Submission to the House of Commons Standing Committee on Finance to give consideration to the statutory review of the Proceeds of Crime and Terrorism Financing Act

By: Christian Leuprecht, Class of 1965 Professor in Leadership, Royal Military College of Canada christian.leuprecht@rmc.ca
Arthur Cockfield, Professor, School of Law, Queen’s University ac24@queensu.ca
David B. Skillicorn, Professor, School of Computing, Queen’s University skill@queensu.ca

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1. Issues

The Panama Papers contain advice by international lawyers to clients to set up illicit financial operations in Canada because they were unlikely ever to be prosecuted. When Canada is repeatedly identified as a “haven” for financial crime, how much more evidence do we need that the Canadian legislation and system is not working? Recent troubles around money laundering in Vancouver casinos shows just how easy this is in Canada.

Over 500 Canadians mentioned in the first release of documents on tax evasion and aggressive offshore tax avoidance by the International Consortium of Investigative Journalists (ICIJ) in 2013 – predating the Panama and Paradise papers by four years – but none have been prosecuted. The names of these Canadians and their illicit financial dealings were exposed and are searchable in the ICIJ records, yet Canadian authorities were either unwilling or unable to investigate and prosecute.

What is more, the government has apparently misrepresented its record of prosecution of transnational criminal offences: to the best of my knowledge, all known prosecutions have been for offences committed in Canada; so, although these cases may have had transnational components, we have yet to have a successful prosecution for offshore tax evasion. Moreover, to the extent there are any convictions related to transnational financial crime it may be for the offence of tax fraud, not offshore tax evasion.

This cuts to the crux of the matter: successful intelligence and law enforcement efforts share a common pattern – they must have full support of the highest levels of command, otherwise they will fail. Canada’s small number of money laundering investigations and prosecutions is indicative of a lack of real and sustained support by both the political and law enforcement leadership. Without change in this regard, any recommendations I and other witnesses bring forth will have little to no effect.

Money laundering investigations are complex, time consuming, resource intensive and often avoided by prosecutors disinterested in complex prosecutions. But why are the tools that Parliament has made available not being used aggressively and the number of Canadian money laundering investigations and prosecutions is unduly low? Few charges, few convictions, diminishing police resources: the current system is not working, and there is ample evidence to
suggest that it has not been working for years. Canadian law enforcement has long known that
front companies, nominees and other forms of secret ownership impede and frustrate money
Committee on Justice and Human Rights, Dave MacKenzie, M.P., Chair, March 2012, states:

Many witnesses told the Committee that (the money laundering forfeiture and burden
shifting provisions) are not effective — and are therefore used very little or not at all —
to confiscate property linked to a criminal organization, since the prosecutor must
always prove beyond any reasonable doubt whose property it is. Martine Fontaine,
Officer in Charge, Integrated Proceeds of Crime, RCMP in Montréal, noted that
“investigations become very complex because we have to prove that the individual
owns the property despite the fact that according to the land registry, the property
actually belongs to his wife, his daughter, his brother, his father or his deceased mother,
or that the car is a rental. Bank accounts are hidden by fronts such as companies,
trusts (…).” . . . Members of criminal organizations often use corporations to conceal
their ownership of the proceeds of crime. Corporations are currently required to
present documents of incorporation and issue annual reports to federal and provincial
authorities. Yet, provincial and federal laws on incorporation often require the name
and contact information for a founder and board member only, and not for the
shareholders. Annual reports provide the company’s address, the names of its officers
and directors, their home addresses and some other information. However, no
information about ownership is provided. This further complicates police
investigations into criminal organizations and the confiscation of their assets. The use
of front men, which is commonplace in criminal organizations, also complicates police
investigations. According to Yvan Poulin, General Counsel, Public Prosecution Service of
Canada, “It is therefore very difficult to link individuals to goods that you attempt to
confiscate. Several years ago, it was the major problem and I would say that the
problem has remained unchanged. No matter to what extent the burden has been
reduced or in some cases transferred to the accused, you still must establish a link
between the asset and the individual in order to be able to confiscate it.

In other words, more than six years ago, law enforcement informed a Committee authorized by
Parliament that concealed ownership impeded effective use of the Money Laundering and
Proceeds of Crime statutes yet, rather than seek a solution, law enforcement decided that it
would use asset confiscation “very little or not at all.” And, if law enforcement testified
concerning these obstacles more than six years ago, it was aware of the problem for far longer.
Yet, law enforcement chose surrender rather than solution.

In June, 2016, the Financial Action Task Force (FATF), an independent inter-governemental body
that develops and promotes policies to protect the global financial system against money
laundering, terrorist financing and the financing of proliferation of weapons of mass
destruction, substantially gave Canada a passing grade on its Anti-Money Laundering/Terrorist
Financing efforts. However, the Report finds: “(I)aw enforcement results are not
commensurate with the ML risk and asset recovery is low,” and “(l)egal persons and arrangements are at a high risk of misuse, and that risk is not mitigated.”

The above-cited Report states that “… according to Statistics Canada, in 2010, the police reported 646 cases of offences under the Criminal Code relating to the proceeds of crime, involving 546 alleged offenders.” In other words, law enforcement claimed substantial and significant use of the Proceeds of Crime statute in 2010. How many of these “646 cases” were fortuitous cash and similar seizures incident to, e.g., a search warrant or traffic stop where drugs or other contraband was discovered in proximity to the cash, as opposed to legitimate money laundering investigations that confronted and overcame concealed ownership of suspected laundered criminal proceeds? Considering that, in the same Report, law enforcement acknowledged the obstacle presented by concealed ownership, it is entirely possible and perhaps likely that most of the “646 cases” did not involve such a fact pattern.

Offences involving financial crime are increasingly complex and transnational, and Canada evidently appears to have neither will nor capacity to disrupt, let alone prosecute. In fact, the resources police federal and provincial police have been dedicating to proceeds of crime/asset forfeiture have been diminishing: there are too many competing priorities, and they have neither interest nor expertise to sustain prosecution of such complex cases so they allocate scarce resources elsewhere. This should not come as a surprise: the moment police train up capability to investigate white collar crime, this scarce skillset is raided by the private sector that can pay much better. In fact, banks already invest substantial resources in identifying financial crime – but have little confidence in police in this regard because prosecutions are so few, especially for large-scale transnational crime.

If this trend does not change, the corrosive effect of criminal capital laundered into legitimate markets will continue to grow. All levels of Canadian government need to realize that, if money laundering investigations and prosecutions continue to be disregarded and underutilized, criminal organizations will become even more entrenched in the legitimate economy through front companies and legitimate businesses, and, therefore, further concealed and immunized from criminal investigation and prosecution, making future money laundering investigations even more complex. Such awareness must be followed by a commitment to prioritize and fund complex financial and money laundering investigations and prosecutions, followed by careful and regular review of law enforcement’s performance. This is amply doable, especially given the revised mandate of to the Civilian Review and Complaints Commission for the RCMP (CRCC) as well as the new National Intelligence and Security Committee of Parliamentarians (NISCOP) and the proposed National Intelligence and Security Review Agency (NSIRA) -- there is now an array of entities that have mandates to hold law enforcement to account and improve efficacy.1

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Only about 10% of money laundering operations use banks; 10% use Money Services Businesses (many of whom are small and notoriously fail to comply with current legislative requirements, in part because they do not have the capacity to do so); 80% use other means of laundering to bypass banks altogether. So, as long as Proceeds of Crime and Terrorist Financing focuses predominantly on banks, 90% of the problem will be missed.

Moreover, the nature of money laundering is changing rapidly. Due to changing enforcement and accounting rules, the trend has been from offshoring to onshoring. Canada’s role in this effort is so big that it has its role has its own nickname: “snow washing” – hiding illicit financial transactions, often for the purposes of international money laundering and tax evasion, in Canada.

2. Adequacy of Canada’s Money Laundering and Proceeds of Crime laws

a. Canada’s Money Laundering and Proceeds of Crime laws have a few very good provisions that need to be noted and retained. Specifically, Canada’s money laundering statute, Section 462.31 of the Criminal Code, defines the predicate offence as a “designated offence” which is separately defined as a conspiracy, attempt, etc. to commit money laundering. This is broader and preferable to the U.S. “specified unlawful activity” approach. Second and very importantly, Section 462.31 (1)(b) and the related Section 354 (1)(b) (Possession of Property Obtained by Crime) include as a predicate offence “an act or omission anywhere that, if it had occurred in Canada, would have constituted a designated offence.” In other words, tax and duty evasion on Canadian exports to Mexico in violation of Mexican law, with the proceeds returned to Canada, violates both the Money Laundering and Proceeds of Crime statutes. In this regard, see and compare the more restrictive extra-territorial jurisdiction allowed under Title 18 United States Code § 1957 (d). Besides assuring criminal accountability, the extra-territorial reach of the respective (1)(b) provisions protects Canada’s economy from the adverse effects of “predatory capital” from wherever derived. This is no small matter and the provision should be lauded.

b. Some provisions are unduly weak or confusing. For example, Section 462.31 requires “intent to conceal or convert,” no matter the amount sought to be laundered. By comparison, Title 18 United States Code § 1957 waives the “intent to conceal” requirement for financial transactions that exceed $10,000. In addition, while the Supreme Court of Canada has clarified the distinction between “conceal” and “convert,” see R. v. Daoust, 1 SCR 217, 2004 SCC 6 (CanLII), the overall provision should be studied to determine if more careful and clear drafting might be in order, guided by attention to what the statute is actually intended to prevent or remediate.

2 In Canada, there are two types of criminal offences: summary and indictable. The second one is more serious. A lot of crimes can be both and the Crown has discretion how to proceed (there are different process protections depending on which route).
Provisions of Canada’s *Money Laundering* statute designed to prevent dissipation of forfeitable assets are also weak. Specifically,

i. while seizure of forfeitable assets authorized by Section 462.32 (1) is effective if the assets are found and able to be physically seized,

ii. restraint orders authorized by Section 462.33 (1) are effective against defendants and property holders that honor them, and

iii. the Voidable Transfer provisions of Section 462.4 might remediate dissipation where transfer of the dissipated asset is known and established in costly and protracted post-forfeiture litigation,

the combined effect of the several provisions is weak in the real world of concealed assets and criminal disregard of restraint orders. Best practice for preventing asset dissipation can be found at Section 895.05, Florida Statutes, including the right to and effect of liens and *lis pendens* to prevent dissipation of forfeitable assets not otherwise physically seized, and the right to judgment against a defendant for the value of dissipated forfeitable assets, to be otherwise satisfied from the defendant’s non-forfeitable assets.

Forfeiture is an important remedy in organized crime cases, both to punish the defendant and, equally important, remediate legitimate markets otherwise corrupted by the presence of criminal capital. The additional remedies described above to prevent dissipation of forfeitable assets will make Canada’s forfeiture remedy more viable and effective.

Finally concerning the weaknesses of Canada’s money laundering provisions, sophisticated criminals frequently use corporate and bank secrecy guaranteed by other countries, e.g., Switzerland, Hong Kong, Singapore and the Bahamas, to name a few, acquiring assets with criminal proceeds (including domestically, i.e., in this context, acquiring assets in Canada) and, in the process, frustrating or in fact fully impeding the money laundering investigation because the authorities cannot identify actual ownership and/or the proceeds used to acquire the asset. Again, as in the context of preventing dissipation of forfeitable assets, the U.S. State of Florida has commendable provisions that penetrate third country secrecy by establishing mandatory disclosure of ownership of domestically owned property and businesses. The tools were developed by the *Attorney General’s Commission on Money Laundering*. The Commission included experts in real estate, banking and commerce who were guided by a desire to enable law enforcement to remove criminal capital more effectively from legitimate markets without impeding the efficiency of business and financial institutions by unnecessary government filings and paperwork. The Commission’s work achieved that goal and was subsequently enacted as Section 607.0505, Florida Statutes.

Underutilization of Money Laundering and Proceeds of Crime statutes is caused, in part, by concealed ownership of assets obtained with criminal proceeds, and the absence of tools to penetrate concealed ownership of assets obtained with criminal proceeds and tools to be more
effective at preventing dissipation of forfeitable assets that cannot be physically seized. In addition to corporate laws that anonymize ownership of assets, Canadian federal (Canada Business Corporations Act) and provincial corporate laws allow for bearer shares, which allows the physical holder of the share to ownership of the corporation’s underlying assets. The shareholder is never registered within a shareholder registry, hence enabling anonymous ownership. Accordingly, an individual with a bearer share can cross borders largely undetected—despite the fact that the share could be worth hundreds of millions or more in value. Under customs laws, individuals generally have a positive duty to disclose any financial instrument with a value of $10,000 or more, but non-disclosure is extremely difficult to detect as a bearer share is simply a sheet of paper that can be hidden in a briefcase. As part of the OECD reform processes, Canada has pressured countries such as the Bahamas and Panama to abolish their bearer share regime—while refusing to do so itself.

3. Recommendations

1. Follow the recommendations in my recent report Force 2.0: Fixing the Governance, Leadership and Structure of the RCMP by reducing the RCMP’s overstretched span of mandates so it can focus on federal and policing priorities, and grant the RCMP separate employer status so it can recruit, remunerate and retain the high skillsets needed to run such exceedingly complex and lengthy inter-jurisdictional investigations and prosecute them successfully: seasoned expert investigators, accountants, lawyers.3

2. Remove the Criminal Intelligence Service of Canada from the purview of the RCMP and, akin to the highly successful Australian Criminal Intelligence Commission, create a specialized stand-alone entity with separate employer status so it can recruit, remunerate and retain the right skillsets to investigate and support prosecution complex transnational criminality. Within the reorganized CISC, embed a separate unit with the Criminal Intelligence Service of Ontario (CISO) in Toronto – no point in having that team in Ottawa when the epicentre of the problem is Canada’s financial capital -- that specializes in financial crime. Instead of the RCMP’s Integrate Market Enforcement Team (IMET) which is ineffective, and modelled on the Integrated National Security Enforcement Teams (INSET) and now-defunct Integrated Proceeds of Crime Teams, create an Integrated Financial Crime Enforcement Team (IFCET) under the purview of CISC and CISO which the RCMP and other relevant federal agencies such as Revenue Canada and FINTRAC, support but do not lead, dedicated specifically to investigating and prosecuting all forms of financial crime: money laundering, terrorist financing, tax evasion.

3. The problem of connecting particular money with either proceeds of crime or Terrorism Financing seems doomed, in part, because

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a. licit and illicit funds are commingled
b. the use commingled funds for both licit and illicit purposes
c. law enforcement and financial intelligence see only small parts of the transaction: FINTRAC sees only the international transfer, but not the domestic transfers beforehand or subsequent transfers abroad beyond Canada’s boundaries; and
d. banks only see transfers within their systems, but not once these transfers leave their systems.

All of this makes it pretty easy for people who understand how transfers work to make individual transfers seem legitimate: because one would need to see the whole picture to identify a pattern associated with risk.

Ideally, Canada might do what the UK does and shift the burden of proof (‘convince us this is an innocent transfer and then we'll allow it’), but Charter provisions as interpreted under Oakes make that unlikely; so, instead, Canada might consider changing the crime to 'illicit international transfer,' with the money seized by default, and requiring litigation to retrieve.

4. Drop the reporting threshold for international transactions from $10,000 to zero. That threshold was always arbitrary and has no legitimate bases in research. Removing the threshold will greatly improve FINTRAC’s domain awareness; at the same time, it will make reporting by financial institutions easier, more efficient, and less costly because now financial institutions will no longer have to filter transactions by this threshold, a filter that imposes costs on banks. However, forcing banks to turn over all of their transfers is politically fraught and practically problematic. But the current system is untenable: it forces banks to be the cops and provide the evidence to the FIUs as public prosecutors. The banks are not keen on that role and will drag their heels whenever possible. As we are seeing, compliance is always going to be weak; but even with the best will in the world, banks do not actually know enough to submit the right STRs consistently.

5. Create separate legislation for Money Laundering and Terrorist Financing. ML takes funds obtained by illicit means and turns it into money that appears legitimate; TF uses money that is, by and large, obtained legally and uses it for criminal purposes. These are different problems that require different instruments. We recognize that combining the two regimes into one set of legislation has been a global trend since at least 9/11 and it may be difficult for Canada to go alone in this regard. Nevertheless, separating the two legal regimes will promote better enforcement, given the nature of the two different criminal activities.

6. Only the actual account holder should be allowed to make cash deposits into an account, and above a certain limit, such deposits should only be allowed in person, with
the person having to identify themselves as the account holder. The removes the last easy way to convert cash into internationally mobile virtual money.

7. Take $100 and $50 bills out of circulation. After all, most Canadians do not use cash for most transactions, and when they do, it tends to be for small transactions. These are the greatest facilitator of money laundering. A now-defunct Toronto gang about which I have written, the Shower Posse, moved cash on airplanes by the suitcase from Toronto to Jamaica. Had they not had access to $100 bills, it would have taken them five times as much luggage to transport the funds, which would have made such bulk moves of cash all the more suspicious.

8. Modelled on AUSTRAC’s best practices, change FINTRAC legislation to make it possible and, in fact, encourage banks to embed members of their financial crime teams with FINTRAC, and FINTRAC analysts with financial institutions’ financial crime teams and make it possible to share financial intelligence, best practices, and training.

9. Implement the recommendations of the agreement in principle reached between the federal and provincial finance ministers on December 11, 2017 to:
(a) amend federal, provincial and territorial corporate statutes or other relevant legislation to ensure corporations hold accurate and up to date information on beneficial owners that will be available to law enforcement, and tax and other authorities; and
(b) amend federal, provincial and territorial corporate statutes to eliminate the use of bearer shares and bearer share warrants or options and to replace existing ones with registered instruments.

10. To promote further financial transparency, the government should create a national registry whereby the identities of beneficial owners of corporations, trusts and other entities will be tracked. Similar reforms are underway in countries such as Germany and the United Kingdom.

11. We also recommend expanding FINTRAC’s mandate to allow for the legal authority to conduct investigations (versus passive analysis and relaying of information to other federal agencies). In conjunction with its partners, FINTRAC should devote more resources to data analysis of the big data generated by cross-border financial transactions to identify relationships between facts that would otherwise be obscure.

12. The government should publicize successful prosecutions for transnational financial crimes on a website (as the US IRS does with respect to offshore tax evasion and the US

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Treasury Department does with respect to terrorism offences, including terrorism financing).