Cullen Commission Final Report: Potential impact for financial services providers

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What banks, credit unions, fintechs and other money service businesses might expect to come

Three years ago, the government of British Columbia (BC) set in motion Canada's first public inquiry into the state of its anti-money laundering framework, by establishing, through Order in Council, the Commission of Inquiry into Money Laundering in British Columbia (the Commission). The Commission's findings (the Final Report) is ripe with anti-money laundering recommendations in B.C. that could have far-reaching impacts for financial services providers throughout the province.

These recommendations, if implemented, would materially alter the mechanics and landscape of Canada's anti-money laundering (AML) regime. Financial services providers of all stripes should stay live to changes in the coming years that will no doubt impact how it will design and operate its business activities in Canada.

Although the Commission's findings and recommendations do not have immediate legislative force and effect, BLG's Banking and Financial Services Group outline potential changes the Final Report may have to Canada's AML regime that will affect reporting entities in the financial services sector, including banks, credit unions, fintechs and other money services businesses (MSBs).

Last month, members of our Disputes Group provided a more fulsome background on the Commission and the recommendations in the Final Report.

Provincial AML regimes – starting with BC

The Commission made 101 recommendations, with a focus on BC establishing an "AML Commissioner," an independent office of the legislature specifically focussed on anti-money laundering in the province. The deficiencies identified in the existing federal AML regime (which span from ineffective information sharing, to vulnerable eligibility requirements), overseen by the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC) has led to the recommendation that an AML regime operating at a provincial level is best positioned to effectively detect and deter money laundering

activities in the province. Currently, Québec is the only other provincial-territorial jurisdiction that regulates MSBs at that level, including for AML. Note that BC stated in 2020 that it is considering whether it should regulate MSBs, but as of yet there is no draft legislation for review and the province has only issued a consultation paper prior to the Commission.

The Final Report recommends BC to draw from the experience of Québec's provincial AML regime that "holds promise" and has lessons that it can share with BC as it designs its own provincial framework. Currently, compliance obligations under the Québec regime are similar in some ways with the federal AML regime, but not identical. One difference is the requirement for operators of MSBs in Québec to disclose their business relationships to Revenu Québec by verifying the identity of co-contracting parties related to money-services activities. The tone of the Final Report suggests there would be common sense potential for a BC regime to inform other provincial AML frameworks in the future, if proved effective.

The evidentiary basis for the Commission's factual findings and resulting recommendations were informed by a variety of sources, including witness testimonies of highly qualified experts on the subject matter of money laundering and financial crime from a range of perspectives from typology, quantification, to legal professionals and law enforcement.

Recommendations impacting financial services providers

The specific recommendations for a provincial AML regime to address existing gaps include the following actions, which, if implemented, would impact financial institutions operating in B.C.:

- The B.C. regulator, Financial Services Authority (BCFSA), to develop AML guidance specifically for credit unions.
- B.C.'s provincial government to provide the BCFSA with a clear, enduring AML mandate, that includes the creation and support for an AML group within the BCFSA.
- The BCFSA to specifically regulate MSBs within the province.
- The federal government to legislate the creation of a "safe harbour" provision to allow financial institutions to share information about potential money laundering activities without giving rise to liability (particularly under privacy considerations).

New ways to think about AML and what is most important in transaction reporting

The often used three-stage model (that is, placement, layering and integration) to assist reporting entities and their employees and agents to understand money laundering typologies is perhaps no longer suitable alone, or sufficient, to identify suspicious activity.

Further, FINTRAC has historically highlighted the importance of financial entities' reporting obligations (especially suspicious transaction reports) in assisting the agency

to deter and detect financial crime. One recurring issue in the Final Report was the need to prioritize reports that make the most impact (qualitative reporting over quantitative reporting that tends to result from defensive reporting). This will require direction from Canadian regulators on Canada's economic crime threat priorities, to inform reporting entities how to allocate compliance resources to meet these objectives.

Therefore, it is possible that money laundering/terrorist financing indicators currently used to assist reporting entities identify suspicious transactions will be refined.

Rate of compliance reviews for MSBs

One of the findings is that FINTRAC conducts "relatively few compliance examinations of MSBs" compared to the number of MSBs registered between 2015 and 2020. In future AML frameworks, MSBs may expect not only more regular compliance examinations by the regulator, but new MSBs will have their AML compliance programs reviewed at an earlier stage of its existence.

Unregistered MSBs may also be identified more often and be required to register with the regulator, failing which, incurring sanctions.

Beneficial ownership registry

The Commission acknowledged shell companies are at the centre of most sophisticated money laundering operations, and the use of nominee ownership is an effective way to put distance between offenders and proceeds of crime. Outside Canada, there has been a trend toward public registers of similar kind as a risk-based approach to combat money laundering. It is unclear what information would be stored in a pan-Canadian beneficial ownership registry, and what level and scale of access the public will have to it. What is clear is the Commission's recommendation for provinces to work with the federal government to operationalize a corporate beneficial ownership registry before the end of 2023.

If you would like to know more about Canada's AML regime or financial services regulatory matters, please contact the author or the key contacts below.

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