

**CULLEN COMMISSION OF INQUIRY INTO MONEY
LAUNDERING
IN BRITISH COLUMBIA**

Opening Statement of Society of Notaries Public of British Columbia

February 24, 2020

Presenters:

Ron Usher
General Legal Counsel &
Commissioned Notary Public

and

John Mayr
Executive Director

The Society of Notaries Public of British Columbia welcomes the opportunity to make this presentation to the Cullen Commission. We acknowledge the unceded territory of the Coast Salish people, including the Musqueam, Squamish, and Tsleil-Waututh nations.

The Society of Notaries Public wishes to express our thanks and gratitude to the Commissioner and Commission staff for the opportunity to participate in this important endeavor.



Historical Perspective

[1] Within Canada, B.C. is unique in that the members of the Society of Notaries Public are legal service providers with a scope of practice that includes areas of non-contentious legal services, including real estate transactions. In our presentation, when we refer to Notaries Public, we mean the members of the Society of Notaries Public of British Columbia who hold a Royal Commission granted by the Supreme Court of B.C. appointing them as a Notary. All lawyers who are practicing members of the Law Society of B.C. are also, by statute, "Notaries Public in and for the Province of British Columbia." We do not regulate lawyer Notaries.

[2] Some history is in order. Notaries in B.C. are "common law" Notaries, and have been in practice in B.C. since the earliest days of the colonies of Vancouver Island and British Columbia. The work they do to this day is similar to the practice of Notaries Public in England in the mid-1800s. Notaries in Quebec are civil law notaries. The common law Notarial practice split from the civil law tradition in the 1500s. That said, there remain many similarities as Notaries everywhere focus on non-contentious legal matters. The text of the current oath of office and commission in B.C. is taken from the English Public Notaries Act of 1843.

Every B.C. Notary, when installed into the profession, takes the following Oath of Office: "I DO SWEAR THAT I WILL NOT MAKE OR ATTEST ANY ACT, CONTRACT OR INSTRUMENT IN WHICH I KNOW THERE IS VIOLENCE OR FRAUD, AND IN ALL THINGS I WILL ACT UPRIGHTLY AND JUSTLY IN THE OFFICE OF A NOTARY PUBLIC."

We note that the first document filed in the Land Registry office in Victoria on May 4, 1861, was witnessed by a Notary.

The Society as Professional Regulator

[3] The Society of Notaries Public of B.C. was established in 1926. The *Notaries Act* has naturally been amended numerous times. By 1967 the provincial government had fully delegated to the Society of Notaries Public the functions of a professional regulatory body.

- [4] The Society is responsible for establishing standards of education (ensuring commissioned notaries are competent in the provision of authorized legal services), inquiring into matters of conduct by members, conducting discipline proceedings, and acting in the public interest. After many years as a diploma program offered through U.B.C., the education currently required to become a member is an “M.A. A.L.S.” (Master of Arts - Applied Legal Studies) from Simon Fraser University.
- [5] The Society of Notaries Public of British Columbia enforces the *Notaries Act* and, like other regulators, is a law enforcement agency.
- [6] There are currently 396 practicing notaries in the Province serving clients and communities.
- [7] Our members did 88,956 real estate transactions involving trust funds in the 12 months preceding Feb. 15, 2020. This represents a significant percentage of the real estate transfers and mortgages done in the Province. While there are no precise statistics, Notaries are also primary providers of personal planning legal services, including wills, representation agreements and powers of attorney. Our Notaries tend to build long term relationships with their clients. The principles of “Know Your Client” are fundamental to those relationships and assist in the understanding of the source of funds used in transactions.
- [8] Notaries are reporting entities under the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (the Act), and they comply with the provisions of that Act. Notaries are subject to FINTRAC audits. To date no B.C. Notary has been subject to a penalty imposed under the PCMLTF Act.
- [9] B.C. Notaries Public are bound by the privacy provisions of the Personal Information Protection Act and other privacy legislation. It is important to note that solicitor/client privilege does not apply to their client relationships. Notaries can and routinely do cooperate with police and tax enforcement agencies as required by law. They are additionally subject to compliance with the Notaries Act, the Society’s Rules, Bylaws, and the Society’s “Principles for ethical and professional conduct guideline.”

- [10] The practice of Notaries necessarily involves compliance with the administration of federal and provincial statutes, the collection and remittance of applicable taxes as well as constant attention to the avoidance of money laundering.
- [11] As a regulatory body, the Society of Notaries Public of British Columbia and its members recognize and understand the negative effects of money laundering on civil society and adopts the United Nations definition of money laundering¹:

Complex interaction with Government Policy

- [12] There are complex interactions between government policy, housing affordability, allegations of money laundering, the conversion of offshore capital, public sentiment, and trust. Concerns about affordability go back very far in British Columbia. The Commission faces a genuinely daunting task in sorting out with some precision the degree to which money laundering is a significant factor in, for example, affordability. The Society stands ready to assist as we can in this task. A serious attempt needs to be made to see if it is possible to do better than a “guestimate of the inestimable.”
- [13] There is a tension that exists between measures related to taxation and transparency and affordability and privacy. Despite the vast majority of land in the Province being owned by individuals, there is a concern that beneficial ownership is hidden through corporations and trusts. Our members will be front and center in the effective launch and operation of the *Land Ownership and Transparency Act*. (LOTA)
- [14] LOTA will create a publicly accessible registry of beneficial interests in land that will include information on freehold interests, life interests, leasehold interests under leases with a term of more than 10 years, contractual rights to occupy land or require the transfer of a freehold interest and other interests prescribed by regulation. The obligations under the Act arise in relation to interests in land that are registered under the Land Title Act and not unregistered interests.

¹ <https://www.fintrac-canafe.gc.ca/guidance-directives/overview-apercu/Guide1/1-eng>

- [15] Not surprisingly, it is anticipated that reporting and maintenance of records related to LOTA will increase the cost related to real estate transactions by a significant amount.
- [16] There is an irony in that information about shareholders of companies used to be publicly available. Access to the information was removed through an act of the Provincial government due to concerns about foreign investment and privacy.

Real Estate and the Role of Legal Professionals

- [17] The involvement of notaries and lawyers in B.C. real estate transactions has allowed strangers to exchange money for real property in a safe, effective, and efficient manner. How we carry out real estate transactions in B.C. is the envy of much of the world. Our “Torrens” land title system is undoubtedly world class.
- [18] In essentially every instance, the funds for real estate transactions that notaries receive come directly from regulated Canadian financial institutions by way of bank drafts, credit union “official cheques,” and direct electronic deposits from these financial institutions.
- [19] Notaries do due diligence on all deposits, including source of funds determinations. They cannot accept certified cheques unless they personally attend at the relevant financial institution. Members may also deposit trust account cheques from lawyers and real estate brokerages. Historically, the system is stable, safe, and trusted. Issues with “bad” funds are very, very rare.
- [20] Various reports have suggested indicators of money laundering. It needs to be said that, for example, there are numerous and legitimate reasons that a person may purchase real property and not require a mortgage. Money is not necessarily being laundered when a student, from a well-off family, purchases a home even when the value of the home is extra-ordinary so long as the funds are not a result of *“any act or attempted act to disguise the source of money or assets derived from criminal activity.”*

[21] We urge the Commission to consult broadly with experts on the “financialization” of real estate as B.C. is not immune to worldwide trends and economic factors.

Enforcement and monitoring systems

[22] Unfortunately, it appears that current law enforcement and monitoring systems may be fundamentally broken. Amongst other factors, this is in part due to underfunding and resourcing. We are very sympathetic to the plight of the many dedicated persons in our agencies charged with law enforcement. They are entitled to resources appropriate to our expectations of results.

[23] Statistical data reported in recent news reports² indicate that a high rate of individuals charged with money laundering are never convicted. It has been reported that only 25% of individuals charged with crimes related to money laundering are convicted.

[24] To highlight the challenges with the system, we point out that in British Columbia, between 2002 and 2018, there were 50 prosecutions of money laundering cases. Of those, ten were found guilty.³

[25] As others have noted, all too often, current systems create silos of information that benefit criminals. Project Athena is a useful and tangible attempt to break down unnecessary barriers. The Society was pleased to host the recent meeting of the project’s real estate sub-group.

[26] We are aware of a matter where FINTRAC received suspicious transaction reports with respect to one of our members. Neither the reporting entity nor FINTRAC or any other agency advised, notified or otherwise provided information to the Society in regard to their concerns. Such information would

² <https://globalnews.ca/news/4939801/provinces-canada-fail-to-convict-money-laundering/>

³ <https://globalnews.ca/news/4939801/provinces-canada-fail-to-convict-money-laundering/>

- have provided the opportunity for the Society as the regulator to conduct targeted audits and inspections.
- [27] This failure to inform and advise deepened the fraud and caused harm to members of the public.
- [28] The Society recommends that the Commission examine and explore barriers to sharing information and encourage governments to make clear provisions in statutes that provide for the sharing of information with appropriate agencies such as the Society. This sharing needs to be timely. It does not work for our members to receive guaranteed funds from a bank and conveyance instructions from a real estate firm where STR's have been filed by other reporting entities.
- [29] For greater clarity, we are suggesting that there needs to be a high degree of coordination between the federal and provincial governments and agencies including:
- a. FINTRAC
 - b. C.R.A.
 - c. Courts at all levels
 - d. Law Enforcement Agencies
 - e. Taxation audit programs
 - f. Professional Regulators
- [30] In British Columbia, section 18 of the *Personal Information Protection Act* provides for the sharing of information held by Notaries. On an urgent basis we were recently able to work with the RCMP, explaining these provisions and allowing for a very time sensitive criminal investigation to proceed without delay.
- 18** (1) *An organization may only disclose personal information about an individual without the consent of the individual, if*
- (j) *the disclosure is to a public body or a law enforcement agency in Canada, concerning an offence under the laws of Canada or a province, to assist in an investigation, or in the making of a decision to undertake an investigation,*
 - (i) *to determine whether the offence has taken place, or*

*(ii) to prepare for the laying of a charge or the prosecution of the offence,
(...)*

- [31] Current Provincial law requires certain disclosure of information respecting land transactions. However, sometimes laws require unrelated individuals – almost always strangers - verify the information required. We would suggest that the information and reporting systems could be strengthened by the Commission making recommendations concerning the collecting information from the appropriate parties. By way of example, requiring a buyer of a property to provide information about the seller and then to subject the buyer to significant fines for the quality of that information of a seller is nonsensical.
- [32] The Commission will want to consider what improvements can be made to the collection of critical taxation and ownership information so that the right information is collected at the right time attested to by the right parties. Notaries are well positioned to be trusted collectors and remitters of appropriate and necessary transaction information from properly advised clients.

Objects of the Commission

It is within the Commission's mandate to consider the following:

The interaction between professional services (legal and accounting) and money laundering.

- [33] Members of the SNPBC are legal services providers who are entitled to and provide legal services and advice directly to clients. The Courts have long held that the professional standard of care as it applies to lawyers also applies to members of the SNPBC.
- [34] There now exists the ability for the electronic monitoring of trust account activity by regulators. Having the explicit statutory authority to use emerging technologies would benefit the regulators and be in the public interest.

Acts or omissions of regulatory authorities and did those acts or omissions lead to money laundering?

- [35] We are not aware of acts or omissions or allegations that the Society has acted or failed to act and that those acts or omissions lead to money laundering. That said, the Society is committed to regularly reviewing our operations to ensure that best regulatory practices are being maintained and improved in response to changing conditions.
- [36] The SNPBC adopted and embraced the provisions of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* and the designation of Notaries Public as reporting entities to FINTRAC.
- [37] The Society of Notaries Public has provided training and education to FINTRAC auditors and assessors with respect to notary practice and real estate transactions.

The scope and effectiveness of the powers, duties and functions carried out by a regulatory authority.

- [38] The government and the public would benefit from the strengthening of the statutory framework for regulated professionals.
- [39] The *Notaries Act*, though functional, is dated and effective regulation requires modernization and forward looking statutory provisions.
- [40] With the existing legislative framework, the Society is an effective regulatory agency that regulates members in the public interest and in the interest of civil society. That said, we look forward to working with the Commission on a range of possible enhancements to our regulatory regime.

Barriers to effective law enforcement

- [41] We would suggest that the Commission consider how legislative initiatives (provincial and federal) could enhance or otherwise ensure that regulators have the tools to create bylaws and rules, to investigate members, to share

information with other regulators and agencies and when appropriate to discipline members.

- [42] We would further suggest that the Commission examine and recommend that courts, police, federal and provincial agencies, regulators and regulated institutions are statutorily required to share information.

Further suggestions for Commission inquiry and consideration

- [43] There is no doubt that those involved in money laundering and financial fraud take advantage of the speed at which money now moves. With respect to real estate transactions, we propose that slowing down the transaction by statutorily requiring a set period of time between contract finalization and completion would allow for legal professionals and other reporting agencies to be able to fully care out appropriate due diligence, data collection, tax clearances and data validation.
- [44] There exists a recognized need for high quality, centralized registries and data validation tools that are affordable for members to access and use. The cost of registries, searches, and other verifications is passed on to consumers directly and indirectly.
- [45] We recommend that the Commission look carefully at mortgage lending by unregulated and non-reporting entities. Of particular interest is the source of funds used for making the loans.
- [46] The B.C. government is taking steps to allow for digital identification. We stand ready to work with these very innovative initiatives.
- [47] The ubiquitous use of the digital exchange of funds is inevitable. It is important that these systems be designed to provide auditable contextual data that will allow for appropriate confirmation of the source and reliability of funds – and for timely auditing by regulators such as the Society.
- [48] On the not so simple end of the scale, an examination and consideration of reforms to courts and judicial systems need to be considered. This will naturally be complex and controversial, but effective prosecutions are the ultimate

deterrence. Is it timely to ask if the R. v. Stinchombe ([1991] 3 SCR 326) disclosure requirements need to be reconsidered.

- [49] There is naturally a need to balance privacy and transparency. The challenge is to ensure that principles of privacy are not being used to obfuscate sources of funds, beneficial ownership, and money laundering.
- [50] We urge the Commission to connect with and consult thoroughly with the banks and credit unions as well as Payments Canada. Their participation is important if we are going to usefully “follow the money.”
- [51] We are also keenly aware of a law we cannot afford to ignore: “the law of unintended consequences” We urge the Commission to explore with a forward looking perspective and diverse consultations the potential effects of any recommendations made.

In closing

- [52] The Society of Notaries Public and Counsel for the Society are available to assist and inform the Commission concerning real estate and land transactions. We encourage the Commission to maintain a connection with the Society of Notaries Public of B.C. We are committed to supporting the Commission in the daunting work of developing real world solutions to money laundering concerns based on methodical research and thoughtful policy development.