

Report to the Cullen Commission

Money Laundering and Foreign Corruption Proceeds in British Columbia: A Comparative International Policy Assessment

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This brief report has been produced for the Cullen Commission of Inquiry into Money Laundering in British Columbia. It broadly addresses three areas. First, it takes a comparative approach to assessing money laundering threats, current anti-money laundering (AML) policy, and potential future improvements to this policy. Second, it examines threats and current and potential responses to the laundering of the proceeds of foreign corruption offences. Finally, the report focuses on current and potential future strategies for confiscating illegal assets.

Coverage of these areas in the report is deliberately uneven. Less time is spent on subjects extensively covered by other material already presented to the Commission and/or the British Columbian government. In some places the report agrees with the conventional wisdom (e.g. the generally low level of anti-money laundering effectiveness, the importance of effective beneficial ownership regulations), but in others it aims to question such wisdom (e.g. in favour of public beneficial ownership registries and Unexplained Wealth Orders (UWO)), or point out obstacles or solutions that tend to be neglected (e.g. institutional incentives and learning-by-doing in AML policy, the potential of non-state actors in fighting cross-border corruption, and the utility of tax powers in asset recovery). In keeping with my knowledge and its limits, this brief report aims primarily to put British Columbian and Canadian policy and practice in comparative perspective wherever possible so as to learn from successes and failures elsewhere. I write from the perspective of a foreigner, appreciating that a similarly qualified Canadian expert will know the local circumstances better.

The conclusions of this report are based on my general expertise on money laundering and related financial crime, as well as the specific sources pertaining to Canada cited in this report. Written during the time of the pandemic, I did not visit Canada to conduct research for the report. My expertise on this subject derives from having conducted academic research on offshore finance, tax evasion, cross-border corruption and money laundering since 2002 and having written seven books and numerous peer-reviewed articles on these related subjects. In addition I have conducted policy work as a consultant in the same area for groups including the World Bank, the United Nations, the Asia-Pacific Group on Money Laundering, the Commonwealth Secretariat and the Asian Development Bank, among others. Finally I have assisted with investigative and prosecutorial work on a *pro bono* basis for the anti-corruption agencies of Kenya and Papua New Guinea.

1.1 Current Money Laundering Threats in British Columbia and Canada

Money laundering is a derivative crime. This section briefly and selectively covers some of the most important mechanisms of laundering in British Columbia and Canada more

generally. It does not examine the predicate crimes that give rise to the illegal funds in the first place.¹ Detailed expert reports already submitted to the Commission have extensively surveyed the range of money laundering techniques in BC, including analyses by Peter German and Stephen Schneider.² Given this existing work, I briefly highlight selected mechanisms of large-scale international laundering, before providing a more detailed assessment of policy effectiveness, and then suggesting improvements.

1.1.1 Cash

The proceeds of a great deal of crime, especially drugs crime, are in cash. Despite much hype about crypto-currencies and other hi-tech laundering threats, cash still works well for many criminals' needs without having to be laundered.³ Even for large sums of criminal money, or when proceeds need to be moved across borders, bulk cash smuggling is certainly a possibility. This is all the more so given Canada's forgiving policy of often returning undeclared cash to those detected carrying it in through the border, with very small penalties.⁴ To an outsider, this policy seems like an incredible favour to international money launderers. It is often asserted that, thanks to AML laws, the days of criminals laundering bags of cash are over. However, the evidence suggests otherwise: even after 30 years of AML, and even in countries like Australia and Canada, moving bags of cash often remains an effective laundering technique.⁵ For example, German's report describes the same individuals making repeat trips in casinos with shopping bags full of bricks of used \$20 notes.⁶

1.1.2 A 'Vancouver Model'? Casinos and Underground Banking

Reports by German and Schneider posit a 'Vancouver Model' of money laundering. As described, its international aspect, involving the laundering of illegal funds from China and other foreign drug money in BC, and the use of underground banking, casinos and real estate, may represent one of the most serious money laundering vulnerabilities in BC.⁷ This model has been extensively analysed in material already presented to the Commission, and thus is only briefly summarised here.

A central feature of the Vancouver Model is said to be the use of casinos, and the role of casinos in money laundering in BC has received widespread media coverage. In some sense, casinos seem responsible for putting the issue of money laundering on the policy agenda in the province. Once again, this subject has been covered in great detail in the report prepared

¹ For information on predicate crimes, see Department of Finance 2015; FATF 2016; Standing Committee House of Commons 2018; Department of Finance 2018.

² German 2018; German et al. 2019 and Schneider 2020.

³ Europol 2015; areas like fraud are an exception.

⁴ FATF 2016: 6.

⁵ Austrac 2017.

⁶ German 2018: 108.

⁷ German 2018; German et al 2019; Schneider 2020.

by Peter German.⁸ Though there are certainly well documented examples of large-scale money laundering through casinos elsewhere (e.g. Macau), laundering through casinos is generally only a secondary mechanism for international money laundering. Even in the context of BC, problems with shell companies and real estate are probably more serious money laundering threats, especially now that some remedial AML actions have been taken in this sector.

The Vancouver Model also foregrounds the role of underground banking associated with particular ethnic communities. First, it must be recognised that these informal value transfer systems have an important legitimate role in providing services that would be more expensive or simply unavailable in the formal sector, especially with the tendency of banks to ‘de-risk’ in this sector.⁹ Second, and perhaps more importantly, although the ability to transfer money from a foreign country to Canada without leaving any formal records obviously creates vulnerabilities, it may leave the recipient with the problem of then introducing cash into the formal sector. In this sense, recipients of cash through underground banking transfers are in the same situation as criminals who have committed profitable predicate crimes: the process of laundering has yet to be accomplished or completed. Thus rather than a risk in itself, informal banking may be a money laundering risk in combination with other, more serious, failings in the system.

1.1.3 Real Estate, Lawyers and Trust Accounts

A now somewhat dated study portrayed the ‘typical’ Canadian laundering scheme as involving real estate bought via a lawyer’s trust account.¹⁰ Indeed, this is a very generic method of money laundering common in many other OECD countries to this day. Laundering through real estate is commonly used for international laundering, including the proceeds of grand corruption.¹¹

Real estate is a commonly exploited sector for large-scale money laundering, and this risk is particularly acute in Canada. It is exacerbated by the lax regulations and even laxer enforcement applied to real estate agents in the domain of anti-money laundering. Given the value of real estate, especially in buoyant markets like Vancouver, it provides a plausible cover for very large transfers that would otherwise be difficult to explain. After all, *prima facie* there is nothing suspicious about a \$5 million wire transfer to buy a \$5 million property.

While banks may have a duty to check the money that passes through their networks, this may be defeated by the common expedient of running the transaction through a lawyer’s trust account, obscuring the customer’s identity from the bank, and possibly cloaking the transaction in legal professional privilege.¹² In common with many other jurisdictions, lawyers’ trust accounts are a repeated feature of those money laundering schemes that come

⁸ German 2018

⁹ Centre for Global Development 2015.

¹⁰ Schneider 2004.

¹¹ US Senate 2010; Global Witness 2016; Sharman 2017; Transparency International-UK 2015a, 2017.

¹² German 2018: 214; Transparency International Canada 2019.

to light.¹³ The ability of lawyers to hold another person's funds under their own name, and to co-mingle these funds with those of other clients in trust accounts, tends to defeat banks' attempts at customer due diligence. As has been widely remarked on, Canadian lawyers are outside the AML system.

1.1.4 Shell Companies

Properties in Canada have been able to be bought through corporate intermediaries (shell companies or trusts) without the requirement to identify the beneficial owner, which indicates a more general vulnerability in corporate transparency and beneficial ownership regulations.¹⁴ The recent Land Owner Transparency Act may change this situation, but once again the proof of the pudding is in the implementation, not the legislation. In most other advanced economies, shell companies and other corporate entities that are opaque or untraceable in preventing the identification of the real people in control are one of the most common strategies for large-scale money laundering, especially in international criminal schemes.¹⁵ The problems of shell companies, and Canadian shell companies in particular, are discussed extensively later in this report.

1.2 Assessing Current Money Laundering Vulnerabilities and the Effectiveness of Policy Responses

In a 2020 interview, the head of the Financial Action Task Force (FATF) made the general observation that in fighting money laundering 'Everyone is doing badly, but some are doing less badly than others'.¹⁶ Although information on money laundering and AML is always seriously incomplete and there is nowhere near enough evidence to say definitively, Canada is unlikely to be in the second category. As the latest FATF review of Canada puts it: 'Law enforcement results are not commensurate with the ML risk and asset recovery is low'.¹⁷ Previous federal governments reports confirm this verdict,¹⁸ even in the title ('Is Canada Making Progress in Combatting Money Laundering and Terrorist Financing? Not Really'). Occasional claims to the contrary by the Canadian government (i.e. that Canada has a 'robust and comprehensive anti-money laundering and anti-terrorist financing regime'¹⁹), are simply not credible.

German quotes BC law enforcement officials saying that they have only 'scratched the surface of the problem', for example, that the amounts of criminal proceeds detected in casinos are 'a drop in the bucket'.²⁰ The general verdict is that regulators and law enforcement are 'woefully underprepared', with no federal AML law enforcement in the province at all, and with provincial law enforcement having effectively 'checked out' of this

¹³ StAR 2018.

¹⁴ Transparency International Canada 2016; CD Howe 2018, 2019.

¹⁵ OECD 2001; StAR 2011; FATF/Egmont 2018.

¹⁶ <https://www.icij.org/investigations/panama-papers/everyone-is-doing-badly-anti-money-laundering-czar-warns/>.

¹⁷ FATF 2016: 3.

¹⁸ Senate 2013: 5, 22.

¹⁹ Department of Finance 2015: 7.

²⁰ German 2018: 45

area.²¹ The figure that in a 16-year period Canada has had only 316 money laundering convictions, while in 2017 alone Britain has had 1435, is a staggering contrast.²² Money launderers in BC and Canada more generally face an open goal.

No one knows how much money is laundered. The commonly cited IMF figure of 2-5 per cent of world GDP was simply plucked from the air for political effect, no evidence has ever been produced to support it. More generally, AML policy has been described by Prof. Michael Levi as ‘an evidence-free zone’.²³ As a result, no one knows what proportion of criminal funds are detected and seized. The consensus guesses, and such figures are no more than guesses as scrutiny by analysts including Maya Forstater and Peter Reuter reveal, are some fraction of one per cent.²⁴ The same guess has recently been applied to Canada.²⁵ The 2-5 per cent of GDP guess generates a money laundering total for Canada of approximately \$35-105 billion, and for BC approximately \$5-12.5 billion. In 2011 the Royal Canadian Mounted Police (RCMP) guessed that \$5-15 billion was laundered in Canada.²⁶

Canada seems to have a particularly weak record in prosecuting and convicting money laundering and related financial crimes. The most recent FATF review judged that despite having most of the necessary legal powers, ‘LEAs [Law Enforcement Agencies] 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 [National Risk Assessment] as a common ML typology. Criminal sanctions applied are not sufficiently dissuasive’.²⁷

Despite the common metaphor that money launderers are in an ‘arms race’ with the authorities, who face a ‘whack a mole problem’, or that criminals are forced to innovate, in fact the effectiveness of AML in Canada and elsewhere is so low that this seems unlikely to be correct. Relatively simple strategies like the lawyer’s trust account-shell company-property approach probably work as well today as they did 20 years ago. As has been noted, even bags of cash are not out of the question. From a launderer’s point of view, why try harder when old strategies still work perfectly well?

More specifically, the Silver International/E-pirate case seems to epitomise the general failure of the Canadian criminal justice system to respond to such threats. Despite laundering up to \$220 million a year, and fairly detailed knowledge of how the money laundering scheme worked, there are no criminal prosecutions in train after earlier RCMP efforts collapsed in 2018. Neither the RCMP nor any element of the government has provided an explanation to the public about what went wrong with the criminal prosecution beyond a mention of inadvertent disclosure of a source. A current provincial civil asset forfeiture case is targeting the relatively modest sum of \$4.86 million from those behind the scheme, with separate

²¹ German et al. 2019: 18.

²² German et al. 2019: 285.

²³ Personal communication with the author, see also Halliday, Levi and Reuter 2020: 60.

²⁴ e.g. Baker 2005; UNODC 2011; Europol 2017; for review of the pitfalls in estimating such figures, see especially Reuter 2012; Forstater 2018.

²⁵ CD Howe 2019

²⁶ CD Howe 2019: 8

²⁷ FATF 2016: 5.

related actions targeting much smaller amounts of cash. Even if these are successful, presumably such forfeitures would constitute neither a proportionate punishment nor a deterrent for others, given the magnitude of the scheme and the illicit profits made by those behind the scheme.²⁸

In light of this failure, the sections below consider the effectiveness of the current AML system with reference to corporate vehicles and beneficial ownership, before analysing important but commonly neglected bureaucratic influences on effectiveness.

1.2.1 Beneficial Ownership Regulation

The Expert Panel on Money Laundering in BC Real Estate in 2019 endorsed the now conventional position that ‘disclosure of beneficial ownership is the single most important measure that can be taken to combat money laundering’.²⁹ Internationally, a series of different studies by inter-governmental organizations, NGOs and academics have converged on this same conclusion that corporate vehicles which obscure beneficial ownership are one of the most important mechanisms for facilitating financial crime, and hence that effective regulation in this area is key to AML effectiveness.³⁰

Completely at odds with the most basic rules of AML, Canada allowed bearer share companies (where whoever holds the physical share certificates owns the company) until very recently, meaning that ownership is completely untraceable.³¹ The majority of trusts formed in Canada do not include beneficial ownership information and are not registered. Corporate Service Providers (CSPs) are unregulated, and hence not part of the AML regime. They rarely have an obligation to verify the identity of those for whom they form companies. Canada also allows nominee directors and shareholders. Judging from other jurisdictions the latter may be lawyers, who may be able to refuse to reveal the beneficial owner on the grounds of legal professional privilege.

More than just potential vulnerabilities, various intermediaries actively market Canadian companies and other corporate entities in offering financial secrecy and opacity. In advertising Canadian (in this case, Prince Edward Island) companies in August 2020, one provider helpfully notes ‘You can use a nominee service. When using nominee directors and shareholders, it is impossible to establish the beneficial owner of a company.’³² The firm at the centre of the Panama Papers scandal, Mossack Fonseca, also approvingly referred to Canada’s potential as a tax haven.³³ The same media source has extensive quotes from CSPs extolling the secrecy provided by Canadian shell companies.³⁴

²⁸ <https://vancouver.sun.com/business/local-business/b-c-civil-forfeiture-office-suing-key-target-of-provinces-biggest-money-laundering-case>.

²⁹ Expert Panel on Money Laundering in BC Real Estate, 2019: 2

³⁰ OECD 2001; Global Witness 2009, 2012, 2016; StAR 2011; US Senate 2010; Findley, Nielson and Sharman 2014; FATF/Egmont 2018.

³¹ FATF 2016: 27; Department of Finance 2018: 19.

³² <https://lawstrust.com/en/company-formation/ca-prince-edward-island>.

³³ <https://projects.thestar.com/panama-papers/canada-is-the-worlds-newest-tax-haven/>.

³⁴ <https://projects.thestar.com/panama-papers/how-a-quebec-company-hid-millions-from-tax-collectors/>; <https://projects.thestar.com/panama-papers/canada-signatures-for-sale>.

Indeed, Canada's compliance with international beneficial ownership standards is so conspicuously bad, that had it been a small developing island state with palm trees, it could have expected to have spent most of the last 20 years on the various AML and tax blacklists maintained by the FATF, OECD and G20, which are in turn widely (and uncritically) reproduced in finance industry risk ratings. Instead, Canada has benefited from the prominent double-standard whereby these exclusive international clubs go easy on their members' failings, while reserving stigma and sanctions for smaller, poorer non-member states.³⁵

1.2.2. Measuring Beneficial Ownership Performance

Though at best a crude indicator, the FATF Mutual Evaluation Report ratings in Canada's 2016 review confirmed this unflattering picture of beneficial ownership and corporate transparency performance, with Partially Compliant and Non-Compliant scores for the Recommendations dealing with the transparency of corporations and trusts (Recommendations 24 and 25). The report is appropriately blunt: 'Legal persons and arrangements are at high risk of misuse, and that risk is not mitigated.'³⁶ Canada received Non-Compliant ratings for those dealing with due diligence requirements imposed on key professions (in the jargon, Designated Non-Financial Businesses and Professions).

In 2010 I made 54 solicitations for shell companies to providers around the world to see whether they required proof of identity, as specified by international standards. The sole Canadian firm contacted did not require any identification. Together with Michael Findley and Daniel Nielson, I then repeated the process on a much larger scale 2011-2013, making 3773 solicitations to CSPs in 170 countries. Of 102 jurisdictions where there were at least 15 solicitations, Canada ranked 69th in terms of compliance with corporate transparency standards (i.e. whether the Provider required proof of the identity of the beneficial owner). By way of comparison, Britain was 52nd, Australia 73rd and the United States 86th (with Delaware, Wyoming and Nevada being among the worst performing US states).³⁷ Just as notable as the generally poor performance of the OECD countries was the very high level of compliance among the jurisdictions typically stereotyped as tax havens.

1.2.3. Bureaucratic Obstacles to AML Effectiveness

Canada suffers from what in many ways is the central paradox of AML policy: the law has provided an escalating succession of powerful tools for surveillance, prosecution and asset confiscation, and yet the actual effectiveness of these laws seems to remain very low. It is striking that more than 30 years after the introduction of international AML standards, there is little or no evidence that there is any less money laundering or predicate crime as a result.³⁸

No doubt there are many reasons for the disconnect between strong laws and weak results, but one important factor that does not get enough attention is the pattern of incentives faced by prosecutors and law enforcement, both as agencies and as individuals. My confidential

³⁵ Findley, Nielson and Sharman 2014.

³⁶ FATF 2016: 4.

³⁷ Findley, Nielson and Sharman 2014.

³⁸ Sharman 2011; Halliday, Levi and Reuter 2020.

interviews with law enforcement in Australia and Britain indicate that often police officers' careers are hurt more by investigations that fail than they benefit from successful investigations. In this sense, the career incentive is to avoid investigating crime.

More generally, in puzzling about the coincidence of strong AML laws and low effectiveness, the question is often 'why aren't police and prosecutors getting more money laundering convictions?' The solution is often seen as piling yet more laws on top of existing ones. The question that is too seldom asked is 'why would police and prosecutors be tackling money laundering, given the career and bureaucratic incentives in place?' To the extent that fighting foreign corruption involves Canadian tax dollars being spent recovering funds that will then be handed over to foreign governments, there is an obvious political disincentive in addition.

Even if avoiding investigations and prosecutions altogether is impossible, there may well be incentives to take simple cases that can be successfully concluded quickly, rather than time-consuming complicated cases with a high probability of failure. Money laundering cases, especially those with an international aspect, are often time-consuming, complicated, and have a high probability of failure. By analogy, if doctors are rewarded for resolving health problems quickly and cheaply they may be much keener to see patients with in-grown toenails rather than those with cancer.

Sometimes sentencing guidelines also create disincentives for prosecuting even simple drug-money laundering cases, as has been the case in Australia. For example, if the predicate offence (drug trafficking) attracts a longer sentence than the derivative money laundering offence (as it often does in Canada), and if the sentences for the two offences are to be served concurrently rather than consecutively (as is at least sometimes the case in Canada),³⁹ there is no point in prosecuting the money laundering offence. Canada should amend its laws to increase sentences for money laundering, and make them consecutive to provide an incentive to investigate and prosecute such offences. Absent these reforms, it is difficult to see why law enforcement would take any interest in these crimes beyond plea bargains and confiscating assets, which does not require a criminal conviction in any case.

Investigating financial crime typically involves a set of specialised legal and accounting skills that may often be in short supply in law enforcement agencies. For example, despite setting up a dedicated Fraud and Anti-Corruption Centre in Australia, not one of the people working there had any accounting qualifications. Often those in the public sector with such skills will be 'poached' by the private sector, given that they may be able to double their salary while doing essentially the same job for a bank or other private firm.

Although Canada has identified cross-border money laundering including those involving corporate vehicles and foreign corruption offences as a serious risk in its National Risk Assessment,⁴⁰ in practice law enforcement has made relatively little effort in this sphere.⁴¹ Even where there have been efforts to investigate this kind of crime, there have been conspicuous failures, the collapse of the criminal case against Silver International once again

³⁹ FATF 2016: 51.

⁴⁰ Department of Finance 2015.

⁴¹ FATF 2016: 52.

being a high-profile example. Though records are now somewhat dated, up to 2012 Canada had never repatriated any proceeds of foreign corruption.⁴² German notes that there has been a loss of skills and experience in the RCMP on money laundering, the kind of deficit that takes years to correct.⁴³ As German puts it, ‘police and prosecutors in B.C. have essentially abandoned laundering and proceeds of crime charges’.⁴⁴ If the current rate of investigating and prosecuting money laundering cases (and indeed all cases of financial crime) is so low, it is unlikely that there is any substantial expertise being built up. Unlike reading legislation, these factors are hard to measure from the outside, but they are more important than the formal content of the legal powers granted to law enforcement.

Yet there are solutions to this neglected problem of incentives as the US, British and Swiss examples demonstrate, especially when it comes to the particular problem of investigating the laundering of foreign corruption proceeds, as detailed below.

1.3 Improving AML Performance

The provincial and federal governments are currently engaged in reforms that may at least partially address some of the problems discussed above. Prominent amongst these are the 2019 BC Land Transparency Act, which should serve to ‘look through’ the corporate veil to find the real owners of properties. Federally, the Canada Business Corporations Act has sought to improve the availability of beneficial ownership information, while other provinces have (very belatedly) taken action to abolish bearer shares and equivalents. The 2019 federal budget contained badly-needed extra funds for an Anti-Money Laundering Enforcement, Co-ordination and Enforcement (ACE) team, as well as plans for a new multi-agency task force.⁴⁵ Relevant legislative changes included broadening the money laundering offence to cover those who recklessly process transactions despite knowing the risk that the funds are proceeds of crime. While all of these are positive developments, it is too soon to tell what difference they will make in practice.

1.3.1 Improving Beneficial Ownership Transparency: Public Registries

Aside from the measures above, what is to be done about the unhappy state of affairs in Canada concerning beneficial ownership? The now common response is to recommend a public beneficial ownership registry. According to a recent report for the United Nations, more than 80 countries have either introduced such a registry or committed to do so.⁴⁶ As noted, acting on the suggestion of the 2018 Experts Panel, the BC government has itself favoured such an approach. In January 2020 the BC government launched a consultation on introducing a beneficial ownership registry, following the earlier expert panel recommendation to this effect (see also Standing Committee on Finance 2018). This built on

⁴² StAR 2014: 19.

⁴³ German 2018: 88.

⁴⁴ German et al. 2019: 292.

⁴⁵ <https://www.publicsafety.gc.ca/cnt/trnsprnc/brfng-mtrls/prlmntry-bndrs/20200621/041/index-en.aspx>; see also <https://www.rcmp-grc.gc.ca/en/news/2020/government-canada-invests-989m-five-years-modernize-the-rcmp-and-strengthen-foundations?re>

⁴⁶ Knobel 2020.

the Business Corporations Amendments Act, which required beneficial ownership information to be kept at the company's registered office. There are advantages to public beneficial ownership registries, but also important drawbacks that are seldom considered.

The main advantage of a public (open) registry, is that journalists, NGOs and other private parties can use these records to scrutinise suspicious arrangements. It is an under-appreciated fact that most large money laundering scandals have come to light not because of the extensive and expensive system of financial reporting and due diligence globalised by the FATF, but instead thanks to the actions of whistle-blowers, investigative journalists and NGOs. One needs only think of the Panama Papers and the related data dumps, as well as particular scandals like 1MDB in Malaysia or the *Biens Mal Acquis* case in France. Civil society and the media have thus generally been much more effective in detecting major financial crime than law enforcement, despite not having any of the special legal and investigative powers accorded to the latter. To the extent that open public registries provide such non-state actors with important company ownership information, it may make them even more effective.

Yet despite the current popularity of beneficial ownership registries there is a striking lack of evidence that they do actually help in deterring, detecting or combating money laundering and related financial crime. The UK government has been the main champion of this policy on the international stage, but it is hard to see either any general decline in financial crime, or even any particular case that has succeeded because of this new level of transparency. Even the British government admits that the UK remains a centre for international money laundering, and British corporate vehicles are still prominent in these cases (e.g. the Russian and Azerbaijani Laundromats).⁴⁷

The danger with registries is that they contain a large volume of low-quality information. In particular, the information is unverified, and there is almost no enforcement against false ownership declarations. In Canada, there are something like 2.6 million companies; who, specifically, will verify the information they lodge on beneficial ownership, and how will this requirement be enforced? In Britain, the only enforcement action for submitting false ownership information was against an individual pointing out the lack of enforcement by creating a company in the name of the minister responsible (Vince Cable), and then reporting the fact that he had done so to the authorities.⁴⁸

1.3.2 Improving Beneficial Ownership Transparency: Regulating Corporative Service Providers

A 2011 report from the World Bank-UN Stolen Asset Recovery Initiative (StAR) judged that because registries are essentially passive archives that receive but do not check corporate information, a better solution is to mandate that CSPs collect beneficial ownership information. This in turn requires that these Providers are licensed and audited to make sure

⁴⁷ See House of Commons UK 2018; <https://www.occrp.org/en/laundromat/the-russian-laundromat-exposed/>; <https://www.occrp.org/en/azerbaijanilaundromat/>).

⁴⁸ <https://www.theguardian.com/commentisfree/2018/apr/22/the-sunday-essay-britain-headquarters-of-fraud>.

that they are indeed verifying their customers' identities and maintaining adequate records.⁴⁹ Returning the very large Global Shell Games solicitation exercise referenced above, the thousands of solicitations here showed that it was much harder (and sometimes impossible) to obtain a shell company from Providers in jurisdictions that imposed this customer due diligence requirement.⁵⁰ In practice, this means that CSPs take a notarised copy of the picture page of the customer's passport, usually coupled with utility bills for proof of residence.

The need for such a system may actually be most acute when British Columbian or other Canadian companies are used for criminal purposes by those in a foreign jurisdiction. This problem is discussed at some length below in connection with laundering foreign proceeds of corruption through New Zealand and Scottish corporate vehicles.

1.3.3 Improving Beneficial Ownership Transparency: Holding Directors Accountable

Another complementary solution is to require at least one local resident director (who is a real person, not another company), and to hold that director responsible for any misdeeds of the company. This requirement helps respond to the problem of nominee directors. Even when law enforcement agencies have been able to get to nominee directors, these corporate stand-ins have often argued that because they are only nominees, they do not know about and are not responsible for the actions of the company. The use of such nominee directors is widespread in Canada, including those who are effectively 'signatures for sale'. Although legally a dubious argument, in Canada nominee directors have in practice been able to successfully disclaim any responsibility for their companies when the latter have been exposed as participating in illegal activities.⁵¹

In fact, however, there is generally no such thing as a nominee director in legal terms: a person is a company director or they are not. It is notable that in my experience of shopping for and creating shell companies in Australia and New Zealand (after the latter reformed its company laws in light of the scandals discussed below), Providers were very wary of acting as nominee directors to fulfil the requirement for a local director. This caution reflected Providers' knowledge that they could be held civilly and criminally liable for any misdeeds of the company. As a result, while nominee directors are allowed in Australia and New Zealand, they are practically hard to come by, greatly reducing the risk of criminal misuse of these companies. It is notable that this solution involves less in the way of governments' time and money than either a registry, or licensing and auditing CSPs, not that these measures are in any way mutually exclusive.

1.3.4 Lawyers and the AML Regime

It is rare to read anything on AML in Canada that doesn't bemoan the exclusion of lawyers from the AML system.⁵² The presumption of these critiques is that if Canadian lawyers were covered in this system, there would be substantially less money laundering vulnerability. Yet given how ineffective AML regulations seem to be even when they do cover lawyers, for

⁴⁹ Stolen Asset Recovery 2011.

⁵⁰ Findley, Nielson and Sharman 2014.

⁵¹ <https://projects.thestar.com/panama-papers/canada-signatures-for-sale/>.

⁵² e.g. FATF 2016; German 2018; German et al. 2019.

example, in Britain, this conventional wisdom actually has very little evidence to support it. Are (regulated) British lawyers less likely to be involved in money laundering than (unregulated) Canadian lawyers? No one knows, as there is not enough evidence to say.

Both those who submit and those who receive lawyers' Suspicious Activity Reports in the UK regard a large majority of these reports as a waste of everyone's time. The most commonly mentioned offences are asbestos in clients' buildings and failure to preserve trees.⁵³ The idea that regulating lawyers is 'better than nothing' ignores the fact that regulation does not come for free, even or particularly where the cost is borne by the community rather than the government. In this sense, regulation may well be worse than nothing.⁵⁴

In terms of reform, it does, however, make sense to limit legal professional privilege to core lawyer functions, rather than those where they are acting as a financial intermediary,⁵⁵ and to exclude use of trust accounts. Trust accounts should only be used for actual legal services provided, and banks should apply particular scrutiny to lawyer trust accounts. The increase in audits by the Law Society of BC is welcome news on this front.⁵⁶ Finally, where lawyers have been wilfully blind or reckless in handling the proceeds of crime, they should be prosecuted for money laundering. There is no substitute for the deterrent effect of criminally prosecuting intermediaries in the money laundering process.

1.3.5 Legalisation

The only guaranteed way to reduce laundering is to legalise formerly criminal behaviour. Given Canada's de-criminalization of marijuana, it has perhaps reduced money laundering more than any other country on Earth over the last few years. Other countries have experienced similar successes in legalizing prostitution and gambling. It is surprising that analyses of money laundering overlook this fairly obvious point.

2 Laundering Foreign Corruption Proceeds in Canada

The second main task of this brief report is to analyse the laundering of the proceeds of foreign corruption in British Columbia and Canada and possible policy counters to this threat, drawing on the experiences of the United States, Britain, Switzerland and Australia. This topic is broken down to first concentrate on the threat in Canada and the other countries specified, then to compare other countries' responses, and finally to suggest possible Canadian policy measures.

As a large, multi-cultural country that attracts migrants from all over the world, including highly corrupt countries, Canada also to a certain extent imports some of the corruption problems of these countries, in the sense of accepting assets that are the proceeds of foreign corruption offences. Canada is further vulnerable to hosting the proceeds of foreign corruption in having a relatively large, advanced and internationalised financial sector with

⁵³ Kebbell 2017: 742.

⁵⁴ Sharman 2011.

⁵⁵ StAR 2018.

⁵⁶ German et al. 2019: 138.

ineffective AML controls. The most prominent risks centre on China, especially for BC, but China is by no means the only source country for foreign corruption proceeds.

Important leaked evidence from China indicates the importance of Canada as a host for foreign corruption proceeds. In 2008 the People's Bank of China produced a secret report analysing the tendency of senior Chinese government officials to flee overseas with stolen state assets.⁵⁷ The report was accidentally published on the web for 24 hours in 2011, from where it was copied and translated. The scale of the problem reported was huge: 16-18,000 officials fleeing with \$120 billion in the period 1993-2008.

The leading three host jurisdictions were identified as United States, Canada and Australia (in that order). The report suggests that senior officials send the assets out of China first (and often their families too), commonly via real estate purchases, before making their escape (p.53).

The various BC reports tend to confirm the accuracy of these claims.⁵⁸ One prominent example saw Li Dongzhe flee to Vancouver in 2004 after he was accused by the Chinese government of embezzling \$113 million. After promises of lenient treatment in 2011, Dongzhe returned to China voluntarily, but was convicted and given a life sentence.⁵⁹ Presumably other Chinese nationals in Canada accused of corruption are now unlikely to put much stock in Chinese government promises of clemency.

Of China's 100 most wanted allegedly corrupt fugitive officials, the Chinese governments maintains that 26 are in Canada, with BC prominent.⁶⁰ More recently, as part of high-profile crack-downs under Xi Jinping, the Chinese government has relentlessly sought to punish corrupt officials both at home (under the 'Fox Hunt' program) and abroad ('Skynet'). The latter has included sending Chinese police to countries like Canada, the United States and Australia on tourist visas to illegally surveil and harass targets.⁶¹

There is also evidence that Canada attracts foreign corruption proceeds from elsewhere. In March 2018 the French NGO Sherpa (which has originated highly successful foreign corruption prosecutions in France) and the Canadian NGO, Coalition Bien Mal Acquis, lodged a complaint with the RCMP that 20 members of the ruling families from Algeria, Burkina Faso, Chad, Congo-Brazzaville, Congo-Kinshasa, Gabon and Senegal had moved proceeds of corruption into Canada. More specifically it has been alleged that corrupt

⁵⁷ People's Bank of China, A Study on Methods of Transferring Assets Outside China by Chinese Corruptors and Monitoring Methods for this Problem, 2008.

⁵⁸ e.g. German et al 2019.

⁵⁹ <https://qz.com/364355/chinas-economic-fugitives-cant-go-home-again/>

⁶⁰ <https://www.theglobeandmail.com/news/world/chinas-fox-hunt-in-canada-strains-trust-that-an-extradition-treaty-is-possible/article32042306/>; Yvette Brend, "5 from B.C. on China's 'most wanted' list of 22 alleged criminals", CBC News, April 29, 2017.

⁶¹ <https://www.justice.gov/opa/pr/eight-individuals-charged-conspiring-act-illegal-agents-people-s-republic-china>; <https://www.theglobeandmail.com/politics/article-csis-warns-chinas-operation-fox-hunt-is-targeting-canadas-chinese/>; <https://www.smh.com.au/national/chinese-police-pursued-a-man-to-australia-on-a-fox-hunt-without-permission-20150415-1mlum2.html>.

officials from these families have purchased at least \$30 million of real estate in Toronto, Ottawa and elsewhere in Canada.⁶² The NGOs have alleged that offences include bribery, illicit enrichment, embezzlement of public funds, and money laundering. They have also requested that the Canadian government sanction these individuals using Magnitsky Act powers.⁶³ The Canadian NGO committed to follow up, but it is not clear that they have taken any action.

The Arab Spring revealed the inadequacy of Canada's policies on detecting and restraining the proceeds of foreign kleptocracy in the country.⁶⁴ Canada froze some assets suspected of being obtained corruptly from the Libyan government in the wake of the revolution of 2011.⁶⁵ Prominent political allies of Vladimir Putin have invested in Canadian real estate, including Vitaly Malkin, earlier rejected for residence in Canada on the grounds of involvement with organized crime.⁶⁶ Other allegations suggest that the proceeds of corruption from illegal logging in Malaysia have been laundered through Ottawa real estate.⁶⁷ Given that BC receives drug money from Mexico and Iran,⁶⁸ it would hardly be surprising if corruption proceeds from these countries are also laundered in the province.

2.1 Comparative Evidence on Hosting Foreign Corruption Proceeds

A rough rule of thumb is that countries probably host illegal wealth in proportion to the size of their financial sectors. As such, the most criminal money, both domestic and foreign, is probably held in the United States, with centres like the UK and Switzerland also prominent. According to the Stolen Asset Recovery grand corruption database, the most common jurisdictions for banks hosting foreign corruption proceeds were the United States, Switzerland and the UK, in that order.⁶⁹

However, this does not mean that countries like Canada are immune from this threat. Below the top tier of global centres, other OECD countries with reasonably large, international financial centres have also recently been exposed for hosting substantial foreign corruption proceeds: Portugal and funds stolen from Angola by the former ruling family, and Eastern European corruption funds laundered through, Deutsche Bank, Denmark's Danske Bank and Sweden's Swedbank, among others. If Canada has not joined the recent trend of OECD countries imposing AML penalties against banks in the hundreds of millions of dollars, this is much more likely to indicate an enforcement failure than the absence of AML failures in these banks.

⁶² <https://www.news24.com/news24/africa/news/french-ngo-asks-canada-to-probe-african-leaders-real-estate-purchases-20180301>.

⁶³ <https://www.asso-sherpa.org/ill-gotten-gains-complaint-in-canada-against-twenty-officials-and-their-relatives-from-seven-african-countries>.

⁶⁴ Davies 2013.

⁶⁵ OECD 2013: 90.

⁶⁶ <https://nationalpost.com/news/russian-businessmans-20-year-bid-to-enter-canada-spawned-top-secret-spy-agency-probes-but-never-citizenship>.

⁶⁷ Bruno Manser Fonds 2011.

⁶⁸ German et al. 2019.

⁶⁹ StAR 2011: 122.

2.1.1 The United States, Britain and Switzerland

The United States took the lead in the fight against cross-border financial crime with the passage of the Foreign Corrupt Practices Act in 1977, and introduced the first comprehensive AML legislation in 1986. The laundering of foreign corruption proceeds in the United States only attracted attention much later, however. Interest was stimulated by high-profile Senate hearings on the laundering of Mexican and Russian corruption proceeds by US banks and shell companies.⁷⁰ In response, several key measures were included in the Patriot Act of October 2001, and the Bush administration set up an Anti-Kleptocracy Initiative in the Department of Justice that has continued to enjoy bi-partisan support to this day.

The UK has tended to attract stolen wealth from its former imperial possessions (e.g. Nigeria, Kenya and Pakistan), but also from the former Soviet Union since the 1990s. Over the last 20 years the British government has taken a strong interest in the international anti-corruption agenda, often led by direct Prime Ministerial action (e.g. David Cameron's anti-corruption summit in 2016), and closely associated with international development. The fact that British banks were deeply implicated in laundering money for Nigeria dictator Sani Abacha, and that regulators failed to either prevent or punish the banks for doing so, helped this issue gain political salience from the turn of the century.⁷¹ More recently, security worries connected with Russian assassinations and organised crime in Britain has thrown a spotlight on criminal money from this source being laundered in London, especially in the real estate sector, and its effects on the British political system.⁷² Bill Browder, the hedge fund manager and activist behind the various Magnitsky Laws, has consistently claimed that the UK is the world's leading centre for the laundering of foreign corruption proceeds.

Switzerland has historically been the world's largest holder of non-resident banking deposits (though recently overtaken by Singapore). From 1934 Switzerland has had strict banking secrecy, which in the past has made it a favoured destination for both foreign corruption proceeds and tax evasion money (the latter was long considered an administrative rather than criminal offence by Swiss authorities). A combination of a deteriorating international reputation, as 'Swiss bank account' became a synonym for dirty money, and external pressure, especially from the United States, has since largely dismantled this secrecy. After the Marcos case in the late 1980s, Switzerland has now become a leader in the fight to trace, seize and repatriate looted wealth. It has returned substantial assets to countries including the Philippines, Nigeria, Peru and Kazakhstan.⁷³

2.1.2 Australia and Foreign Corruption Proceeds

Australia's experience with hosting foreign corruption funds may be particularly relevant to Canada in general terms (both multi-cultural common law Commonwealth federal jurisdictions), and similar specific vulnerabilities (high inward investment from China, especially in real estate, and a poor record of AML regulation in beneficial ownership and the

⁷⁰ US Senate 1999; 2004; 2006.

⁷¹ Global Witness 2009.

⁷² House of Commons UK 2018.

⁷³ Monfrini 2008; Gully-Hart 2008.

professions).⁷⁴ German et al. have noted particular similarities between Vancouver and Sydney.⁷⁵ As with Canada, there is strong evidence that some portion of the large capital flows from China represent the proceeds of corruption. But given its multi-cultural nature, Australia hosts corruption funds from a wide variety of other jurisdictions, from South Sudan to Malaysia.⁷⁶

Australia is in a different category from the United States, Britain and Switzerland. This is not because of an absence of foreign corruption funds, but because the Australian federal government has chosen to turn a blind eye to these illicit inflows.⁷⁷ In these circumstances, the extensive surveillance and confiscation powers possessed by law enforcement are moot, no action has been taken. This inaction moved the head of the Papua New Guinean anti-corruption agency to refer to Australia as ‘the Caymans of the South Pacific’. The lesson for Canada is that no amount of new legislation will improve effectiveness in the absence of ensuring that rules are actually enforced.

2.2 ‘Onshore Offshore’: Laundering Foreign Corruption Proceeds through Shell Companies

OECD countries may facilitate the laundering of the proceeds of foreign corruption even when none of the tainted wealth actually enters their economies, to the extent that they fail to enforce beneficial ownership transparency. In this sense, OECD countries provide a function similar to classic offshore financial centres in providing shell companies for non-residents. As discussed below, New Zealand, Scottish and US companies, partnerships and trusts have been used as onshore financial centres providing an offshore service. The combination of a reputable corporate domicile less likely to arouse suspicion than a classic offshore centre, and de facto anonymity thanks to poor enforcement, is an attractive proposition for would-be launderers. BC and Canada have the same vulnerability.

According to Canadian, US and British law enforcement agencies, as well as many NGO and media reports, New Zealand shell companies played important roles in laundering funds stolen in the Magnitsky case, evading sanctions placed on North Korea, and were also used by the Mexican Sinaloa drug cartel. New Zealand trusts were used to hold assets stolen from Malaysia’s sovereign wealth fund 1MDB.⁷⁸ One particular New Zealand CSP, run by father-and-son duo Geoffrey and Ian Taylor, became notorious for being the directors and/or shareholders of record for various shell companies involved in a whole series of serious crimes.⁷⁹

The infamy of New Zealand shell companies initially stemmed from SP Trading, formed by the Taylors, which was found to be the owner of a plane-load of weapons intercepted in Bangkok on their way from North Korea to Iran in violation of international sanctions. The

⁷⁴ OECD 2013.

⁷⁵ German et al. 2019: 47.

⁷⁶ Sentry 2016; Bruno Manser Fonds 2011.

⁷⁷ Sharman 2017.

⁷⁸ International Enforcement Law Reporter 2019 volume 35 (11) p.423.

⁷⁹ <https://www.icij.org/investigations/offshore/geoffrey-taylor/>;
<https://www.occrp.org/en/investigations/1592-taylor-network-back-in-business>.

director turned out to be a young woman working at Burger King paid \$NZ 20 for her signature (the media has exposed similar instances in Canada⁸⁰). In the case of New Zealand, the widespread misuse of its companies and trusts had reputational consequences for the country as a whole, as the European Union dropped it from its whitelisted group of countries deemed to have equivalent AML standards.

Another example of an ‘onshore offshore’ product benefiting from the same combination of solid reputation and lax regulation has been the Scottish Limited Partnership. This type of partnership came to enjoy a period of popularity as the money laundering vehicle of choice for proceeds of corruption from Eastern Europe.⁸¹ These partnerships were initially excluded from the UK’s beneficial ownership registry, leading to a massive increase in their use: more were formed in 2016 than in the century after they were first created (1907-2007).⁸² Even as early as April 2008, I had Scottish Limited Partnerships recommended to me as a secrecy product during a visit to an offshore law firm in Panama City.

Unlike English Limited Partnerships, the Scottish equivalent has a legal personality separate from its partners, whose names thus stay off records associated with the enterprise. The attraction of this form for those looking to keep their identity secret is that the general and limited partners can be (and for a large majority are) foreign shell companies, whose beneficial ownership is also difficult to determine. As such, there is no actual person named in connection with the Partnership. The fact that the formation of Scottish Limited Partnerships slumped after they were belatedly included in the beneficial ownership register gives a strong indication of how important secrecy was for their users.

These vehicles played a starring role in the ‘Russian Laundromat’ (along with New Zealand shell companies), a scheme by which over \$20 billion of suspicious funds were moved out of Russia and other former Soviet countries. The Partnerships linked in the press with criminal activities were provided by about 10 CSPs.⁸³ Typically, no action has been taken against these CSPs by the British authorities.

The ultimate ‘onshore offshore’ jurisdiction might be the United States. Like Canada, the US is a longstanding laggard in mandating identification of those setting up shell companies. Unlike Canada, it is one of the handful of countries that has refused to engage in global automatic tax information exchange; the US demands such information from foreign countries but does not reciprocate. According to the World Bank/UN Stolen Assets Recovery Initiative, US corporate vehicles were the most commonly used in major cases of cross-border corruption.⁸⁴ Incisive studies by the US Senate have revealed how lax beneficial ownership standards (well below those the United States has coercively enforced on other countries) mean that corrupt foreign officials have repeatedly been able to launder their tainted wealth in the United States.⁸⁵

⁸⁰ <https://projects.thestar.com/panama-papers/canada-signatures-for-sale>.

⁸¹ Transparency International-UK 2017.

⁸² Transparency International-UK 2017: 6.

⁸³ Transparency International-UK 2017: 3.

⁸⁴ StAR 2011: 121.

⁸⁵ US Senate 2010; Bean 2018.

Due to Canada's weak beneficial ownership standards, it may be in danger of becoming the 'new New Zealand' when it comes to laundering foreign corruption proceeds and those from other crimes. This is to say, that like New Zealand companies and trusts, and later Scottish Limited Partnerships, British Columbia and Canada provide money launderers, corrupt officials and other financial criminals with the respectability of a seemingly virtuous onshore corporate domicile, but also the lax regulations and de facto anonymity that is no longer available in classic offshore tax havens. These dual advantages for money launderers (high reputation and low regulation) give rise to particular risks that Canadian corporate vehicles will be used to further financial crime within and beyond the country. As German et al. note, BC registered companies 'are as effective in concealing ownership as many of their offshore counterparts'.⁸⁶ As noted earlier, trusts are often unregistered, and as such completely below the radar. Limited Partnerships and Limited Liability Partnerships have also been mentioned as vulnerability, especially with the use of a nominee partner.⁸⁷

2.3 Comparative Approaches to Countering the Laundering of Foreign Corruption Proceeds

The three countries that have mounted a relatively effective response to the inward flow of foreign corruption proceeds — the United States, UK and Switzerland — each created a specialised agency to tackle the investigation and confiscation of these funds, though it took a notably different form in each country. Because of the institutional and personal disincentives described above, without such a specialised unit, it is unlikely that units with a general financial crime/AML remit will prioritise this sort of offence.

The United States Department of Justice has set up an Anti-Kleptocracy Task Force with a dedicated staff of 28, plus support from others. This is matched by a separate FBI unit also devoted to investigating and confiscating foreign corruption proceeds. The UK has taken the unusual route of using foreign aid to finance an Overseas Corruption Unit of 70 staff in the National Crime Agency (NCA) with the mission of investigating both foreign bribery and foreign corruption proceeds in Britain.⁸⁸ In interviews with members of the NCA's Overseas Corruption Unit they have been adamant that absent a specialised unit, the patterns of incentives means that there would have been no prospect of them investigating foreign corruption proceeds. Finally, Switzerland set up a specialised unit in its foreign ministry with responsibility for foreign corruption proceeds.⁸⁹

Beyond the necessity of a dedicated unit that has an incentive to tackle these sorts of crimes, the second major lesson is the limits of criminal law in recovering foreign corruption proceeds, in that what success have been recorded in this domain is rarely the result of criminal convictions. This conclusion leads to the discussion of different means of asset recovery discussed in the following section.

A key determinant of success in actions against foreign corruption proceeds is whether or not the original foreign predicate crime that gave rise to the money in the first place has to be

⁸⁶ German et al. 2019: 14.

⁸⁷ <https://projects.thestar.com/panama-papers/lessons-for-canada>.

⁸⁸ Kanji and Messick 2020.

⁸⁹ Sharman 2017.

proved. The maximal position, that there must be a prior criminal corruption conviction in the ‘victim’ country before the country that hosts the resulting funds will take action, generally dooms efforts to recover these assets. The exceptions may raise human rights and political questions, especially in countries like China and Russia and other dictatorships, as to whether the official was prosecuted as part of a purge or because of a change in political circumstances.

A particular challenge in the United States has been that the authorities have had to establish not just that a given asset was bought with funds derived from crime in a foreign jurisdiction (difficult enough), but they have also had to link the specific asset with the specific crime that gave rise to the funds in the foreign jurisdiction. American judges have been explicit that just showing that foreign officials are living well beyond their means is not sufficient for asset confiscation to succeed.⁹⁰ As discussed in the section on Confiscation and Asset Recover below, in the UK the bar to confiscating tainted wealth from overseas is significantly lower than in the United States, with judges allowing for an ‘irresistible inference’ that particular assets are the proceeds of corruption.

While the UK response to laundering overseas corruption proceeds via real estate has been in a registry of beneficial ownership, the United States has instead relied on Geographic Targeting Orders. These require title insurance companies to identify the real people holding property above a certain value (\$300,000) through corporate vehicles. Initially concentrated in New York City, these Orders have now been expanded to cover eight other areas seen to be at particular risk.⁹¹

In the United States, the Department of Justice has brought forfeiture cases against the assets of foreign kleptocrats such as Teodorin Obiang of Equatorial Guinea (2011), in the 1MDB Malaysian case (2017), Gulnara Karimova of Uzbekistan case (2012), Alice Diezani of Nigeria (2017), in the Abacha Nigeria case (2014), and most recently against the former leader of Gambia (2020). Even where these cases have not been carried through to their conclusion, they have led to settlements where significant assets have been recovered (e.g. the Obiang case). Overall more than \$1.5 billion foreign corruption proceeds have been recovered via this route.

The dependence on non-conviction-based remedies in the US is particularly notable because no country has more experience than the US in bringing successful international corruption prosecutions, including those for international corruption, thanks to hundreds of Foreign Corrupt Practices Act cases since the early 1990s (the Act was passed in 1977 but then left largely unenforced for over a decade). If even agencies like the FBI and the prosecutors of the Southern District of New York find it hard to bring criminal cases against foreign kleptocrats, then it is dubious that law enforcement or prosecutors elsewhere will be able to. The experience in Britain and Switzerland also bears this out, with rare exceptions like the conviction of Nigeria governor James Ibori in Britain.

The notable recent exceptions come from successful criminal cases brought by NGOs in

⁹⁰ Sharman 2017: 76-77.

⁹¹https://www.fincen.gov/sites/default/files/shared/Generic%20Real%20Estate%20GTO%20Order%20FINAL%20508_2.pdf

France against Obiang in 2017 (upheld on appeal in 2020), and against Rifaat al-Assad (brother of former Syrian ruler Hafez al-Assad and uncle of current ruler Bashir al-Assad). However, because of the prominent role of investigating magistrates and the different legal system, these examples may be less relevant to Canada.⁹²

In Switzerland the most prominent successes against the Marcos and Abacha families have come from designating these families as criminal enterprises, a move that shifts the onus onto the targets to prove the legality of their wealth, rather than the Swiss authorities having to directly prove that these assets are the proceeds of crime. This measure was first developed to combat international drug cases, with its later anti-corruption employment being an unanticipated reinterpretation. Switzerland has subsequently passed laws that ease the burden of Mutual Legal Assistance and asset recovery from victim countries with low capacity, the so-called Lex Duvalier and Lex Ben Ali measures.⁹³ As the names suggest, these were designed for countries like Haiti or those experiencing revolution as with the Arab Spring, and so these laws may be less relevant when countries like China request co-operation from host jurisdictions.

2.4 Potential Canadian Responses to the Laundering of Foreign Corruption Proceeds

Most if not all of the earlier recommendations for strengthening general AML effectiveness also apply in fighting the laundering of foreign corruption proceeds in the Canadian financial system. This applies especially to improving beneficial ownership regulation. Aside from these measures, what else can British Columbia and Canada take from these foreign examples of targeted action against foreign corrupt officials and their looted wealth?

To the extent that either the provincial or federal government are interested in making meaningful progress against the laundering of foreign corruption proceeds, they need to invest in a specialised unit with responsibility for this function. The British, Swiss and US coverage provides examples of why this is a requirement, while the Australian experience gives an indication of what happens in the absence of such a unit: nothing. No doubt there is some 'selection bias' in this finding, because the presence of such a unit is itself an expression of prior political will, but political will alone does not secure convictions or recover stolen assets.

This unit should specialise not just in attacking corrupt officials and their wealth, but also the Canadian banks and enablers who, through sins of omission or commission, assist in the local laundering process. The failure to hold local enablers of foreign laundering to account has been a key weakness of equivalent efforts in Britain and Switzerland; the US has actively penalised banks, but not professionals like lawyers, realtors or those forming shell companies. To the extent that the goal is to prevent foreign corruption funds entering the Canadian financial system in the first place, rather than engage in the long, difficult and expensive process of finding, seizing and repatriating the funds after the fact, it is crucial to create proportionate incentives for local intermediaries to apply proper due diligence and block tainted funds. Though (as ever) enforcement is more important than legal changes, making money laundering culpability extend to recklessly and negligently laundering (not

⁹² Perdriel-Vaissiere 2017.

⁹³ Adam and Zellweger 2013.

just knowingly) is important.

Specific Canadian problems of disclosure and the need to finish cases within set times may mean that it is in practice impossible to bring cases in instances of grand corruption laundering in Canada. International asset recovery cases may go on not just for years but for decades after initial legal action is launched,⁹⁴ and so these time limits may need to be changed if such prosecutions are to succeed.

A less expensive option is a robust program of visa denial for those where there is credible evidence of foreign corruption offences. Both the US and UK have programs along these lines, while other governments have done so on an ad hoc basis. The Canadian government has this power and more general targeted sanctions under the Magnitsky Act. As well as Russian entities, others from Iran, Burma, Syria, Venezuela and Zimbabwe have been listed under this Act. Although Canadian economic sanctions are beyond the scope of this paper, the enforcement failures in this domain seem to be of a piece with Canadian AML enforcement failures.⁹⁵

As well as boosting general AML effectiveness, greater transparency in real estate and beneficial ownership is also particularly useful for deterring and detecting foreign corruption proceeds. In 2019 it was estimated that \$28 billion in Vancouver real estate was owned via opaque corporate vehicles.⁹⁶ Reporting suspicious money in the sector described as ‘dismal at best’, a handful each year, and properties registered with individuals named ‘trophy wife’ and ‘launderer’.⁹⁷

Encouragingly, Canada does allow for the direct application of foreign conviction and non-conviction-based confiscation orders, and courts can mandate restitution or compensation to foreign jurisdictions.⁹⁸ If foreign governments seek to recover corrupt assets via civil law, they must take on a Canadian lawyer to do so.⁹⁹ Foreign offences are a predicate crime for money laundering in Canada according to the behaviour test in s. 354(1)(b) of the *Criminal Code* (Possession of the Proceeds of Crime: ‘an act or omission that, if it had occurred in Canada, would have constituted an offence punishable by indictment’). There is similar wording in Laundering Proceeds of Crime provision of the *Criminal Code*, s. 462.31(1)(b).

In June 2020 quick action by the private firm John and Johnson succeeded in recovering proceeds of corruption in Quebec on behalf of the Nigerian government. These lawyers obtained a freezing order in the British Virgin Islands court for a private jet owned through a British Virgin Islands shell company by corrupt Nigerian ex-oil minister Dan Etete. The firm acts on behalf of the Nigerian government, with the plane’s seizure authorised just hours after it landed in Montreal. The search for over a billion dollars associated with the Etete scandal is supported by litigation financiers Drumcliffe International in return for five per cent of the

⁹⁴ Sharman 2017.

⁹⁵ <https://ipolitics.ca/2018/06/23/canada-failing-to-enforce-magnitsky-law/>.

⁹⁶ German et al 2019: 13.

⁹⁷ German et al 2019: 52.

⁹⁸ OECD 2013: 93.

⁹⁹ FATF 2016: 200.

assets recovered.¹⁰⁰

To its great credit, the Canadian government has taken a much more consistent political line against corrupt dictatorships than the US, Britain or Australia. However, political leadership has not translated into practical effectiveness when it comes to blocking or confiscating looted wealth coming into the country.

2.5 Countering Corruption Beyond the State?

As noted earlier, despite the extensive financial supervisory apparatus created by the AML system, most large international corruption cases are first detected not on the basis of Suspicious Transaction Reports or by law enforcement, but thanks to journalists, whistleblowers and NGOs. The importance of non-state actors extends from the cases stemming from the Panama Papers and the other series of massive leaks of financial information, to more recent scandals like 1MDB and Danske Bank. British Columbia seems to fit the pattern here, with the alert about laundering in casinos coming not from regulators, law enforcement or FINTRAC, but from the media.¹⁰¹ In contrast, disquieting reports from within law enforcement and the regulators tended to be suppressed and the bearers of (accurate) bad news disciplined or fired,¹⁰² at least until these problems were made public by the media.

Beyond their evidence-gathering role, the importance of civil litigation may mean that non-state actors can also play a prominent role in recovering assets. The French Obiang and Assad cases were criminal prosecutions launched not by the French state, but in response to applications made by NGOs Sherpa and Transparency International-France.¹⁰³ The Canadian Coalition Biens Mal Acquis has made a complaint to the RCMP as noted earlier. Although common law systems are less hospitable to private prosecutions than in countries like France and Spain, they are not unknown.

More generally, British Columbia and Canada may increase the effectiveness of their AML and anti-corruption regimes by allowing non-state actors to pursue strategic litigation in response to transnational corruption cases. Legal advice would need to be sought as to whether or not standing requirements in civil and/or criminal cases would need to be broadened to support such litigation being pursued by NGOs in pursuit of assets looted from overseas. Over at least the last decade various NGOs have considered or undertaken strategic litigation in response to transnational corruption cases. At present the Open Society Foundations is searching for such privately-initiated cases to fund, and so the usual financial barriers to private legal action is much less daunting. Various 'how to' guides on non-state anti-corruption litigation have been published.¹⁰⁴

3 Confiscating Illegal Assets

¹⁰⁰ International Enforcement Law Reporter vol.36 (6): 234.

¹⁰¹ German 2018: 12, 105.

¹⁰² German 2018: 123.

¹⁰³ Perdriel-Vaissiere 2017.

¹⁰⁴ e.g. Thelesklaf and Pereira 2011; Messick 2016; Edmonds and Jugnarain 2016; Stephenson 2016.

The single most important aim of AML policy is to ‘take the profit out of crime’, thereby reducing the incidence of predicate offences. To this end, it is essential there be an effective system for confiscating the proceeds of crime. The same principle applies in the narrower area of overseas corruption proceeds. The centrepiece of the UN Convention Against Corruption is Chapter 5, which mandates the principle that assets corruptly taken from a victim country to a host country should be seized and returned by the latter to the former.

This final section looks at various options for confiscation, both in the context of general AML policy, and more specifically as applied to recovering foreign corruption proceeds. Specifically, it concentrates on Non-Conviction Based Forfeiture and civil asset recovery, confiscation based on tax powers, and Unexplained Wealth Orders or UWOs. I conclude that avenues for confiscation on the balance of probabilities are crucial, but that practical experience in using these powers is more important than the technical details of the law. I further argue that the potential of UWOs has been exaggerated, while the considerable potential of tax powers in confiscating criminal assets has been neglected.

3.1 Non-Conviction-Based Forfeiture

Non-Conviction-Based Forfeiture (NCBF) measures are aimed at confiscating assets where the target is a fugitive or dead, or where there is simply not enough evidence to prove a case beyond a reasonable doubt. Instead, these cases are generally decided at the civil standard of the balance of probabilities or the preponderance of evidence. Both provincial BC and federal law enforcement agencies have these powers, which seem to have become something of a default option when faced with money laundering cases.¹⁰⁵

There is no doubt these measures can be a powerful weapon in confiscating illegal assets. Yet the practical effectiveness of NCBF and similar legal measures has a lot more to do with the experience and incentives of those using them than technical legal provisions of these instruments. The chief attraction of these and are other related confiscation measures is that cases only have to be proven on the balance of probabilities, rather than beyond a reasonable doubt. Yet within the British National Crime Authority, the financial and career cost of losing this kind of case has meant that such actions have only been approved when there is enough evidence to put the case beyond a reasonable doubt.¹⁰⁶ This undermines much of the point of these powers. The same risk aversion is also apparent in applying freezing orders to money suspected of being foreign corruption proceeds.

In the case of the Australian Federal Police, temporary success was a product of progressively learning how to use new legal powers for confiscation. Otherwise, just because new legislation is passed does not mean that law enforcement will know how to use these powers in a way that survives a court challenge. In Australia, the relevant unit started with small, simple drug-related cases, successively building up to larger and more complicated drug cases, and then other sorts of offences that had some international component. At this point, however, the relevant team was split up, officers were transferred to other unrelated duties, the knowledge and experience was dissipated, and confiscations stopped. Obviously, this was not a legal problem, yet too often both problems and solutions of asset recovery are

¹⁰⁵ German 2018; German et al. 2019.

¹⁰⁶ Author’s interview, National Crime Authority, London, UK, 14 December 2015.

thought of in exclusively legal terms. To the extent that investigative and prosecutorial functions are in different bodies, both need to have this expertise.

A point that is seldom noted is that non-conviction based measures (broadly conceived) will not only result in more criminals losing their property, but also more innocent law-abiding people having their property wrongly taken by the state. Avoiding injustice is after all why there is a presumption of innocence in the first place; to the extent this is removed, there will be collateral damage. There are many stories of the accidental or deliberate misuse of confiscation powers by law enforcement, particularly in the United States, but those writing on confiscation implicitly seem to assume that these miscarriages of justice are a price worth paying.¹⁰⁷ This conclusion is open to debate.

3.2 Civil Cases: A British Example

In civil cases in Britain judges have allowed drawing an ‘irresistible inference’ that particular assets in the UK represent the proceeds of foreign corruption, without the need for a prior conviction in the foreign jurisdiction, or even any link to a particular instance of corruption. Thus one of the most successful asset recovery instances was essentially a one-man effort by a private lawyer of Libyan extraction, Mohamed Shabaan, who was authorised (but not paid) to search for Gaddafi family assets abroad immediately after the 2011 revolution.

The asset in question was a £10 million London mansion owned by Gaddafi’s son Saadi via a British Virgin Islands shell company, Capitana Seas.¹⁰⁸ Having fled to Niger, and neglected to pay the \$500 renewal fee for the shell company, the civil case in London proceeded unopposed, with the judge agreeing with the contention that the mansion was purchased with money stolen from the Libyan government, and thus that the mansion rightly belonged to the new Libyan government. Civil action also led to the UK’s largest asset recovery case in 2019, with £190 million repatriated to Pakistan after a civil case by the NCA against Malik Riaz Hussain (a close associate of former Prime Minister Nawaz Sharif) was settled.¹⁰⁹

3.3 Unexplained Wealth Orders and Illicit Enrichment Laws

Unexplained Wealth Orders (UWOs) are one more solution to the problem of the difficulty of proving complex cross-border corruption and money laundering cases beyond a reasonable doubt. Somewhat like Illicit Enrichment laws, they modify the onus of proof such that it is up to individuals in possession of what is adjudged to be suspicious wealth to show how they came by this wealth legally, rather than the state having to prove its illegality. However, it is important to note that a UWO is usually only a first step in a process that leads to confiscation, it is not a means of confiscation in itself.

UWOs are controversial in extending the power of the state and reducing citizens’ rights and freedoms (which may make them unconstitutional in some jurisdictions, perhaps including Canada). They arguably weaken the presumption of innocence, property rights and the right

¹⁰⁷ Asian Development Bank/OECD 2007; Transparency International UK 2015b.

¹⁰⁸ <https://www.bbc.co.uk/news/world-asia-17561111>.

¹⁰⁹ <https://www.aljazeera.com/news/2019/12/pakistan-tycoon-hands-244m-settle-uk-corruption-probe-191204065641192.html>.

to silence.¹¹⁰ However, the discussion below brackets these principled objections, and instead concentrates on whether they actually are effective. Portrayed as a something of a ‘silver bullet’ in some contexts, UWOs have so far had a decidedly mixed record.

Three countries are particularly important in assessing the potential of UWOs for British Columbia and Canada: Ireland, Australia (both federal and state jurisdictions) and the UK.

In Ireland the Criminal Assets Bureau has used UWOs hundreds of times since they were first introduced in 1996 to confiscate proceeds of organised crime, tax evasion and welfare fraud. The CAB has been regarded as generally successful. Importantly, expectations were kept relatively modest, both for UWOs and the Bureau more generally. Unlike Britain’s experiment of an Asset Recovery Agency, there was no goal of the Bureau ‘paying for itself’ in terms of the value of assets confiscated. The Bureau was a response to domestic organised crime, rather than cross-border financial crime, a relatively easier mission than the current targets of UWOs in Britain.

Australian states began introducing UWOs or equivalent measures from 2000 (Western Australia, followed by Queensland and South Australia in 2009 and New South Wales 2010), with federal adoption in 2010.¹¹¹ Like Ireland, this measure was introduced to target domestic organised crime (particularly drug-trafficking by motorcycle gangs) rather than foreign-owned assets; unlike Ireland, they have generally been a failure, with some limited exceptions at the state level (Western Australia recovered \$5 million of suspected drug proceeds through 24 such orders over a decade).¹¹² Indeed, it seems that at a federal level this power has never been used, despite being introduced more than a decade ago.¹¹³

One source within the Australian Federal Police explained this abstinence by the fact that law enforcement was looking for ‘the perfect case’ to use this power, so that it would be guaranteed to survive the likely court challenge. Such is the level of risk aversion that this perfect case has never come along, and thus this prerogative has been preserved at the expense of never using it. In part, this non-use is also explained by the fact that the authorities can achieve broadly the same effect of a UWO via levying a tax assessment if a person is judged to be living beyond his or her declared income. Like a UWO, such an assessment puts the onus on the individual to disprove this assessment in court.

UWOs were introduced into Britain after a particularly successful lobbying effort by Transparency International-UK, and on the back of more general government worries about the laundering of overseas corruption proceeds in British property, especially London. They apply where there is a reasonable suspicion of crime, and/or where the presumed owner is a senior public official from outside the European Economic Area. The NCA has indicated that it has a list of over 100 properties that could be subject to such orders, yet this power has been used sparingly so far (against two families), and the most recent Order was defeated in court in April 2020.¹¹⁴

¹¹⁰ Ivory 2014.

¹¹¹ For a review, see Bartels 2010.

¹¹² Bartels 2010.

¹¹³ FATF 2019, 61-62.

¹¹⁴ <https://www.spotlightcorruption.org/from-hajiyeva-to-aliyev-where-next-for-unexplained->

Skeptics make several charges against the effectiveness of UWOs. Firstly, the information gained cannot then be used in criminal trials, in effect removing the possibility of prosecution. Secondly, in practice, as in Australia, British authorities have been risk-averse in using this power, such that in the first instance against Zamira Hajiyeva there was enough evidence to go straight for a civil or criminal confiscation, and hence that the UWO was redundant, in fact it may have slowed down the process of asset recovery. Finally, it may well be easier for foreign targets to fake documentation from their home countries ‘explaining’ their wealth than it will be for British law enforcement to convincingly demonstrate that these documents are in fact fake. A lack of knowledge about Kazakhstan was one of the reasons the most recent use of the UWO failed in Britain, leaving the authorities with a £1.5 million legal bill.¹¹⁵ In the Canadian context, those using such an order may be in the difficult position of disproving foreign financial documentation.

Given the British and especially Australian experience, enthusiastic endorsements of UWOs for British Columbia and Canada represent the triumph of optimism over experience, especially if (unlike Ireland) these are to be targeted at cross-border financial crime. They seem to have been introduced as part of a political anti-corruption syllogism (‘we must do something about corruption, this is something, therefore we should do it’). Very much like public beneficial ownership registries, a conspicuous lack of evidence for the effectiveness of UWOs has not stopped large sections of the anti-corruption policy community, especially NGOs, portraying UWOs as a ‘game-changer’.

Many former British colonies in Africa and Asia have illicit enrichment laws, now endorsed in the United Nations Convention Against Corruption (Article 20). These are once again aimed at reversing the burden of proof, in that public officials with more wealth than they can explain can be criminally prosecuted. It seems doubtful that such a measure is necessary in Canada (and open to debate whether it would be consistent with the *Canadian Charter of Rights and Freedoms*). Perhaps the main argument in favour is to satisfy the dual criminality requirement for Mutual Legal Assistance or extradition requests from foreign countries on the basis of illicit enrichment.

3.4 A Neglected Alternative: Using the Tax System

Strangely, the part of the government that has the most experience with recovering assets is often thought of last, if at all, when comes to recovering criminal assets: the tax apparatus. Given its core function of extracting revenue from the population, a minority of whom will go to extreme lengths to evade their financial obligations, the national tax agency will have the most expertise in financial investigation and confiscation. While there is some *de facto* co-operation between Canada Revenue and Canadian law enforcement in confiscating criminal assets, such instances seem to be much more the exception than the rule.

Australia provides one example of how close co-operation between tax and law enforcement has given rise to a situation where complex criminal asset recovery cases have in effect been

wealth-orders/

¹¹⁵ <https://www.thetimes.co.uk/article/1-5m-legal-bill-forces-rethink-over-mcmafia-wealth-orders-x02gc8s23>

handled through tax remedies. This is despite the fact that Australian law enforcement agencies at both the federal and state level have an extremely powerful range of confiscation powers at their disposal, including non-conviction based forfeiture actions and UWOs. These tax powers are more useful in combating domestic criminals than those from abroad, though thanks to the increased co-ordination of international tax enforcement even the latter may be vulnerable.

Because of practical inexperience, a lack of relevant skills, and institutional and individual risk aversion, Australian law enforcement rarely use confiscation powers, except in relatively simple drug laundering cases, or confiscations at the border.¹¹⁶ This underlines the short-sightedness of expecting new laws in British Columbia or federally to significantly improve the performance of recovering criminal assets, especially in the complex and difficult cases that involve a foreign predicate crime like corruption. There is very little correlation between the strength of criminal asset confiscation laws and actual success in recovering such assets. Australia has very strong laws with very little success in confiscating assets, while the United States has much more success in this area, including in very difficult foreign corruption cases, despite law enforcement agencies having weaker legal powers.¹¹⁷

In practice, in challenging cases where law enforcement officials are convinced that an individual has significant wealth derived from crime, it is left to the Australian Tax Office to raise a tax assessment against the individual.¹¹⁸ For example, a person with no legitimate, declared source of income who nevertheless lives in an expensive mansion with a yacht and many luxury cars would be assessed as having a high income, and then presented with a tax bill, possibly including many previous years, that may run into millions of dollars. Issuing such a tax assessment is a relatively simple administrative matter. Unlike the confiscation powers described below, there is no court involvement. The onus is on the tax-payer to prove that the tax assessment is wrong, at first through administrative means, and then through the courts. The assessments are not public, but nevertheless there are high-profile cases where criminal cases have collapsed, but the authorities have then been able to successfully raise a tax assessment against the same assets.¹¹⁹

My interview with a former Canada Revenue Authority official suggests the potential. A drug-dealer is caught in Vancouver and has \$20,000 in cash in his home. The police contact CRA, who raise a tax assessment against the individual immediately, an administrative matter that doesn't require any court proceedings, the money is immediately confiscated as tax owed. The CRA also has the power to raise notional tax assessments against individuals where they believe that declared income has been understated. This is a similar situation that UWOs and illicit enrichment laws are designed to solve: where a person is living beyond his means, with a strong suspicion that the money is derived from crime, but where there is not enough evidence to be confident of a criminal conviction. Once again, the onus is on the tax-

¹¹⁶ FATF 2019: 62, 68.

¹¹⁷ Sharman 2017.

¹¹⁸ FATF 2019: 62-63.

¹¹⁹ Under section 167 of the Australian Tax Code 1936, see <https://www.ato.gov.au/law/view/document?DocID=PSR/PS200724/NAT/ATO/00001&PiT=99991231235958>. A high-profile example was against former prominent politician Graham Richardson.

payer to prove that the tax assessment is wrong. If not, the CRA can garnish bank accounts or place liens against property and other assets. Could these tax powers, raising notional tax assessments against suspected criminal assets, help compensate for the shortcomings of criminal asset recovery as they have in Australia?

There are some reasons for caution. The Australian Tax Office is unusually integrated with the country's AML and law enforcement agencies. Australia's AML system is singular in that it was first designed in the late 1980s with combating tax evasion being a primary goal. There is a routine and free flow of information between Austrac (the Australian Financial Intelligence Unit) and the Tax Office. The Tax Office has been involved with or led long-running multi-agency task forces on financial crime.

In contrast, there is no AML culture in the CRA, and there is a much stricter separation of financial information collected for tax and AML purposes in Canada than Australia.¹²⁰ Although there is an Integrated Proceeds of Crime Initiative that includes CRA and the RCMP, as well as ad hoc Joint Force Operations, results so far have been modest.¹²¹ As such, although there is unexploited potential for Canadian authorities to use the tax system to achieve the same basic goals as non-conviction-based forfeiture, UWOs, and unexplained wealth laws, there are systemic limits compared with Australia.

What about international cases where the target is a foreign tax resident and there are no local obligations? Even here the tax option may be a productive path to asset recovery. It may be simpler for a foreign government to raise a tax assessment against an individual's assets in Canada (given that most states tax world-wide income) and pass the request on to CRA to execute, and then return the funds to pay the tax debt in the home country. Once again, this might be administrative matter in which the onus is on the target to contest the assessment in court, rather than the authorities having to clear either a civil or criminal threshold of proof.

¹²⁰ FATF 2016: 8, 43. Despite tax evasion being a predicate crime for money laundering from 2010, to 2016 no tax evasion case brought by CRA sought money laundering sanctions, 2016: 48.

¹²¹ FATF 2016: 47-48.

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