c 210, ss 47.13, 47.16; *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165, s 44; *Representative for Children and Youth Act*, SBC 2006, c 29, ss 10, 14, 14.1. OPBAS also has similar powers: *The Oversight of Professional Body Anti–Money Laundering and Counter Terrorist Financing Supervision Regulations 2017* (UK Statutory Instrument 2017/1301), s 7. Interestingly, OPBAS can also commission a "skilled person" report in which it can require a self-regulatory organization to appoint someone to provide a report on a matter relating to the exercise of OPBAS's functions under the regulations: ibid, s 13.

and investigation unit (though it could be provided information with respect to the number of sworn members assigned to that unit, the number of arrests made by the new unit, the number of money laundering and proceeds of crime investigations that resulted in charges being recommended and approved, etc.). Likewise, it would not be appropriate for the AML Commissioner to receive privileged information from the Law Society, though it could receive information concerning the anti–money laundering program implemented by that organization.

To fulfill the study function, it will be important for the AML Commissioner to be able to compel information from government, government agencies, and regulators. The Province may also wish to consider whether the commissioner should be given the power to compel information from private entities and individuals for the purpose of studying money laundering risks, vulnerabilities, and trends. The exercise of such a power could provide the commissioner with important and timely real-world insights. If the Province decides to provide the AML Commissioner with the ability to compel information from private entities and/or individuals, it would have to give careful consideration to the manner in which this power should be limited.

Staffing and Budget

While I am not inclined to make any specific recommendations concerning the staffing or budget of the AML Commissioner's office, it essential that the Province appoint a commissioner with a high level of knowledge and expertise in money laundering issues and that he or she be given the resources to hire staff capable of performing the research, data analysis, policy support, evaluation, coordination, and reporting functions outlined above. It is also important that the AML Commissioner be in a position (legally and financially) to seek the assistance of outside professionals, including lawyers, accountants, law enforcement officials, and academics in carrying out his or her functions.[40]

The Anti–Money Laundering Deputy Ministers' Committee

While an independent office of the Legislature is well-placed to provide strategic oversight of the provincial anti–money laundering regime, it is equally important that there be a coordinating body *within* government to respond to advice from the AML Commissioner and to study and implement measures designed to respond to the money laundering threats facing this province.

In September 2018, the Province created the Anti–Money Laundering Deputy Ministers' Committee and Anti–Money Laundering Secretariat, initially, to implement the recommendations made by Peter German in *Dirty Money 1*. The

40 I note, in particular, that many of the recommendations contained in this Report involve the creation of constitutionally permissible information-sharing partnerships. My hope is that the AML Commissioner will be in a position to assist with these efforts. However, that task that will almost certainly require the involvement of lawyers.

Anti–Money Laundering Deputy Ministers' Committee is composed of deputy representatives of the Ministry of Finance, the Ministry of Public Safety and Solicitor General, and the Ministry of the Attorney General.[41] It reports to the attorney general, minister of finance, and solicitor general as the lead ministers.[42] When it was created in September 2008, it was responsible for implementing the recommendations in *Dirty Money 1*.[43] Meanwhile, the Anti–Money Laundering Secretariat was responsible for day-to-day actions such as providing information to ministers and developing the legal and regulatory structures that might be utilized in order to address money laundering.[44]

Mark Sieben, deputy solicitor general, explained that upon the release of the expert reports referred to above, the Deputy Ministers' Committee and the Anti–Money Laundering Secretariat were given an expanded mandate to develop a coordinated, multi-sectoral response to money laundering:

> It became apparent during the initial year of the committee's existence that discussion and examination of money laundering, while it was premised on the original German report, couldn't be confined simply to looking at what was happening in gaming and casinos … Consequently, additional external work was done both by Dr. German as well as a panel led by Maureen Maloney. And those reports in due course informed the broader scope of the committee as well as the activity that the committee asked of the secretariat.[45]

While the Deputy Ministers' Committee and Anti–Money Laundering Secretariat have primarily been responsible for the implementation of the recommendations contained in the expert reports, they have also been involved in the development and implementation of a provincial anti–money laundering strategy with the ultimate goal of building a "strong and sustainable anti–money laundering (AML) regime by effectively using targeted actions and tools to identify, prevent, and disrupt illegal activity."[46]

I consider the development and implementation of that strategy to be a critical step in the fight against money laundering. It is only through a coordinated research, compliance, and enforcement regime, in which there is a clear understanding of money laundering threats, that the Province will achieve any sustained success in combatting

41 Evidence of M. Harris, Transcript, June 11, 2020, p 7.

42 Exhibit 42, Government of BC, Anti–Money Laundering Deputy Ministers' Committee Terms of Reference (June 2019), p 1.

43 Evidence of M. Harris, Transcript, June 11, 2020, pp 8–9.

44 See Exhibit 41, Draft – Ministry of Attorney General, Anti–Money Laundering Deputy Ministers Terms of Reference, p 4; Evidence of M. Sieben, Transcript, June 11, 2020, p 12. Megan Harris, the former lead to the Anti–Money Laundering Secretariat, described the responsibilities of the secretariat as partly advisory and partly project management: Transcript, June 11, 2020, p 13.

45 Evidence of M. Sieben, Transcript, June 11, 2020, p 11; Exhibit 42, Government of BC, Anti–Money Laundering Deputy Ministers' Committee Terms of Reference, p 1.

46 Exhibit 46, Provincial Anti–Money Laundering Strategy (January 30, 2020) [AML Strategy], p 3.

those threats.[47] It is important that there be a body within government that is tasked with maintaining a focus on, and guiding the Province's response to, money laundering. I understand that the Deputy Ministers' Committee and Anti–Money Laundering Secretariat have developed some expertise in money laundering issues through the study and implementation of the recommendations contained in the expert reports (as well as other anti–money laundering measures).

I therefore recommend that the Deputy Ministers' Committee and Anti–Money Laundering Secretariat be continued and that these bodies be given responsibility for the continued development and implementation of the provincial anti–money laundering strategy. This strategy should include the introduction of specific measures aimed at identifying, preventing, and deterring money laundering activity in the province's economy. I also recommend that the Deputy Ministers' Committee and Anti–Money Laundering Secretariat be given responsibility for implementing the recommendations contained in this Report.

Recommendation 2: I recommend that the Province maintain the Deputy Ministers' Committee and Anti–Money Laundering Secretariat and that they be given responsibility for the continued development and implementation of the provincial anti–money laundering strategy, including the implementation of measures identified in this Report.

It will be important for the AML Commissioner to have ready access to the Deputy Ministers' Committee and the Anti–Money Laundering Secretariat, such that he or she can make recommendations and provide policy advice to them as necessary.

Anti–Money Laundering Liaison Officer

Another measure that would assist in identifying, preventing, and investigating money laundering activity is the designation of an anti–money laundering liaison officer from each government agency, regulator, and law enforcement body that has an anti–money laundering mandate. The Law Society describes the benefits of this model as follows:

> AML-related relationship building and collaboration among different agencies are most effective when (a) each agency has clearly designated an individual staff member as the agency's primary representative on AML measures; (b) other agencies can be assured that the designated representative has the authority and experience to speak on behalf of their organization, and can escalate an issue as appropriate; and (c) the same representative consistently attends AML collaboration or information-

47 On this point see Evidence of N. Maxwell, Transcript, January 14, 2021, pp 62–63, 120–22.

> sharing activities. Conversely, relationship building and collaboration are less successful if agencies have not clearly assigned an AML representative, send different representatives to each meeting, or send staff who are not authorized to act on, or escalate consideration of, an issue in a timely way.[48]

I believe that the appointment of such dedicated anti–money laundering liaison officers has considerable promise for the creation of effective information-sharing pathways among provincial law enforcement and regulatory bodies. While the exchange of tactical information would have to be governed by specific and constitutionally permissible information-sharing agreements, the implementation of this proposal would undoubtedly facilitate the exchange of strategic information and allow for the implementation of measures designed to prevent money laundering activity. I therefore recommend that the Province introduce a statutory requirement that all government agencies, regulators, and law enforcement bodies with an anti–money laundering mandate designate an anti–money laundering liaison officer to be the primary point of contact for improved inter-agency collaboration and information sharing.

Recommendation 3: I recommend that the Province introduce a statutory requirement that all government agencies, regulators, and law enforcement bodies with an anti–money laundering mandate designate an anti–money laundering liaison officer to be the primary point of contact for improved inter-agency collaboration and information sharing.

Conclusion

In this chapter, I have explained the need for a dedicated AML Commissioner in British Columbia and set out the role I envision for that office. Although the primary role and responsibilities of this office are set out here, I have indicated at various points in this Report areas where the AML Commissioner would be well suited to research or study a particular issue and facilitate collaboration between different actors with anti–money laundering mandates.

I expect that the AML Commissioner will ensure, once this Report has been released, that there is continued focus on anti–money laundering in British Columbia. Money laundering is a continually evolving phenomenon, and criminals will constantly seek to exploit new areas of vulnerability. It is crucial that there be a team, following the conclusion of this Commission of Inquiry, whose focus is on money laundering. This will ensure that the Province's approach to anti–money laundering becomes current and remains effective.

I have also recommended that the Deputy Ministers' Committee and the Anti–Money Laundering Secretariat be continued. These bodies will serve

48 Closing submissions, Law Society of British Columbia, para 75.

important coordination roles within government as the Province implements the recommendations in this Report and receives further information and advice from the AML Commissioner in the future. Finally, I have recommended that all government agencies, regulators, and law enforcement bodies designate an anti–money laundering liaison officer to serve as the primary point of contact for improved inter-agency collaboration and information sharing.