REPORT OF

PROFESSOR WILLIAM GILMORE

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1. I, William Christopher Gilmore, LL.B. (Edinburgh), LL.M. (London), M.A. (Carleton), Ph.D. (London), have prepared this report at the request of the Cullen Commission of Inquiry into Money Laundering in British Columbia. I am the Emeritus Professor of International Criminal Law in the School of Law of the University of Edinburgh, Scotland. In my academic capacity I have conducted extensive research on the nature, scope and evolution of international anti-money laundering measures and associated issues relating to international cooperation in the investigation and prosecution of profit generating criminal offences and the confiscation of the proceeds thereof. I am, *inter alia*, the author of *Dirty Money: The Evolution of International Measures to Counter Money Laundering and the Financing of Terrorism* (4th edition 2012: Council of Europe Publishing, Strasbourg) and was one of the two principal authors of the official United Nations *Commentary* on the 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1998: United Nations, New York). In addition, I have had practical involvement in international efforts to combat money laundering and the financing of terrorism. I was, from 1 January 1991 to 31 December 1992, the Head of the Commercial Crime Unit and Assistant Director of the Legal Division of the Commonwealth Secretariat. During that period my duties included contributing to anti-money laundering policy development, awareness raising concerning this issue, and providing related technical assistance to the member states and territories of the Commonwealth. I maintained some level of involvement with relevant inter-governmental initiatives thereafter. By way of illustration, I was the Scientific Expert (Legal) to the Council of Europe Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (MONEYVAL) from its creation in 1997 to December 2017. In that capacity I participated in the deliberations of its member governments at each of its Plenary meetings. I also participated, as the legal expert, in nine of the mutual evaluations carried out under its auspices. These are designed to gauge the level of formal compliance of individual member states with international anti-money laundering

and counter-terrorist financing standards and the effectiveness of said national systems. In 2013 I received training in the new assessment methodology in Moscow from members of the Financial Action Task Force (FATF) Secretariat supplemented by input from experts drawn from the World Bank and the International Monetary Fund. Between 2015 and 2017 I was Co-Chair of MONEYVAL's Working Group on Evaluations. Also in a Council of Europe context, I was the legal adviser to the committee of governmental experts (Committee PC-RM) which negotiated the 2005 Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism. In 2017 I was awarded the Medal of Honour of the Council of Europe for contributions to the countering of money laundering and the financing of terrorism. In 2009 I was the specialist adviser to the inquiry conducted by the European Union Committee of the House of Lords on money laundering and the financing of terrorism. I have acted, on an *ad hoc* basis, as an advisor to several jurisdictions and international bodies on related issues.

I have drawn upon this background and experience in the formulation of my report which is as follows:

I. The Financial Action Task Force (FATF)

(i) *Background and Context*

2. The Financial Action Task Force (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. It was created at the behest of the Paris Summit of the G-7 in 1989 and reflected its deep concern with the adequacy of international action against drug trafficking and the laundering of the significant proceeds which were derived from that illegal trade.

3. The FATF is, primarily, a standard setting and policy making body; though one of limited membership. It currently comprises 37 jurisdictions representing major financial centres and strategically important countries drawn from all parts of the globe. Canada has been a member since its creation. The European Commission and the Gulf Co-operation Council are also members. Its Secretariat is located in, though it is not formally part of, the Paris based Organisation for Economic Cooperation and Development (OECD). The Task Force, which has a rotating Presidency, meets in Plenary session (normally) three times each year. Its mandate was originally set at Ministerial level for specific time periods but more recently it has become, in effect, open-ended.

(ii) *The Evolution of FATF Standards*

4. Initially the FATF had a single-issue agenda; namely, to set standards and promote the effective implementation of legal, regulatory and operational measures to combat the laundering of the proceeds of crime. To this end it formulated, in 1990, a package of 40 Recommendations which was intended to represent a common, comprehensive and minimum anti-money laundering standard. The "package" of recommendations embodied three central strands. First, it called for the strengthening of domestic criminal justice systems with a particular 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. It was recognised, however, that sole reliance on criminal justice measures would not be sufficient. This perception resulted in the inclusion of a second and more innovative element; namely, the decision to involve, in an unprecedented fashion, participants in financial sector activity in an effort to prevent and detect money laundering. This flowed in part from the analysis of money laundering techniques and the identification of the stages in the process where the launderer was believed to be most vulnerable to detection. Finally, the 40 Recommendations

of 1990 embodied the recognition that the success of any strategy to combat money laundering would depend, to a significant extent, on the range, scope and quality of the mechanisms of international cooperation. This was accordingly made the third central strand of its programme of action.

5. The FATF has periodically revised and updated its standards. In the course of 1995-1996 a major "stocktaking" review of the original 1990 recommendations was initiated which resulted in agreement being reached on a range of amendments. While the total number of recommendations remained at 40 some of the original package were deleted, others amended, and many renumbered.

6. Among the more significant amendments of relevance for present purposes were the extension of the predicate offences for money laundering beyond drug trafficking (Recommendation 4), and the expansion of the scope of the preventative aspects of the strategy to cover non-financial businesses (Recommendation 9). Importantly, while the 1990 recommendations envisaged the establishment of either a permissive or a mandatory system for the reporting of suspicious transactions (Recommendation 16) the former option was removed in 1996. The new text was worded thus:

> 15. If financial institutions suspect that funds stem from a criminal activity, they should be required to report promptly their suspicions to the competent authorities.

7. In contrast to the structured nature of the 1996 revisions the FATFs engagement with the issue of the financing of terrorism emerged in the immediate aftermath of the attacks perpetrated against the United States on 11 September 2001. In late October 2001 the FATF convened a special Plenary meeting in Washington, D.C. to consider its response to those events. It was decided at that gathering to explicitly extend the remit of the Task Force to embrace the subject of the financing of terrorist activities. In addition eight Special Recommendations were

formulated to address various aspects of this new high priority concern. A ninth was added in October 2004. The underlying philosophy was that these measures, when combined with the existing 40 Recommendations, would provide an appropriate framework for the prevention, detection and suppression of the financing of terrorism.

8. Also in 2001 the FATF announced its intention to conduct a wide-ranging review of its package of 40 Recommendations. This process was brought to a conclusion in June of 2003 when a new version was formally adopted at a Plenary meeting held in Berlin. It contained numerous amendments. These ranged from stylistic modifications to deletions and additions of considerable import. The major changes embodied in the new text were as follows:

- specifying a list of crimes that must underpin the money laundering offence;
- the expansion of the customer due diligence process for financial institutions;
- enhanced measures for higher risk customers and transactions, including correspondent banking and politically exposed persons;
- the extension of anti-money laundering measures to designated non-financial businesses and professions (casinos; real estate agents; dealers of precious metals/stones; accountants; lawyers, notaries and independent legal professionals; trust and company service providers);
- the inclusion of key institutional measures, notably regarding international co-operation;
- the improvement of transparency requirements through adequate and timely information on the beneficial ownership of legal persons such as companies, or arrangements such as trusts;
- the extension of many anti-money laundering requirements to cover terrorist financing; and
- the prohibition of shell banks.

9. These extensive changes were embodied in a text with a significantly altered overall structure. It consisted of four sections: (1) Legal Systems (Recommendations 1-3); (2) Measures to be Taken by Financial Institutions and Non-Financial Businesses and Professions to Prevent Money Laundering and Terrorist Financing (Recommendations 4-25); (3) Institutional and other Measures Necessary in Systems for Combating Money Laundering and Terrorist Financing (Recommendations 26-34); and, (4) International Co-operation (Recommendations 35-40). This was supplemented by an important glossary of definitions and a range of revised interpretative notes both of which form an integral part of the standards.. The revised 40 Recommendations of 2003 did not, as such, incorporate the then nine Special Recommendations on the Financing of Terrorism. Rather the two, read in combination, were deemed to constitute the overall FATF standard.

10. The most recent structured review was proposed in 2008 by the UK, Brazil and The Netherlands and taken forward in the years which followed. The objective was to undertake a limited and focused updating exercise rather than to work towards wholesale reform. Nonetheless, the revised standards, adopted on 16 February 2012, contain a number of changes of both form and substance which are worthy of note.[1] In so far as the former is concerned the nine Special Recommendations on terrorist financing have been fully integrated into the 40 Recommendations. There has also been a significant expansion of the text of certain of the recommendations and associated interpretative notes in an effort to bring greater clarity and specificity to the standards. Finally, for present purposes, the internal structure in which the recommendations are presented has also been revised in a significant fashion. They are now grouped under seven headings; viz, (A) AML/CFT Policies and Coordination; (B) Money Laundering and Confiscation; (C) Terrorist Financing and Financing of Proliferation; (D)

[1] For the current version see, *International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation: The FATF Recommendations Adopted by the FATF Plenary in February 2012* (updated June 2019) (2019) (FATF, Paris).
https://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf

Preventative Measures; (E) Transparency and Beneficial Ownership of Legal Persons and Arrangements; (F) Powers and Responsibilities of Competent Authorities and other Institutional Measures; and, (G) International Cooperation.

11. Among the main changes of substance introduced by the 2012 amendments are the following:

- The inclusion for the first time of treatment of the financing of the proliferation of weapons of mass destruction (Recommendation 7), this subject area having been added to the FATF mandate in 2008;
- An extension of the scope of predicate offences for money laundering so as to embrace tax crimes;
- A strengthening of the regime as it relates to corruption, especially in the context of the treatment of politically exposed persons(PEPs);
- The enhancement of requirements relating to transparency of the ownership and control of legal persons and arrangements;
- The introduction of more stringent expectations concerning the role of law enforcement agencies and Financial Intelligence Units (FIUs) in efforts to combat money laundering and the financing of terrorism; and,
- Affording formal centrality to the assessment of money laundering and terrorist financing risks and the application of a risk based approach.

In the period since 2012 the FATF has demonstrated an increased willingness to update individual standards on an ad hoc basis to respond to new threats and challenges: “Revisions include language to address the threat posed by foreign terrorist fighters in 2013, clarification of

information sharing requirements in 2017 and revisions to the standards to address the risks posed by virtual assets in 2018".[2]

12. Through this process of periodic revision of its 'soft law' standards the FATF has remained at the cutting edge of international policy making in the areas of concern reflected in its mandate. This is well illustrated by the progressive expansion of the expectations in relation to the scope of the criminalisation of money laundering. It will be recalled that in 1990 Recommendation 4 called for the criminalisation of "drug money laundering as set forth in the Vienna Convention", while Recommendation 5 encouraged countries to

> [c]onsider extending the offense of drug money laundering to any other crimes for which there is a link to narcotics; an alternative approach is to criminalize money laundering based on all serious offenses, and/or on all offenses that generate a significant amount of proceeds, or on certain serious offenses.

In each of the subsequent revision exercises the expectations of the FATF in this regard have been deepened. In the 2012 version this core issue is addressed in Recommendation 3, the associated Interpretive Note, and the relevant definitions contained in the Glossary. The text of Recommendation 3 is brief. It reads in full as follows:

> Countries should criminalize money laundering on the basis of the Vienna Convention and the Palermo Convention. Countries should apply the crime of money laundering to all serious offences, with a view to including the widest range of predicate offences.

Importantly, by virtue of the Glossary "the word *should* has the same meaning as *must*".

13. Further detail is contained in the extensive Interpretative Note to Recommendation 3. This acknowledges, for example, that the goal of extending money laundering to the widest range

[2] *Financial Action Task Force: 30 Years* (2019) (FATF, Paris), p.49.https://www.fatf-gafi.org/publications/fatfgeneral/documents/fatf-30.html

of predicate offences can be achieved in a number of different ways: on an all-crimes basis, through recourse to a "threshold" of punishment system, by using a "list" approach, or indeed through a combination of such devices. However, it is further stipulated that: "Whichever approach is adopted, each country should, at a minimum, include a range of offences within each of the designated categories of offences". These designated categories, some 21 in number, are listed in the Glossary. They range from "insider dealing and market manipulation" to "terrorism, including terrorist financing".

14. While the expectations contained in the FATF package of counter-measures have become progressively broader in scope and more challenging and more detailed in nature, they have also come to be widely accepted by the international community as a whole. Indeed, the 40 Recommendations have been endorsed by in excess of 200 separate jurisdictions. This accomplishment owes much to the proliferation of FATF-style regional bodies, a development considered further in Section I (iii) (c) below.

(iii) *Other FATF Priorities*

(a) *Introduction*

15. While the elaboration of the FATF standards in 1990 was a significant accomplishment, it was not an end in itself. It has been kept in being since that time in order to ensure the continuing utility of its programme of counter measures and to maximise its practical impact. To these ends it has traditionally focused on three priorities: (1) keeping track of developments in money laundering methods and trends and examining the adequacy of its recommendations in that light; (2) monitoring the implementation of the recommendations by members; and (3) carrying out an ambitious external relations programme to promote the greatest possible mobilisation of effort in the wider international community to counter these forms of criminal activity.

16. The instructions received from the Cullen Commission require a focus, for present purposes, on the second and third strands of FATF activity mentioned above. However, prior to turning to those issues, it is of relevance to note that some of the output flowing from FATF activity under strand (1), or related thereto, have resulted in publications on matters falling within the terms of reference of the Commission and which may be of relevance to its deliberations. Some result from so-called "typologies", exercises through which the FATF has sought to chart the sophistication, complexity and professionalism of money laundering operations in particular sectors. These are supplemented by a range of "guidance" or "best practices" papers which are intended to assist national authorities, relevant private sector actors and other interested bodies with the implementation of FATF standards and expectations. Finally, the FATF has produced a range of reports intended to assist relevant authorities and the private sector on the application of the risk based approach to money laundering. These reports are made available to the public on the FATF website (www.fatf-gafi.org).[3]

(b) Monitoring Implementation: Mutual Evaluation

17. A priority of the FATF since its creation has been to monitor the implementation of its recommendations by its members. Initially this was based on a system of self-assessment. However, this was soon supplemented – and eventually replaced – by an innovative process known as mutual evaluation. This is, in essence, an international system of periodic peer review under which each member is subject to a form of on-site examination. The process is conducted by an interdisciplinary team of experts drawn from other FATF members and assisted by officials

[3] A non-exhaustive listing would include the following:

- *Guidance for a Risk-Based Approach: Legal Professionals* (June 2019)
- *Guidance for a Risk-Based Approach: Money or Value Transfer Services* (February 2016)
- *Money Laundering and Terrorist Financing Vulnerabilities of Legal Professionals* (June 2013)
- *Vulnerabilities of Casinos and Gaming Sector* (March 2009)
- *RBA Guidance for Casinos* (23 October 2008)
- *RBA Guidance for Dealers in Precious Metal and Stones* (17 June 2008)
- *RBA Guidance for Real Estate Agents* (17 June 2008)
- *Money Laundering and Terrorist Financing through the Real Estate Sector* (29 June 2007)

from its Paris based Secretariat. The resulting report is discussed, amended, and formally adopted by one of the regular Plenary meetings on the Task Force.

18. To date the FATF has completed three full rounds of evaluation and a fourth is in progress. Canada has participated in each of these phases and its most recent report is discussed in Section II below. The initial round of mutual evaluation, the major purpose of which was to assess the degree of formal compliance with the recommendations, was completed in 1995. The second round, which treated compliance with the recommendations, and considered issues relating to effectiveness of implementation, was completed in the course of 1999. Account was also taken of action taken to follow-up on suggestions for improvement made in the first round report. These early country specific assessments were confidential in nature although agreement was reached that executive summaries would be made public. These were contained in the annual reports of the FATF.

19. The third round of mutual evaluations commenced in 2005 and addressed the revised 40 Recommendations and the Special Recommendations on the financing of terrorism. While many of the central elements of the process remained unchanged, several innovative features were introduced and are deserving of mention. First, all third round evaluations were prepared according to a detailed and complex common methodology with the intention that this would result in a greater element of objectivity, accuracy and comparability in the resulting reports. A second major innovation was the introduction of a compliance rating system for each of the recommendations. While satisfaction of the formal technical criteria embodied in each of the standards retained its centrality the conclusions of the assessment team as to effectiveness of implementation was also relevant and could have a positive, neutral or negative impact on the overall rating. Finally, it was agreed that all third round reports would be public documents and made available on the FATF website.

20. As noted above, following the revision of the 40 Recommendations in 2012 a new cycle of evaluations was initiated and is now well underway. Significant changes to the process were agreed and these are embodied (in the main) in a new common methodology of February 2013.[4] Under the new procedures two, inter-linked, evaluation reports are produced for each jurisdiction subject to the process. First, there is a technical compliance assessment. This addresses formal compliance with the specific requirements of each recommendation. As in the past a rating is allocated to each recommendation. These range from "compliant" (there are 'no shortcomings') through to "non-compliant" (there are 'major shortcomings'). Within the Task Force this compliance assessment is, in effect, a desk-based review which is undertaken in advance of the on-site visit by the evaluation team.

21. The second element of the new process is an effectiveness assessment. This is the most significant innovation introduced for the fourth round of evaluations and is the major focus of the evaluation team during its in-country visit. As has been noted elsewhere:

> Assessing effectiveness is based on a fundamentally different approach to assessing technical compliance with the Recommendations. It does not involve checking whether specific requirements are met, or that all elements of a given Recommendation are in place. Instead, it requires a judgment as to whether, or to what extent, defined outcomes are being achieved, ie, whether the key objectives of an AML/CFT system … are being effectively met in practice.[5]

In this process the attention of the evaluation team is directed to eleven so-called immediate outcomes (IOs) each of which is said to represent one of the key goals which an effective anti-money laundering system should achieve. To assist the evaluators, the new common

[4] See generally, *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT Systems: Adopted in February 2013 (updated October 2019)* (2019) (FATF, Paris). https://www.fatf-gafi.org/media/fatf/documents/methodology/FATF%20Methodology%2022%20Feb%202013.pdf

[5] *Id.*, p.15.

methodology sets out, for each of the eleven immediate outcomes, the following: (1) the main relevant features; (2) the core issues to be considered; (3) examples of the types and sources of information that could support the conclusions on core issues; and (4) examples of the specific factors that could support the conclusions on core issues.

22. This is the most highly intrusive part of the process and one which imposes a heavy burden on both the assessors and the evaluated country. The methodology, however, explicitly places the onus on the country concerned to demonstrate the effectiveness of its system. In its words: "if the evidence is not made available, assessors can only conclude that the system is not effective".[6] As with the technical assessment, ratings are also allocated in this context, ie, a grading is provided for each of the eleven immediate outcomes. The possibilities are:

(a) 'High level of effectiveness' (the immediate outcome is achieved to a very large extent. Minor improvements needed);

(b) 'Substantial level of effectiveness' (the immediate outcome is achieved to a large extent. Moderate improvements needed);

(c) 'Moderate level of effectiveness' (the immediate outcome is achieved to some extent. Major improvements needed); and

(d) 'Low level of effectiveness' (the immediate outcome is not achieved or achieved to a negligible extent. Fundamental improvements needed).

No overall effectiveness rating for the jurisdiction is, however, formulated by the evaluation team or by the Plenary meeting where the report is subsequently discussed and adopted.

23. The technical compliance and effectiveness elements are, however, closely related both in terms of substance and in form. By way of illustration of the former, the methodology notes that it is "unlikely that a country that is assessed to have a low level of compliance with the technical aspects of the FATF Recommendations will have an effective AML/CFT system (though it

[6] *Id*., p.15.

cannot be taken for granted that a technically compliant country will also be effective). In many cases, the main reason for poor effectiveness will be serious deficiencies in implementing the technical elements of the Recommendations".[7]

24. In a more formal sense both elements are intended to be taken together to form an integrated view of the system of the jurisdiction subject to review. In practice, however, it is fair to say that the analysis of effectiveness is afforded a greatly enhanced focus by the FATF Plenary.

25. An important requirement of each national assessment carried out under this common methodology is that it contains recommendations on how the anti-money laundering and counter-terrorist financing system in question should be improved. This applies to both the technical compliance and effectiveness elements of the process. The evaluators are instructed to "prioritise these recommendations for remedial measures, taking into account the country's circumstances and capacity, its level of effectiveness, and any weaknesses and problems identified".[8]

26. The adoption of a mutual evaluation report by the FATF Plenary does not bring the process to an end and peer pressure to promote improvements continues to be applied. In this context the Task Force has elaborated a multi-layered follow-up process the level of intrusiveness of which is keyed to the overall ratings achieved by the jurisdiction in question. In the majority of cases, jurisdictions are placed onto either the "regular" or "enhanced" follow-up streams; a distinction considered in greater detail in Section II below.

27. Given the fact that finalised mutual evaluation reports are published on the FATF website, poorly performing members can suffer reputational damage. For this reason, and given the significant time-lag between evaluation cycles, the FATF has now introduced procedures through which post-report progress by countries can be formally recognised. As has been pointed out elsewhere: " For the first time, the FATF will conduct follow-up assessments. The follow-up

[7] *Id*., p.17.
[8] *Id*., p.21.

assessments, conducted in the fifth year after a country's initial mutual evaluation, provide a comprehensive update on a country's progress. The scope of the follow-up assessment is targeted primarily on areas where the country achieved low or moderate levels of effectiveness and can lead to a re-rating of the results achieved during the mutual evaluation".[9] At the June 2019 FATF Plenary Canada successfully requested that its fifth year follow-up assessment be postponed from June 2021 to the February 2022 Plenary.

28. It is of relevance to note that the FATF has a separate process within which it treats countries and territories deemed to display strategic anti-money laundering or terrorist finance system deficiencies. This is overseen by the International Cooperation Review Group (ICRG). While there are several routes through which a country can become subject to ICRG review, the most common is through achieving particularly poor ratings in either the technical compliance or effectiveness elements of the mutual evaluation process. In the latter context, for instance, this is considered to be the case when: (a) it has a low or moderate level of effectiveness for nine or more of the 11 Immediate Outcomes, with a minimum of two lows; or (b) it has a low level of effectiveness for six or more of the 11 Immediate Outcomes.

29. Jurisdictions subject to the ICRG arrangements are publicly identified in one of two FATF lists which are reviewed at each Plenary and published on its website. These are often referred to externally as the "grey" and "black" lists. The former enumerates those actively working with the Task Force, to an agreed timeframe, to resolve their strategic deficiencies. As of 21 February 2020 some 18 jurisdictions were so listed. Only one (Iceland) was an FATF member. As of the same date only two countries – North Korea and Iran – appeared on the "black" list. Neither is a member of the Task Force. As a consequence of that "black listing", the members of the international community have been requested to apply enhanced due diligence to

[9] *Supra*, note 2, p.92.

financial transactions involving the countries in question and to introduce other specified counter-measures.

(c) The FATF Global Network: MONEYVAL in Overview

30. From the beginning the FATF has sought to persuade the wider international community to accept and implement its anti-money laundering standards whilst at the same time remaining a body of limited membership. Various strands of activity were devoted to this end. Of these the most successful by far was that of encouraging regional mobilisation by non-member jurisdictions. Over time this has resulted in the creation of nine separate and independent entities known as FATF Style Regional Bodies (FSRBs). While they differ in terms of form and structure each has accepted the 40 Recommendations and agreed to monitor their implementation using the common methodology of 2013. Each is now an Associate Member of the FATF and together they constitute its Global Network. They are:

- The Asia/Pacific Group on Money Laundering (APG)
- The Caribbean Financial Action Task Force (CFATF)
- The Eurasian Group (EAG)
- The Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG)
- The Task Force on Money Laundering in Central Africa (GABAC)
- The Financial Action Task Force of Latin America (GAFILAT)
- The Inter-Governmental Action Group against Money Laundering in West Africa (GIABA)
- The Middle East and North Africa Financial Action Task Force (MENAFATF)
- The Council of Europe Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (MONEYVAL)

It should be noted that there exists some cross-over in terms of membership and participation within the Global Network. For instance, Canada, in addition to being a member of FATF, is a full member of APG, a Co-operating and Supporting Nation (COSUN) in CFATF and enjoys Observer status in GAFILAT.

31. Of the FSRBs, MONEYVAL is among the oldest, most firmly established and best known. This is the regional body for Europe and was founded in 1997. Headquartered in Strasbourg, its core membership consists of all Council of Europe member states which are not members of the FATF, plus the Russian Federation which is a member of both. In addition, and for political reasons associated with long standing tensions in the Middle East, Israel was invited to participate and has retained this status since becoming a FATF member in 2018. In recent years the Holy See (including Vatican City State), the UK Crown Dependencies of Guernsey, Jersey and the Isle of Man, and the British Overseas Territory of Gibraltar have become fully associated with its work and subject to its procedures.

32. Over the years the relationship between MONEYVAL and the FATF has become particularly strong. For example, under Article 3(3) of its governing statute of 2013 the Presidency of the FATF is authorised to appoint two member states to attend MONEYVAL Plenary meetings with full rights of participation including voting rights.[10] At present this status is enjoyed by Germany and Italy. Furthermore the FATF Secretariat attends all such Plenary meetings as an active observer.

33. Nowhere is the closeness of this relationship more evident than in the current mutual evaluation cycle which commenced, for MONEYVAL members, in 2015. As noted above, in this context the evaluations are conducted against the 2012 FATF Recommendations utilising the

[10] Contained in the Appendix to Resolution CM/Res (2013) 13 on the Statute of the Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (MONEYVAL), adopted by the Committee of Ministers of the Council of Europe on 9 October 2013.
https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680759b36

same 2013 methodology. Furthermore, MONEYVAL's Rules of Procedure closely mirror those of the Paris-based Task Force.[11]

34. One consequence is that the reports of both bodies are subject to very similar expectations and procedures designed to ensure their quality and consistency. Thus while the multi-disciplinary assessment teams are selected for each evaluation on an *ad hoc* basis, each evaluator "should be very knowledgeable about the FATF Standards, and are required to attend and successfully complete an assessor training event before they conduct a mutual evaluation".[12] As noted earlier, each evaluation team is supported throughout by members of the Secretariat. Among other things, these officials are charged with assisting the team with the interpretation of the recommendations and the methodology as well as providing advice on consistency of approach with previous reports.

35. Following the on-site visit, which typically lasts for two weeks or more, the assessors prepare a draft report, including preliminary recommendations and ratings. This is then shared with the jurisdiction subject to evaluation which is afforded the opportunity to comment – which it usually does in some detail – on all aspects of the draft text. A second version of the report is then prepared by the evaluation team.

36. At this stage the text is subject to an initial MONEYVAL review of quality and consistency which draws on expertise from a pool of qualified volunteer experts and includes the involvement of an external (ie, non MONEYVAL) review element. Among the purposes of this procedure is the identification of problematic interpretations of the recommendations and highlighting of potential inconsistencies with earlier reports adopted by the MONEYVAL or FATF Plenaries in the current round of evaluations.

[11] "Rules of Procedure for the 5th Round of Mutual Evaluations" (MONEYVAL (2014) 36 REV 9, 7 January 2020). https://rm.coe.int/rules-of-procedure-for-the-5th-round-of-mutual-evaluations-/1680996ccf

[12] *Consolidated Process and Procedures for Mutual Evaluations and Follow-up: "Universal Procedures", (October 2019)* (FATF, Paris), p.6.https://www.fatf-gafi.org/media/fatf/FATF-Universal-Procedures.pdf

37. The input received from the expert reviewers along with the second draft of the report form the basis for a face-to-face meeting between the evaluation team and the authorities of the assessed country. "During this session, the assessment team and country should work to resolve any disagreements over technical compliance or effectiveness issues and identify potential key issues for Plenary discussion."[13] The session is frequently attended by one or more of the Co-Chairs of MONEYVAL's Working Group on Evaluations.

38. The draft report, revised as necessary to reflect any agreement reached in the face-to-face session, is then circulated to all MONEYVAL delegations, observers and others. This is expected to be done some five weeks prior to the relevant Plenary. This comes with an invitation to provide the Working Group on Evaluations (WGE) with comments on any substantive issues of concern, such as inconsistencies between the analysis in the report and the rating suggested, inconsistency in the treatment of similar issues in different reports, and issues of a horizontal nature. The purpose of the WGE, which meets shortly in advance of the relevant Plenary meeting in which the report is due to be discussed, is set out in its terms of reference as follows:

> The Working Group on Evaluations (WGE) is established to assist MONEYVAL by preparing the plenary discussion and proposing solutions to the Plenary on technical and some other significant issues, in order to allow the plenary to focus discussions on primarily effectiveness issues, matters of substance and recommendations to the assessed jurisdiction. The discussions conducted at the WGE are expected to guide the decisions of the Plenary in relation to priority and substantive issues. The WGE does not have decision-making powers which rest with

[13] *Procedures for the FATF Fourth Round of AML/CFT Mutual Evaluations (updated October 2019) (2019)* (FATF, Paris), p.13.https://www.fatf-gafi.org/media/fatf/documents/methodology/FATF-4th-Round-Procedures.pdf

> the Plenary. The Plenary will take the final decisions on changes of a substantive nature to a MER.[14]

Following the WGE meeting a "Key Issues" document is prepared to assist Plenary discussion of the country report. In MONEYVAL such discussions normally take up a full working day and often result in changes to the text and, with some regularity, to alterations in some of the compliance ratings.

39. Upon adoption of the evaluation report, and prior to publication, there is a further opportunity, this time afforded to all members of the FATF, the Global Network, and relevant international financial institutions (IFIs), to raise significant quality and consistency concerns. This follows the circulation of the report as adopted in the Strasbourg Plenary by the FATF Secretariat in Paris. It will suffice for present purposes to note:

> 39. To be considered further in this process, a specific concern should be raised by at least two of the following parties: FATF or FSRB members or Secretariats or IFIs, at least one of which should have taken part in the adoption of the report. Otherwise, the post-Plenary Q&C review process is complete, the FATF Secretariat will advise the assessment body and delegations accordingly and the report will be published.[15]

40. MONEYVAL's follow-up and compliance enhancing procedures are broadly similar to those of the FATF. The two are not, however, identical. By way of illustration, within the FATF the options for dealing with a jurisdiction which has failed to make satisfactory progress to address the deficiencies identified in its mutual evaluation report include both suspension and termination of membership.[16] Unsurprisingly, given the very different institutional context in which MONEYVAL operates, these options are not open to it. However, in instances of ongoing

[14] *Supra*, note 11, Appendix 4.
[15] *Supra*, note 12, p.12.
[16] See, *supra*, note 13, at pp.23-24.

significant non-compliance the matter can be brought to the attention of the Committee of Ministers of the Council of Europe with a view to it being considered at a political and diplomatic level.[17]

(iii) *Conclusions*

41. The evolution of the international anti-money laundering system over the past thirty years or more has been, in many ways, quite remarkable. From the modest 1989 initiative of seven of the world's major industrialised states, including Canada, to better address the significant profits generated by the international drugs trade, has developed a multi-faceted approach to the improved prevention, detection, investigation and prosecution of the laundering of all serious profit generating crimes with a view to the confiscation of their proceeds. To this has been added a focus on the financing of terrorism and (somewhat more problematically) proliferation of weapons of mass destruction. In that process the FATF, and increasingly the other members of its Global network, has played a leading role. The resulting geographic reach of its 40 Recommendations well illustrates the magnitude of these developments.

42. The development of the AML/CFT system touched upon in this report has not been free from difficulty or controversy either at the international or domestic levels. For instance, in the late 1990s and the early 2000s the FATF's efforts to broaden the geographic impact of its work came to rely, to a significant degree, on a name, shame and punish strategy which both focused on non-members and left it open to accusations of embracing double-standards. In formulating and implementing the current ICRG process, the FATF has learned from that earlier exercise. In particular, the greater emphasis on inclusiveness and consultation, especially with the FSRBs, has greatly reduced the opportunities both for confrontation and for the emergence of systemic tension. Similarly, the progressive extension of AML/CFT 'preventive' obligations to an ever

[17] See, *supra*, note 11, Rule 27.

wider range of businesses and professions has rarely been enthusiastically welcomed, at least initially, by those affected or by the industry and professional bodies which represent their interests. The FATF has, in turn, greatly expanded its efforts at private sector consultation especially at times when the standards are under review.

43. As has been seen, central to the workings of the FATF and its regional counterparts have been the efforts, through a periodic process of peer review, to monitor the national measures taken to satisfy the expectations contained in its developing and increasingly detailed package of counter-measures. The mutual evaluation system which has evolved is an unusually intrusive and resource intensive one and had not previously been resorted to with any frequency within the international community. Its use by the FATF and the FSRBs has, however, done much to popularise it (or variants of it) in other contexts ranging from efforts to combat corruption to initiatives to promote international tax transparency.

44. Major efforts have been made over time to improve the quality and to ensure the level of consistency of the resulting country specific evaluations. The gradual shift of focus from the assessment of formal technical compliance with the recommendations towards an emphasis on effective implementation in practice has also been particularly noteworthy.

45. The current system – and especially that relating to the assessment of effectiveness – is far from being beyond criticism. Some opportunities to be critical flow from the decision to resist the use of professional "expert" assessors and to rely on individuals – though trained in the use of the methodology– made available by member states and thus embracing more clearly the "peer assessment" dimension of the process. There is, as a consequence, a considerable variation in the backgrounds and strengths of assessment teams and not all variations and weaknesses in the resulting reports can or will be addressed through the quality control mechanisms which have been put in place. Some would also argue that the available effectiveness ratings – and their descriptors – are inadequate for the range and complexity of circumstances which are

encountered. More fundamentally, some academic analysis points to the nature of the data that are typically available to the evaluators and how they are utilised in casting doubt on the intrinsic value of the resulting product.[18]

46. For these reasons, among others, there is a need to treat the results of the often lengthy mutual evaluation reports with some caution. That said the ongoing commitment of the international community to their production perhaps underlines the reality that they continue to be regarded as providing a credible, though imperfect, snap-shot of a jurisdiction's efforts to create a hostile and inhospitable environment for those involved in highly lucrative forms of criminal behaviour and to afford some degree of protection to its economic and political system.

II. Overview of the 2016 Mutual Evaluation of Canada

(i) *Technical Compliance Challenges*

47. The evaluation of Canada came fairly early in the current cycle with its sole focus being on the revised 40 Recommendations of February 2012. Its fourth round assessment, utilising the methodology of 2013, was conducted under the responsibility of the International Monetary Fund (IMF) which, along with the World Bank, has provided the FATF and the FSRBs with evaluation assistance of this kind, on a limited and agreed basis, for many years.[19] It utilised a multi-disciplinary team consisting of Fund staff, IMF consultants, and officials drawn from a range of FATF and APG member states. The on-site visit, lasting approximately two weeks, took place in November 2015. The resulting report, just in excess of 200 pages in length, was discussed in, and adopted by, the FATF Plenary in June 2016.[20]

48. As noted above, such reports contain coverage of both formal compliance and effectiveness of national implementation efforts. The former is contained in an extensive

[18] See, eg, M Levi, P Reuter and T Halliday, "Can the AML System be Evaluated without Better Data?" (2018) *Crime Law Soc Change*, Vol. 69, at pp.307-328. https://doi.org/10.1007/s10611-017-9757-4
[19] See, eg, *supra*, note 13, at p.20.
[20] See, *Canada: Mutual. Evaluation Report* (2016) (FATF, Paris).https://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-Canada-2016.pdf

"Technical Compliance Annex" which treats all of the FATF recommendations in sequence and allocates a compliance rating to each.

49. To this end the methodology "sets out the specific requirements of each Recommendation as a list of criteria, which represent those elements that should be present in order to demonstrate full compliance with the mandatory elements of the Recommendations".[21] In this regard the onus to demonstrate compliance is placed firmly on the country undergoing evaluation. It should also be noted that the individual criteria are not to be regarded as possessing equal importance. As has been noted elsewhere:

> When deciding on the rating for each Recommendation, assessors should consider the relative importance of the criteria in the context of the country. Assessors should consider how significant any deficiencies are given the country's risk profile and other structural and contextual information (eg, for a higher risk area or a large part of the financial sector).[22]

50. The evaluators are provided with the same range of rating options as were available in the third round of assessments conducted by the Task Force. These are as follows:

Compliant	C	There are no shortcomings.
Largely Compliant	LC	There are only minor shortcomings.
Partially Compliant	PC	There are moderate shortcomings.
Non-compliant	NC	There are major shortcomings.
Not applicable	NA	A requirement does not apply, due to the structural, legal or institutional features of a country.

[21] *Supra*, note 4, p.12.
[22] *Id*, p.13.

51. The ratings achieved by Canada for technical compliance are set out in the Appendix to this paper and, in more detail, in the "Summary of Technical Compliance – Key Deficiencies" in the June 2016 evaluation.[23] These ratings reveal a mixed picture. If for present purposes, and as suggested by much of the practice and the procedures of the FATF, one takes 'C' and 'LC' ratings to represent, if only rather crudely, pass grades, and 'PC' and 'NC' to denote fail marks, it can be seen that Canada demonstrated solid technical compliance in the following areas: (A) AML/CFT Policies and Coordination (Rs 1 and 2); (B) Money Laundering and Confiscation (Rs 3 and 4); (C) Terrorist Financing and Financing of Proliferation (Rs 5 to 8); and, (G) International Cooperation (Rs 36 to 40). In none of the above was a rating of below 'LC' awarded.

52. By way of contrast, performance in section 'D', relating to 'Preventive Measures' (Rs 9 to 23) and 'F', addressing 'Powers and Responsibilities of Competent Authorities and other Institutional Measures' (Rs 26 to 35) was less uniformly positive. Section 'E' of the recommendations (Rs 24 and 25) on 'Transparency and Beneficial Ownership of Legal Persons and Arrangements' registered only 'PC' and 'NC' ratings.

53. Comparisons with the ratings achieved by Canada in its 2008 Report[24] should be treated with caution. As noted earlier, the FATF standards were both restructured and amended in 2012. Furthermore, the current round treats all issues of effectiveness separately from those relating to technical compliance. While bearing that 'health warning' in mind, some broad indications of value can perhaps be gleaned from such an exercise. For example, of the 49 FATF standards subject to review in 2008 (the 40 Recommendations and the 9 Special Recommendations) a total of 19 (or just under 39%) attracted 'PC' or 'NC' ratings. In the 2016 technical evaluation 11 of the now 40 standards (27.5%) were rated at these lower levels.

54. In the period between the two rounds in question Canada was in the regular FATF follow-up process and reported regularly to Plenary meetings as to its progress in addressing deficiencies

[23] See, *supra*, note 20, at pp.205-209.
[24] See, *Third Mutual Evaluation on Anti-Money Laundering and Combating the Financing of Terrorism: Canada* (2008) (FATF, Paris).https://www.fatf-gafi.org/media/fatf/documents/reports/mer/MER%20Canada%20full.pdf

identified in the 2008 exercise.[25] That such progress was real is suggested by the movement in 2016 from negative to positive compliance ratings in a range of areas including, among others, Customer Due Diligence (R 10), Correspondent Banking (R 13), Higher-risk Countries (R 19), Regulation and Supervision of Financial Institutions (R 26), and Sanctions (R 35).

55. Looked at in a slightly different way, as the table below indicates, all but one of the recommendations attracting 'PC' or 'NC' technical compliance ratings in 2016 are in areas in which relative weakness was also detected in 2008.

Subject Area	2012 Rec	2016 TC Rating	Previous FATF Rec(s)	2008 MER Rating
Politically Exposed Persons	12	NC	6	NC
New Technologies	15	NC	8	NC
Wire Transfers	16	PC	SRVII	NC
Reliance on Third Parties	17	PC	9	NC
Reporting of Suspicious Transactions	20	PC	• 13 • SRIV	• LC • LC
DNFBPs: Customer Due Diligence	22	NC	12	NC
DNFBPs: Other Measures	23	NC	16	NC
Transparency and Beneficial Ownership of Legal Persons	24	PC	33	NC
Transparency and Beneficial Ownership of Legal Arrangements	25	NC	34	PC
Regulation and Supervision of DNFBPs	28	PC	24	NC
Financial Intelligence Units	29	PC	26	PC

56. As noted in the previous paragraph, one of the technical compliance areas attracting negative ratings in 2016 had fared better in 2008; namely, Recommendation 20 on reporting of suspicious transactions. It attracted a grade of 'PC' in the most recent exercise while (on a composite basis) it was viewed as 'LC' in 2008. The factors underlying the 2016 outcome were:

[25] Canada was removed from the follow-up process for the third round in February 2014.

"Minor deficiency that financial leasing, finance and factoring companies are not required to report suspicious activity to FINTRAC" and "lack of a prompt timeframe for making reports".[26]

57. Recommendation 20 is one of the five standards to which the FATF has traditionally attached special significance. The remainder are the money laundering offence (R 3), the terrorist financing offence (R 5), CDD (R 10) and record keeping (R 11) in relation to all of which Canada achieved either 'C' or 'LC' technical assessment grades. However, under the procedures governing the fourth round of evaluations attracting a negative rating on even one of these "core" recommendations is sufficient to consign the jurisdiction in question to "enhanced follow-up".[27] There is also a second route to "enhanced follow-up" from the technical compliance component of the assessment; namely, attracting eight or more NC/PC ratings.[28] Canada, as noted above, was awarded 11. For an original member of the Task Force to qualify for this unwanted status under both headings must have been the cause of disappointment both within the Canadian delegation and among the wider FATF membership.

58. Since the adoption of the Mutual Evaluation Report in June 2016 Canada has submitted three enhanced follow-up reports to the FATF Plenary. These were on the agenda in November 2017, October 2018 and October 2019 respectively. Somewhat unusually none have been accompanied by a request for technical compliance re-ratings. Under the relevant FATF procedures it is anticipated that countries will have addressed most such deficiencies within a three year period following adoption of the evaluation report.[29] As the FATF publications policy in this context is closely tied to the completion of re-rating,[30] these Canadian follow-up reports have not been made public on its website.

59. It is understood that at the October 2019 Plenary Canada was directed to report back in June 2021 with the firmly stated expectation that it would seek technical compliance re-ratings at

[26] *Supra*, note 20, p.206. See also, p.157.
[27] See, *supra*, note 13, para 90(a)(ii), p.23.
[28] See, *id*, para 90(a)(i).
[29] See, *id*, para 86, at p.22.
[30] See, *id*, at p.28.

that meeting. Since that time, and in the light of the ongoing COVID-19 pandemic, the submission date has been moved back to October 2021. At that time, the primary focus will be on recommendations which attracted 'PC' or 'NC' ratings. To add a further element of complexity, under the FATF procedures, where any of the relevant standards have been revised since the end of the on-site visit (for Canada in November 2015) "the country will be assessed for compliance with the revised standards at the time its re-rating request is considered (including cases where the revised Recommendation was rated LC or C)".[31] Several such revisions will arise for consideration in the case of Canada; namely, R 2 (national cooperation and coordination, rated 'C'), R 5 (terrorist financing offence, 'LC'), R 7 (targeted financial sanctions related to proliferation, 'LC'), R 8 (non-profit organisations, 'C'), R 18 (internal controls and foreign branches and subsidiaries, 'LC'), and, R 21 (tipping off and confidentiality, 'LC'). [32]

(ii) *Effectiveness Concerns*

60. The enhanced follow-up reports submitted by Canada have also contained information on its post-June 2016 efforts to improve the effectiveness of its implementation of the FATF standards as revealed, *inter alia*, in the discussion of the Immediate Outcomes in the June 2016 evaluation. Such information, however, was included in those submissions for information purposes only. For each FATF member, whether in regular or enhanced follow-up, the procedures envisage a separate and fairly comprehensive assessment of effectiveness which will normally take place five years after the adoption of the relevant evaluation report. As noted at an earlier stage of this paper, the Canadian five year follow-up assessment is now due to be discussed at the February 2022 FATF Plenary. It will "primarily target the Immediate Outcomes (IOs) with Low or Moderate Effectiveness (LE/ME) in areas of higher risk and materiality".[33]

[31] *Id*, para 87, p.22.
[32] For details see, *supra*, note 1, Annex II, at pp.130-132. For consequential alterations to the methodology see, *supra*, note 4, at pp.190-192.
[33] *Supra*, note 13, p.27.

61. As will be seen from the Appendix to this report, Canada attracted one or other of these lower ratings in relation to six of the 11 IOs and it is on these that the February 2022 FATF discussions will concentrate. All five of the remaining IOs attracted a 'substantial level of effectiveness' (SE) rating. It will be recalled that this denotes that the IO has been achieved "to a large extent" and that "moderate" improvements are needed. None of the IOs attracted the gold standard rating of 'high level of effectiveness' (HE) under which its criteria are deemed to have been "achieved to a very large extent" and that consequently only "minor improvements" are required. Looked at in this way it is clear that the outcome of the effectiveness assessment of the Canadian AML/CFT system as of the time of the on-site visit in November 2015 was somewhat uneven. It was, however, sufficient to exceed the criteria set for automatic entry into enhanced follow-up under this heading.[34]

62. Section II (iii) (b) of this paper outlined the very different approaches adopted by the methodology to the assessment of technical compliance on the one hand and to effectiveness on the other. It follows that the relationship between the outcomes of these processes will not be entirely straightforward. It was noted, however, that there was a fairly strong expectation that a low level of technical compliance would have a negative impact on effectiveness. In the 2016 report on Canada this relationship is particularly evident in the area of the transparency of legal persons and arrangements. In this sphere the primary recommendations of relevance are 24 and 25. They attracted technical compliance ratings of 'PC' and 'NC' respectively. It is thus unsurprising that the relevant part of the effectiveness assessment was negatively impacted; IO.5 receiving the only 'Low' rating in the Canadian report.

63. The methodology anticipates that in other circumstances the relationship between the two phases of the evaluation may be more complex. In particular, "it cannot be taken for granted that

[34] See, *id*, para 90(a)(iii) and (iv), at p.23.

a technically compliant country will also be effective".[35] In the case of Canada this is well illustrated in the context of IO.7 on the investigation and prosecution of money laundering offences. This relates primarily, though not exclusively, to three of the FATF Recommendations; namely, R.3 (money laundering offence); R.30 (responsibilities of law enforcement and investigative authorities); and, R.31 (powers of law enforcement and investigative authorities). In a technical sense these were regarded as areas of relative strength for Canada and received ratings of 'C', 'C' and 'LC' respectively. Notwithstanding this fact IO.7 attracted only a 'moderate' effectiveness grading from the evaluation team. The reasoning leading to this conclusion has been summarised thus:

> 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 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 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

[35] *Supra*, note 4, p.17. The concepts of "effectiveness" and "risk" are very closely related. In the approach of the FATF risk is seen as a function of three primary factors; ie., threat, vulnerability and consequence. Effectiveness can, in many respects, be regarded as shorthand for effectively mitigating those risks. Thought of in this way risk (and context) is part of the necessary analysis of every core issue.

> 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.[36]

64. The National Risk Assessment (NRA) mentioned above is a reference to the public version of the 2015 *Assessment of Inherent Risks of Money Laundering and Terrorist Financing in Canada*.[37] Produced under the auspices of the Canadian Minister of Finance, this was the country's first such comprehensive national assessment. Though important in its own right its production, and its timing, also constituted a response to the expectations of the FATF. The NRA explicitly acknowledged that it would "be considered as part of the upcoming FATF Mutual Evaluation of Canada, which will assess Canada against these global standards".[38]

65. As was seen in Section I (ii) above, the 2012 amendments to the recommendations afforded centrality to the identification, understanding and mitigation of domestic money laundering and terrorist financing risks. The importance attached to this area is perhaps best reflected by the fact that the first of the 2012 recommendations concerns assessing risk and applying a risk based approach. Similarly, in the methodology for assessing effectiveness the first Immediate Outcome (IO.1) is articulated as follows: "Money laundering and terrorist financing risks are understood and, where appropriate, actions co-ordinated domestically to combat money laundering and the financing of terrorism and proliferation". The outcome of the evaluation of Canada was a positive one under both strands; R1 was assessed at the 'LC' level and IO.1 attracted a rating of 'SE'. Indeed, the first "Key Finding" in the latter context is that the

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[36] *Supra*, note 20, p.5. As can be seen considerable emphasis has been placed on the perceived mis-match between Canada's understanding of AML risk, as reflected in its NRA, and the priorities, practices and outcomes considered in an IO.7 context. It is of relevance to recall that Core Issue 7.2 requires the evaluation team to consider "to what extent are the types of ML activity being investigated and prosecuted consistent with the country's threats and risk profile and national AML/CFT policies?" See, *supra*., note 4, p.116.

[37] (2015) (Department of Finance Canada, Ottawa). A somewhat longer and classified version was also produced for internal governmental use. See,eg., *supra*, note 20, p.17.https://www.canada.ca/en/department-finance/services/publications/assessment-inherent-risks-money-laundering-terrorist-financing.html

[38] *Id*, p.7. Those standards also require that assessments of national risk be kept up to date. It is understood that in advance of the October 2019 FATF Plenary Canada indicated that an update of its NRA was in progress and that it was expected that it would be completed in July 2020.

"Canadian authorities have a good understanding of the country's main ML/TF risks and have an array of mitigating measures at their disposal".[39] It is clear that the "comprehensive" 2015 NRA was a significant contributory factor in the reaching of this conclusion.

66. In the view of the assessors the single most important negative feature in this context flowed from the position of the legal profession. As the evaluation report notes:

> 50. The legal profession in Canada is especially vulnerable to misuse for ML/TF 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 AML/CFT measures, which, in light of the risks, raises serious concerns.[40]

This formed the basis for the second "Key Finding" for IO.1. Importantly the first of the prioritised recommendations in this part of the evaluation report was that Canada should "mitigate the risk emanating from legal counsels, legal firms, and Quebec notaries in their performance of the activities listed in the standard".[41]

67. It should be appreciated that under the 2013 methodology a serious deficiency such as that identified in IO.1 in relation to the legal profession is not confined to that section of the assessment in terms of its impact. Indeed, assessors are instructed to "take into consideration their findings for this Immediate Outcome (IO) in their assessment of other IOs".[42] By way of illustration, this "major loophole" in the Canadian AML regime is mentioned as a "Key Finding"

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[39] *Supra*, note 20, p.31.
[40] *Id*, p.15. See further, *Attorney General of Canada v. Federation of Law Societies of Canada* [2015] 1 S.C.R. 401.
[41] *Supra*, note 20, p.31. This also forms the basis for the first of the 'Priority Actions' flowing from the report as a whole. See, *id*, at p.9.
[42] *Supra*, note 4, p.96.

in IO.3 on supervision[43] and IO.4 on preventive measures.[44] Addressing this deficiency is afforded the top priority in both relevant sets of recommendations. The same cascading effect[45] is also evident in the technical compliance section of the 2016 report on Canada.[46]

68. The report does not provide a precise basis for determining the weighting of the negative impact that this issue had on the ratings of effectiveness suggested by the evaluation team or as determined by the FATF Plenary. In neither case was it the sole factor of concern. This is well illustrated by IO.4 on preventive measures. This attracted a 'Moderate Effectiveness' rating indicating that major improvements were required. This is a particularly complex and wide ranging part of the methodology which relates in the main to those recommendations (9 to 23) which are pivotal in efforts to engage relevant private sector actors. As seen in the previous section and as illustrated in the Appendix to this paper, the relevant standards attracted a broad range of positive and negative technical compliance ratings.

69. The assessment of the manner and extent to which financial institutions (FIs) and designated non-financial businesses and professions (DNFBPs) implement preventive measures and report suspicious transactions[47] is divided into four inter-related parts; namely, the understanding of ML/TF risks and the application of mitigating measures; CDD and record-keeping; reporting obligations and tipping off; and, internal controls and legal/regulatory requirements impeding implementation. From this analysis there emerged some nine recommended actions in addition to that relating to the legal profession.[48]

70. The Mutual Evaluation Report of Canada is now nearly four years old. It, in turn, is designed to reflect the situation as it existed at the time of the on-site visit by the evaluation team in November 2015. The Canadian efforts to address the shortcomings identified in the

[43] See, *supra*, note 20, at p.87.
[44] See, *id*, at p.77.
[45] See, *supra*, note 4, at p.13.
[46] For instance, this is listed as a factor underlying the ratings for recommendations 1, 22, 23, and 28.
[47] See generally, *supra*, note 20, at pp.78-86.
[48] See, *id*, at pp.77-78.

assessment of effectiveness and act on its recommendations have been underway for some time but will not, as previously noted, be formally considered by the FATF until, as things stand, February 2022. These factors, among others, are such as to emphasise the need for caution in its use. That said, the report contains much material which intersects with the mandate of the Cullen Commission of Inquiry into Money Laundering in British Columbia and may thus prove to be of relevance to its deliberations.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

The 8th Day of May, 2020

William C Gilmore

APPENDIX

Effectiveness & Technical Compliance Ratings

Effectiveness Ratings

IO.1 - Risk, policy and coordination	IO.2 - International cooperation	IO.3 - Supervision	IO.4 - Preventive measures	IO.5 - Legal persons and arrangements	IO.6 - Financial intelligence
Substantial	**Substantial**	**Substantial**	**Moderate**	**Low**	**Moderate**

IO.7 - ML investigation & prosecution	IO.8 - Confiscation	IO.9 - TF investigation & prosecution	IO.10 - TF preventive measures & financial sanctions	IO.11 - PF financial sanctions
Moderate	**Moderate**	**Substantial**	**Substantial**	**Moderate**

Technical Compliance Ratings

R.1 - assessing risk & applying risk-based approach	R.2 - national cooperation and coordination	R.3 - money laundering offence	R.4 - confiscation & provisional measures	R.5 - terrorist financing offence	R.6 - targeted financial sanctions – terrorism & terrorist financing
LC	**C**	**C**	**LC**	**LC**	**LC**
R.7- targeted financial sanctions - proliferation	**R.8** -non-profit organisations	**R.9** – financial institution secrecy laws	**R.10** – Customer due diligence	**R.11** – Record keeping	**R.12** – Politically exposed persons
LC	**C**	**C**	**LC**	**LC**	**NC**
R.13 – Correspondent banking	**R.14** – Money or value transfer services	**R.15** –New technologies	**R.16** –Wire transfers	**R.17** – Reliance on third parties	**R.18** – Internal controls and foreign branches and subsidiaries
LC	**C**	**NC**	**PC**	**PC**	**LC**
R.19 – Higher-risk countries	**R.20** – Reporting of suspicious transactions	**R.21** – Tipping-off and confidentiality	**R.22** - DNFBPs: Customer due diligence	**R.23** – DNFBPs: Other measures	**R.24** – Transparency & BO of legal persons
C	**PC**	**LC**	**NC**	**NC**	**PC**
R.25 - Transparency & BO of legal arrangements	**R.26** – Regulation and supervision of financial institutions	**R.27** – Powers of supervision	**R.28** – Regulation and supervision of DNFBPs	**R.29** – Financial intelligence units	**R.30** – Responsibilities of law enforcement and investigative authorities
NC	**LC**	**C**	**PC**	**PC**	**C**
R.31 – Powers of law enforcement and investigative authorities	**R.32** – Cash couriers	**R.33** – Statistics	**R.34** – Guidance and feedback	**R.35** – Sanctions	**R.36** – International instruments
LC	**LC**	**C**	**LC**	**LC**	**C**
R.37 – Mutual legal assistance	**R.38** – Mutual legal assistance: freezing and confiscation	**R.39** – Extradition	**R.40** – Other forms of international cooperation		
LC	**LC**	**C**	**LC**		

C = Compliant
LC = Largely compliant
PC = Partially compliant
NC = Non-compliant