Part XII
Asset Forfeiture

Asset forfeiture is widely regarded as one of the most effective ways of stifling and disrupting organized crime groups. Not only does it deprive these groups of the profits of their unlawful activity (thereby taking the profit out of crime), it also prevents those funds from being reinvested in the criminal enterprise where they can be used to purchase drugs, weapons, vehicles, and other products necessary to support their unlawful activities. Unfortunately, however, the number and value of assets seized through the asset forfeiture system in British Columbia is shockingly low. I view the failure to vigorously pursue these assets as a missed opportunity to disrupt and deter the activities of organized crime groups and others involved in serious criminality.

In what follows, I review the two primary forms of asset forfeiture in this province: criminal asset forfeiture and civil asset forfeiture. In Chapter 42, I review the criminal asset forfeiture regime in Canada and recommend that law enforcement bodies make better efforts to identify and pursue unlawfully obtained assets for seizure and forfeiture under that regime. I also recommend that law enforcement bodies and prosecutors receive training on the tools available within the criminal asset forfeiture regime.

In Chapter 43, I review the civil asset forfeiture regime in British Columbia as well as five other common law jurisdictions: the United States, the United Kingdom, the Republic of Ireland, Australia, and Manitoba. I also make a number of recommendations aimed at strengthening the investigative capacity of the BC Civil Forfeiture Office and recommend the introduction of unexplained wealth orders to give the Civil Forfeiture Office an additional tool to deprive offenders of the profits of their unlawful activity.

Chapter 42
Criminal Asset Forfeiture

Criminal asset forfeiture (sometimes referred to as "conviction-based forfeiture") is generally understood as the forfeiture of proceeds of crime or offence-related property in connection with a criminal prosecution. *Criminal* asset forfeiture can be contrasted with civil asset forfeiture (sometimes referred to as "non-conviction-based forfeiture"), which is generally understood as the forfeiture of proceeds of crime or offence-related property through the use of civil forfeiture legislation such as the *Civil Forfeiture Act*, SBC 2005, c 29. Over the past 20 years, there has been a significant decrease in the use of the criminal asset forfeiture regime, in part, because of the proliferation of civil asset forfeiture legislation. However, the legislative tools are still in place, and there are cases in which it is advantageous to pursue the remedies available under that regime.

In what follows, I review the forfeiture provisions of the *Criminal Code*, RSC 1985, c C-46, and emphasize the need for law enforcement agencies to make better efforts to identify and pursue unlawfully obtained assets for seizure and/or forfeiture under those provisions.

Criminal Asset Forfeiture Provisions

While federal legislation has long contemplated the forfeiture of property obtained through the commission of a criminal offence, these provisions underwent substantial amendments in 1989 in order to fulfill Canada's commitments under the *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*.[1]

1 1583 UNTS 3; CTS 1990/42. See also Robert Hubbard et al, *Money Laundering and Proceeds of Crime* (Toronto: Irwin Law, 2004), p 79. While a number of these provisions are contained in the *Criminal Code*, there are many other federal statutes that allow for the forfeiture of proceeds of crime and offence related property, including the *Controlled Drugs and Substances Act*, SC 1996, c 19; the *Excise Act*, RSC 1985, c E-14; the *Customs Act*, RSC 1985, c 1 (2nd Supp); and the *Immigration and Refugee Protection Act*, SC 2001, c 27.

In *R v Lavigne*, Madam Justice Deschamps described the history and purpose of those amendments as follows:

> In 1989, Canada honoured the commitment it had made when it signed the *Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, Can. T.S. 1990 No. 42, by amending the *Criminal Code* to add Part XII.2 (Proceeds of Crime): R.S.C. 1985, c. 42 (4th Supp.) (formerly S.C. 1988, c. 51), s. 2. The new provisions allowed the prosecution to use unprecedented investigative methods (s. 462.32), created new offences (s. 462.31(1)) and established special rules for sentencing (ss. 462.31(2) and 462.37).
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> ...
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> Great importance is ... attached to the proceeds of crime, and one of the stated goals is to neutralize criminal organizations by depriving them of the profits of their activities. The Honourable Ray Hnatyshyn, who was the Minister of Justice when the bill was introduced, said that traffickers had been insufficiently deterred by traditional sentencing methods. Canada therefore had to adopt methods by which it could deprive offenders of the profits of their crimes and take away any motivation to pursue their criminal activities. Of all the methods chosen, the primary one is forfeiture (House of Commons, *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-61*, Issue No. 1, November 5, 1987, at p. 1:8). The effectiveness of the adopted methods depends largely on the severity of the new provisions and on their deterrent effect (*Quebec (Attorney General) v. Laroche*, [2002] 3 S.C.R. 708, 2002 SCC 72, at para. 25).[2]

One of the key amendments introduced by Parliament was the ability to apply for pre-trial seizure or restraint of assets where there are reasonable grounds to believe that a forfeiture order could be made in respect of that property.[3] Section 462.32(1) allows a judge, on application by the Attorney General, to issue a special search warrant authorizing a peace officer to search a building, receptacle, or other place for property in respect of which a forfeiture order may be made, and seize any property that could be subject to a forfeiture order.[4] Similarly, section 462.33 allows the Attorney General to apply for a "restraint order" prohibiting the owner of property (usually real estate) from selling or otherwise dealing with an interest in property except as specified in the order.[5]

Another key provision is section 462.37, which allows for the forfeiture of unlawfully obtained property in a broad range of circumstances. Section 462.37(1) provides that

2 *R v Lavigne*, 2006 SCC 10, paras 9–10.

3 In basic terms, seizure refers to the confiscation of property, whereas a restraint order allows a person to remain in possession of property (usually land) but prevents him or her from selling or otherwise disposing of it.

4 *Criminal Code*, s 462.32(1).

5 Ibid, s 462.33.

where an offender is convicted of a designated offence[6] and the court is satisfied, *on a balance of probabilities* (in other words, it is more likely than not), that the property sought to be forfeited was obtained through the commission of that offence, it must make an order that the property be forfeited to the state and disposed of in accordance with the law.[7]

For the purpose of these provisions, the court may infer that property was obtained or derived as a result of the commission of a designated offence where:

> (a) the evidence establishes that the value of all the property of the person alleged to have committed the offence exceeds the value of all the property of that person before the commission of that offence; and
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> (b) the court is satisfied that the income of that person from sources unrelated to criminal activity cannot reasonably account for such an increase.[8]

Section 462.37(2) deals with a circumstance where the court is not satisfied that the property was obtained through the commission of the designated offence of which the offender was convicted but is satisfied that the property is proceeds of crime (i.e., that it was obtained or derived through the commission of a designated offence other than the one before the court). In such circumstances, the court can make a forfeiture order only if it is satisfied, *beyond a reasonable doubt*, that the property is proceeds of crime.[9]

Section 462.37(2.01) gives the court significant powers to order forfeiture where the offender has been convicted of a criminal organization offence punishable by five or more years of imprisonment; an offence under sections 5, 6, or 7 of the *Controlled Drugs and Substances Act*, SC 2018, c 16 (which include trafficking in a controlled substance, importing or exporting a controlled substance, and production of a controlled substance); an offence under certain provisions of the *Cannabis Act,* SC 2018, c 16; or human trafficking offences under sections 279.01 to section 279.03 of the *Criminal Code.* In such circumstances, the court can order that *any* property of the offender be forfeited if it is satisfied, *on a balance of probabilities*, that:

- in the ten-year period before criminal proceedings were commenced, the offender engaged in a pattern of criminal activity for the purpose of directly or indirectly receiving a material benefit, including a financial benefit; or

6 The proceeds of crime provisions of the *Criminal Code* focus on "designated offences," which are defined as (a) any offence that may be prosecuted as an indictable offence under the *Criminal Code* or any other Act of Parliament, other than an indictable offence prescribed by regulation, or (b) a conspiracy or an attempt to commit, being an accessory after the fact in relation to, or any counselling in relation to an offence referred to in paragraph (a). Examples include drug trafficking, human smuggling, counterfeiting, illegal gaming, and certain types of fraud: *Criminal Code*, s 462.3(1).

7 *Criminal Code*, s 462.37(1).

8 Ibid, s 462.39.

9 Ibid, s 462.37(2).

- the income of the offender from sources unrelated to designated offences cannot reasonably account for the value of all of the offender's property.[10]

In determining whether the offender has engaged in a pattern of criminal activity for the purpose of that provision, the court must consider:

- the circumstances of the offence for which the offender is being sentenced;
- any act or omission — other than an act or omission that constitutes the offence for which the offender is being sentenced — that the court is satisfied, on a balance of probabilities, was committed by the offender and constitutes an offence punishable by indictment under any Act of Parliament;
- any act or omission that the court is satisfied, on a balance of probabilities, was committed by the offender and is an offence in the place where it was committed and, if committed in Canada, would constitute an offence punishable by indictment under any Act of Parliament; and
- any other factor that the court considers relevant.[11]

If an offender is found to have engaged in a pattern of criminal activity, it is always open to the offender to prove that the subject property was not obtained from a designated offence, in which case the court is prohibited from making a forfeiture order.[12]

I pause here to note that these provisions give the state a number of significant powers to pursue unlawfully obtained assets. First, the use of the disjunctive "or" in section 462.37(2.01) suggests that *either* a pattern of serious criminal activity *or* a lack of income from other sources is sufficient for the court to make a forfeiture order. In this respect, section 462.37(2.01) can operate in a manner similar to an unexplained wealth order (see Chapter 43). Where the offender has been convicted of an offence listed in section 462.37(2.01), the prosecution can seek forfeiture of *any* property of the offender on the basis that the income of the offender from sources unrelated to those offences cannot reasonably account for the value of all of the offender's property.

Second, the provision seems to allow for the forfeiture of property that was acquired *before* the conduct forming the basis of the criminal proceedings (provided that the other requirements of that provision are satisfied). In *R v Saikaley*, for example, the court found that property purchased by the accused before the timeframe covered by

10 Ibid, s 462.37(2.01).

11 Ibid, s 462.37(2.04).

12 Ibid, s 462.37(2.03).

the indictment was, in theory, subject to a forfeiture order under section 462.37(2.01).[13] The court stated:

> [82] Like the Mercedes Benz, two of the Mr. Saikaley's homes were purchased before the timeframe of the Indictment. 144 Kerry Hill Crescent was purchased in June, 2006, and a down payment for 168 Ingersoll Crescent was made in 2008 (with the purchase actually completed in 2011). Since s. 467.32(1) requires that the property being sought to be forfeited be directly linked to the offences before the Court, the Crown cannot resort to this section in support of its application for the forfeiture of these properties.
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> [83] Similar to its claim with respect to the Mercedes Benz, the Crown will have to resort to s. 467.32(2.01) to substantiate its claim against the Respondent's property.

Section 462.37(3) is another important provision that allows the court to impose a fine in lieu of forfeiture where it would be impracticable to make a forfeiture order under section 462.37(1) or 462.37(2.01). It provides, in relevant part:

> (3) If a court is satisfied that an order of forfeiture under subsection (1) or (2.01) should be made in respect of any property of an offender but that the property or any part of or interest in the property cannot be made subject to an order, the court may, *instead of* ordering the property or any part of or interest in the property to be *forfeited*, order the offender to *pay a fine* in an amount equal to the value of the property or the part of or interest in the property. In particular, a court may order the offender to pay a fine if the property or any part of or interest in the property
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> (a) cannot, on the exercise of due diligence, be located;
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> (b) has been transferred to a third party;
>
> (c) is located outside Canada;
>
> (d) has been substantially diminished in value or rendered worthless; or
>
> (e) has been commingled with other property that cannot be divided without difficulty. [Emphasis added.][14]

Where the court imposes a fine in lieu of forfeiture, it must also impose a term of imprisonment to be served if the fine is not paid within the time established by the court.[15] Table 42.1 (below) sets out the maximum and minimum terms of imprisonment (which vary depending on the amount of the fine).

13 *R v Saikaley*, 2013 ONSC 4349 [*Saikaley*], para 25.

14 For commentary with respect to the purpose of this provision in the criminal forfeiture scheme see *R v Vallières*, 2022 SCC 10, paras 24–37.

15 *Criminal Code*, s 462.37(4). For a discussion of the constitutionality of these provisions see *R v Chung*, 2021 ONCA 188, paras 98–144.

Table 42.1: Minimum and Maximum Terms of Imprisonment Under Section 462.37(4)

Section	Fine Amount	Term of Imprisonment
462.37(4)(a)(i)	0 to $10,000	0 to 6 months
462.37(4)(a)(ii)	$10,001 to $20,000	6 to 12 months
462.37(4)(a)(iii)	$20,001 to $50,000	12 to 18 months
462.37(4)(a)(iv)	$50,001 to $100,000	18 to 24 months
462.37(4)(a)(v)	$100,001 to $250,000	2 to 3 years
462.37(4)(a)(vi)	$250,001 to $1,000,000	3 to 5 years
462.37(4)(a)(vii)	$1,000,001 or more	5 to 10 years

Source: Compiled by the Commission.

Any term of imprisonment imposed under those provisions must be consecutive[16] to any other term of imprisonment, and cannot be considered as part of the global sentence imposed on the accused. Moreover, the court cannot take into account the rehabilitation of the offender or the offender's ability to pay in considering these issues.

When used to full effect, this provision can provide a powerful response to profit-oriented crime. In *R v Vallières*, for example, the Supreme Court of Canada upheld a fine of more than $9 million representing the *gross* profits earned by the offender through a large-scale maple syrup theft, even though the offender made a personal profit of only $1 million. In reaching that conclusion, the court repeatedly emphasized the intent of these provisions – namely, to send a clear message that crime does not pay and to discourage individuals from committing profit-oriented crimes:

> Lastly, limiting a fine in lieu to the profit made by an offender from their criminal activities undermines and disregards what Parliament intended … As this Court stated in *Quebec (Attorney General) v. Laroche*, 2002 SCC 72, [2002] 3 S.C.R. 708, "[t]he legislative objective of Part XII.2 plainly goes beyond mere punishment of crime" … A fine in lieu is not part of the global sentence imposed on an offender for the commission of a designated offence … It follows that the amount of the fine does not vary based on an offender's degree of moral blameworthiness or the circumstances of the offence. Rather, the dual objective of the fine is to deprive an offender of the proceeds of their crime and to deter them from reoffending. But the objective of deterrence is not focused only on the actual offender: it also applies to potential accomplices and criminal organizations …
>
> Through the severity of the proceeds of crime provisions, Parliament is sending a clear message that "crime does not pay" and is thus attempting to

16 A consecutive sentence means that the offender cannot serve two sentences at the same time; rather, the offender must serve both sentences one after another.

> discourage individuals from organizing themselves and committing profit-driven crimes. In *Lavigne*, Deschamps J. noted that "[t]he effectiveness of the adopted methods depends largely on the severity of the new provisions and on their deterrent effect" (para. 9). Parliament's decision that the fine must correspond to the value of the property is therefore deliberately harsh. Reducing a fine to the profit made by an offender from their criminal activities would clearly be contrary to this objective. [Emphasis added.][17]

Another example can be found in the *Saikaley* decision, where the court made effective use of section 462.37(3) in circumstances where a forfeiture order would have been impracticable. For example, the court imposed a fine in lieu of forfeiture in respect of unlawfully obtained funds that could not be recovered because they had been used to discharge a mortgage. It also imposed a fine in lieu of forfeiture in respect of "unexplained" funds that passed through a company bank account controlled by the offender.[18] Without the ability to impose a fine in lieu of forfeiture, the state would not have been in a position to recover those funds.

I consider section 462.37(3) to be an extraordinarily powerful tool that has the potential to significantly disrupt the activities of criminal organizations and others involved in serious criminal activity. It is also something that differentiates the criminal asset forfeiture regime from the civil asset forfeiture regime, which contemplates *in rem* proceedings against property and does not allow the court to impose a fine in lieu of forfeiture.

It is therefore essential that law enforcement agencies understand the use that can be made of this provision and develop the evidence needed to pursue such an order.

In addition to section 462.37, there are other provisions of the *Criminal Code* that allow for a forfeiture order in specific circumstances. For example, section 462.38 allows the Attorney General to apply for a forfeiture order where the owner of that property has died or absconded, and section 462.43 gives the court the discretion to make a forfeiture order in various circumstances where property is seized pursuant to a warrant under section 462.32.

The *Criminal Code* also contains provisions for the seizure and forfeiture of offence-related property such as the vehicle used to transport illicit drugs and weapons to the point of sale. Section 490.1 is triggered whenever the accused is convicted of an indictable offence and the Crown need only prove that the property was used in connection with the commission of such an offence on a balance of probabilities.

Where the criminal prosecution was commenced at the instance of the provincial government and conducted by or on behalf of that government, the property will be forfeited to the provincial government to be disposed of or otherwise dealt with by the attorney general or the solicitor general of that province.[19] In *R v Trac*, 2013 ONCA 246,

17 *R v Vallières*, 2022 SCC 10, para 34.

18 *Saikaley*, paras 114, 116–17, 128, 130–33.

19 *Criminal Code*, s 490.1(1).

Doherty J.A. explained that where the Crown seeks forfeiture of offence-related property in connection with a money laundering prosecution, the forfeiture inquiry does not involve tracing the assets back to money generated by criminal activity. Rather, the focus is on the "means" used by the offender to carry out the money laundering scheme with the result that any bank accounts, shell companies, or real estate holdings used in connection with that scheme could be subject to seizure and forfeiture under section 490.1. He wrote:

> [88] The Crown led substantial evidence of the kind of activity associated with the use of bank accounts for money laundering. The Crown expert gave detailed evidence that many of the respondent's accounts displayed several of those *indicia*. That evidence, combined with the respondent's admission as to the nature of his money laundering operation, had to be considered in determining whether any particular asset the Crown sought forfeited was either the "means" by which the money laundering offence was committed, or was "used in any manner in connection with" the money laundering. If the asset fell within either definition, it was "offence-related property" and subject to forfeiture under s. 490.1, regardless of whether the credit in the account when it was ordered frozen could be traced to cash generated by the respondent's drug business.
>
> [89] *The proper application of the definition of "offence-related property" to the bank accounts in the context of the money laundering offence does away with the need to attempt to segregate legitimate funds in an account from drug money. Instead, forfeiture depends on whether the evidence shows that the accounts were used to further the money laundering scheme. If an account was used in any way to further the respondent's money laundering scheme, that account, and more precisely the property in the account at the time of seizure (the credit owed to the account holder by the bank), is offence-related property regardless of the origins of the deposits reflected in the credit in the account.*[20] [Emphasis added.]

Applying the reasoning of Justice Doherty, it seems that the use of section 490.1 to seize bank accounts, shell companies, real estate, and other assets used in most complex money laundering schemes would be a particularly useful tool in targeting sophisticated money laundering operations. I would therefore encourage the dedicated money laundering intelligence and investigation unit recommended in Chapter 41 to consider the potential use of section 490.1 in investigations into serious money laundering activity.

I would also note that Justice Doherty's reasoning would seem to be applicable in the civil forfeiture context, and I encourage the BC Civil Forfeiture Office to consider the use of the "instrument of unlawful activity" provisions in the *Civil Forfeiture Act* to pursue the "tools" used by professional money laundering organizations and others.

20 *R v Trac*, 2013 ONCA 246, paras 81, 88–91.

Distribution of Proceeds

Where property is seized under certain provisions of federal statutes, including the *Criminal Code*, the *Seized Property Management Act,* SC 1993, c 37, governs the custody and management of that property. Section 9(b) allows the minister of public works and government services to manage that property in any manner that he or she considers appropriate, and section 9(c) allows him or her to dispose of any property that is forfeited to the federal government under a federal statute.[21]

Section 10 requires the federal government to share the proceeds of these forfeitures with the government of a province that has participated in the investigation leading to the forfeiture, in accordance with the *Forfeited Property Sharing Regulations*, SOR/95-76.

In basic terms, these regulations require the Attorney General of Canada to assess the contribution of the federal government and each province that participated in the investigation, on the basis of the following:

(a) the nature of information provided by the agencies of the Government of Canada and each jurisdiction, and the importance of that information; and

(b) the participation by the agencies of the Government of Canada and each jurisdiction in the investigation and prosecution that lead to forfeiture or the imposition of a fine.[22]

For the purpose of that assessment, the provincial contribution includes contributions made by a law enforcement agency operating under provincial legislation or the Royal Canadian Mounted Police acting under contract in that province.

Once that assessment is complete, the Attorney General of Canada must assign a percentage "representing the contribution of the Government of Canada and of each relevant jurisdiction, as compared with the contribution of another jurisdiction or group of jurisdictions" to be determined as follows:

(a) where the contribution of the Government of Canada or a jurisdiction constitutes the predominant portion of the total contribution, it shall be considered to be 90 percent;

(b) where the contribution of the Government of Canada or a jurisdiction constitutes a significant portion of the total contribution, it shall be considered to be 50 percent; and

(c) where the contribution of the Government of Canada or a jurisdiction constitutes a minimal portion of the total contribution, it shall be considered to be 10 percent.

Over the past 10 years, the value of assets seized by law enforcement bodies in British Columbia and managed by the Seized Property Management Directorate has decreased

21 *Seized Property Management Act,* s 9. I understand that the Seized Property Management Directorate manages assets seized or restrained under this legislation.

22 *Forfeited Property Sharing Regulations,* s 7.

significantly from a high of roughly $19.6 million in 2010–11 to a low of $2.9 million in 2018–19 (excluding seizures made in accordance with the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, SC 2000, c 17 (*PCMLTFA*)).[23] Table 42.2 sets out the value of these seizures from 2009 to 2019.

Table 42.2: Value of Non-*PCMLTFA* Seizures in BC, 2009–2019

Fiscal Year	Case Count	Asset Count	Asset Value
2009–10	1,271	1,900	$17,006,522
2010–11	1,295	1,900	$19,625,592
2011–12	1,176	1,647	$10,267,218
2012–13	868	1,234	$10,658,433
2013–14	611	820	$5,441,117
2014–15	699	940	$3,042,950
2015–16	621	950	$10,822,314
2016–17	539	802	$4,818,928
2017–18	327	465	$3,014,679
2018–19	207	253	$2,910,508

Source: Exhibit 373, Overview Report: Asset Forfeiture in British Columbia, p 16.

Likewise, the value of assets *forfeited* to the federal government has decreased from 2000 to 2019. Table 42.3 sets out the value of those forfeitures.

Table 42.3: Value of Assets Forfeited to the Federal Government from Non-*PCMLTFA* Seizures in BC, 2009–2019

Fiscal Year	Case Count	Asset Count	Asset Value
2009–10	648	1,098	$11,868,688
2010–11	753	1,232	$12,124,034
2011–12	696	1,095	$8,755,758
2012–13	720	1,101	$8,763,999
2013–14	703	1,051	$6,241,404
2014–15	467	766	$10,915,887
2015–16	353	586	$3,254,889
2016–17	360	640	$6,123,578
2017–18	328	525	$3,905,040
2018–19	233	383	$4,477,959

Source: Exhibit 373, Overview Report: Asset Forfeiture in British Columbia, p 16.

23 Seized assets are assets that have been seized by law enforcement but have not yet been forfeited to the state pursuant to a forfeiture order. Note, however, that assets are often seized in one year and forfeited in another year, which can lead to situations where the value of assets forfeited in a particular year can exceed the value of assets seized in that year.

These numbers are very small. In 2018–19, for example, law enforcement bodies in this province seized only 253 assets with an approximate value of $2.9 million. By contrast, the police-run asset recovery unit in New Zealand seized or restrained approximately NZ$428 million (Can$358 million) in illicit assets between July 2017 and October 2020, with the top three offences used as a basis for the restraining orders being money laundering (56%), drug crime (26%) and fraud (12%). New Zealand's population, gross domestic product, government structure, and legal system are similar to British Columbia's, which make it a useful point of reference in examining the potential benefits arising from a robust asset forfeiture regime.

I strongly believe that law enforcement bodies in this province must make better use of the criminal asset forfeiture regime, and I turn to this matter below.

When Should Criminal Asset Forfeiture Be Pursued?

After reviewing the criminal asset forfeiture regime, I am persuaded that it contains a number of powerful but underutilized tools that have the potential to disrupt and deter organized crime groups and others involved in serious criminal activity. In many cases, these tools may allow for the seizure and forfeiture of property that could not be the subject of a civil forfeiture action. Moreover, there will be cases where it is more efficient to pursue a forfeiture order in conjunction with the criminal prosecution.

Stefan Cassella, a former US prosecutor with significant experience in the prosecution of money laundering offences, explained that these efficiencies are one reason that US prosecutors often pursue criminal asset forfeiture over civil asset forfeiture despite the lower burden of proof that arises in the civil forfeiture context:

> If you're going to prosecute the defendant anyway, it's a whole lot easier to get the forfeiture judgment as part of his sentence than it is to commence an entirely new case – an entirely new *in rem*[24] case against him – and prove everything again. It's one-stop shopping. It's easier to just get the forfeiture as part of the criminal case.[25]

While decisions about whether to pursue criminal asset forfeiture must be made on a case-by-case basis, it is essential that law enforcement bodies understand and give serious consideration to the criminal asset forfeiture provisions in every investigation into profit-oriented criminal activity. It is also essential that law enforcement bodies develop the evidentiary basis needed to bring successful forfeiture applications.

Where, for example, the target of the investigation has engaged in a pattern of criminal activity within the meaning of section 462.37(2.01), investigators should ensure that they include all relevant information concerning that conduct in their Report to

24 *In rem* is Latin for "against a thing" and can be contrasted with *in personam*, which means "against a person." In other words, *in rem* proceedings relate to an object rather than a person.

25 Evidence of S. Cassella, Transcript, May 10, 2021, p 64.

Crown Counsel. Likewise, where there is an opportunity to pursue a fine in lieu of forfeiture, it is essential that investigators develop the evidence necessary to support such an application.

I therefore recommend that law enforcement bodies implement a policy requiring that all investigators conducting investigations into profit-oriented crime consider the criminal asset forfeiture provisions and, where feasible, develop the evidentiary basis necessary to support a forfeiture application.

Recommendation 96: I recommend that law enforcement bodies implement a policy requiring that all investigators conducting investigations into profit-oriented crime consider the criminal asset forfeiture provisions and, where feasible, develop the evidentiary basis necessary to support a forfeiture application.

I also recommend that law enforcement bodies implement a policy requiring that all investigators conducting investigations into profit-oriented crime include, in their Report to Crown Counsel, information concerning the assets owned or controlled by the target of the investigation (and their associates) along with recommendations concerning possible forfeiture applications.[26] The inclusion of information concerning the associates of the target is important. In many cases, a police investigation may uncover information about illicit assets held not only by the target of the investigation, but by their family members or associates.

Recommendation 97: I recommend that law enforcement bodies implement a policy requiring that all investigators conducting investigations into profit-oriented crime include, in their Report to Crown Counsel, information concerning the assets owned or controlled by the target of the investigation (and their associates) along with recommendations concerning possible forfeiture applications.

In order to ensure that law enforcement agencies and prosecutors understand and make effective use of these provisions, it is essential that they receive appropriate training on the importance of asset forfeiture in combatting organized crime and the use of the criminal asset forfeiture provisions in depriving offenders of the fruits of their unlawful conduct. I therefore recommend that the Province ensure that all investigators and prosecutors addressing profit-oriented criminal activity receive training on the importance and use of the criminal forfeiture provisions.

26 If, however, there is a risk that the assets will be sold or removed from the jurisdiction, it may be necessary to consult with Crown counsel at an earlier stage of the investigation to allow it to apply for a seizure or restraint order under ss 462.32 and/or 462.33.

Recommendation 98: I recommend that the Province ensure that all investigators and prosecutors addressing profit-oriented criminal activity receive training on the importance and use of the criminal forfeiture provisions.

I see these recommendations working hand-in-hand with the recommendation made in Chapter 39 that all provincial law enforcement bodies engaged in the investigation of profit-oriented criminal activity implement a standard practice requiring that all investigators consider money laundering / proceeds of crime issues at the outset of the investigation, and conduct a financial investigation with a view to pursuing money laundering / proceeds of crime charges and identifying assets for forfeiture.

Of course, there will be cases where unlawfully obtained assets are more appropriately pursued through the civil asset forfeiture regime.

I turn now to a discussion of the civil asset forfeiture regime in this province.

Chapter 43
Civil Asset Forfeiture and Unexplained Wealth Orders

Civil asset forfeiture (sometimes referred to as "non-conviction-based forfeiture") is generally understood as the forfeiture of proceeds of crime or offence-related property through the use of civil forfeiture legislation such as the *Civil Forfeiture Act*, SBC 2005, c 29. The policy rationale for these statutes is similar to the criminal asset forfeiture provisions (i.e., to ensure that the profits of unlawful activity do not accrue and accumulate in the hands of those who carry out such activity and to deter present and would-be perpetrators of unlawful activity). However, civil forfeiture legislation does not create offences, prohibit any conduct, or impose any penalty, fine, or term of imprisonment on any individual.[1] Rather, the state brings *in rem* proceedings against *property* alleged to be proceeds of crime or an instrument of crime, and any person asserting an interest in the property may defend the forfeiture claim.

Like the criminal asset forfeiture regime, the BC civil forfeiture regime contains powerful tools that can be used to disgorge unlawfully obtained assets and criminal instruments from organized crime groups and other criminal actors. Unfortunately, however, the value of assets seized through this regime in British Columbia is not commensurate with the volume of illicit funds generated each year. In what follows, I review the asset forfeiture regimes in place in five common law jurisdictions: the United States, the United Kingdom, the Republic of Ireland, Australia, and Manitoba (which has recently enacted an unexplained wealth order regime).[2] I then review the key provisions of the British Columbia legislation and make a number of recommendations aimed at strengthening the civil forfeiture regime in this province.

1 Exhibit 378, Civil Asset Forfeiture in Canada, pp 4–5. For a discussion of the policy rationale for civil forfeiture legislation see *Chatterjee v Ontario (Attorney General)*, 2009 SCC 19, paras 3, 23.

2 While it is important to use caution in looking at other jurisdictions, a number of useful lessons can be drawn from their experiences.

The United States

The United States was one of the first countries to use asset forfeiture as a law enforcement tool. In 1789, the First Congress enacted statutes authorizing the seizure and forfeiture of ships and cargos involved in customs offences, and later statutes authorized the forfeiture of ships engaged in piracy and slave trafficking.[3] The challenge was that the ship or its cargo might be found within the jurisdiction of the United States but the property owner either remained abroad or could not be found at all.

Allowing the government to file a lawsuit against the ship (as opposed to the property owner) allowed the government to prevent the property from being used to commit another offence, or in the case of a customs offence, to recover the duties that were owed on the imported goods. It also meant that it was unnecessary to prove that the ship's owner had any role in the offence.[4]

Today, American authorities pursue asset forfeiture in a wide variety of cases, including drug and money laundering cases. There is no single US asset forfeiture statute but, rather, a collection of disparate federal statutes that address different aspects of asset forfeiture. Mr. Cassella states:

> We have the exact opposite of one comprehensive statute. We have the result of different committees of Congress over a period of more than 200 years deciding when and how to enact asset forfeiture statutes, and you get exactly what you would expect from that process.[5]

One of the unique features of the US system is that there is no separate civil forfeiture agency responsible for bringing civil forfeiture proceedings. Rather, the prosecutor assigned to the criminal case can choose whether to pursue forfeiture as part of the defendant's sentence or bring a separate civil forfeiture action.[6]

Mr. Cassella explained that, in his experience, it has always seemed sensible to have the investigation done by the same agency and make a judgment at the appropriate time as to whether to pursue criminal asset forfeiture or civil asset forfeiture:

> It's always seemed to me based on my experience that it was much more sensible to treat these as two different tools to be used to achieve the same objective. Forfeiture is a law enforcement tool and it has purposes. Punishment, deterrence, incapacitation, recovery of money for victims,

3 Exhibit 378, Civil Asset Forfeiture in Canada, p 6; Stefan Cassella, "An Overview of Asset Forfeiture in the United States" in Simon Young (ed), *Civil Forfeiture of Criminal Property: Legal Measures for Targeting the Proceeds of Crime* (Edward Elgar Publishing, 2009), p 24.

4 S. Cassella, "An Overview of Asset Forfeiture in the United States," p 25. See also *Harmony v United States*, 43 U.S. (2 How.) 210 (1844), pp 233–34 ("[t]he vessel which commits the aggression is treated as the offender, as the guilty instrument or thing to which the forfeiture attaches, without any reference whatsoever to the character or conduct of the owner" and *The Palmyra*, 25 US (12 Wheat.) 1 (1827), p 14 ("the thing is here primarily considered as the offender, or rather the offense is attached primarily to the thing").

5 Evidence of S. Cassella, Transcript, May 10, 2021, p 21.

6 Ibid, pp 24–25.

> all of the purposes for which asset forfeiture is pursued. And there are times when it makes sense to do it as part of a criminal prosecution and times when not possible or advisable to do so.
>
> And so, it seemed to us and it has always seemed to me to be sensible to have the investigation done by the same people. The objectives are the same, the facts you have to collect and the things you have to prove are very much the same. And then you make a judgment at the appropriate time as to whether to pursue the case criminally because you have a criminal prosecution or not because you don't or you think it's not appropriate to do is.[7]

In the United States, *criminal* asset forfeiture is seen as part of the offender's sentence and requires the government to establish, beyond a reasonable doubt, that the offender has committed a criminal offence before the court can make a forfeiture order.[8]

By contrast, the *civil* asset forfeiture requires the government to prove, on the civil standard (expressed in the United States as the preponderance of the evidence), that a crime was committed and that the property subject to the forfeiture order was derived from or used to commit that crime:

> Aside from the form of the action, what distinguishes civil forfeiture from criminal forfeiture is that it does not require a conviction or even a criminal case; the forfeiture action may be commenced before a related criminal case is filed, while one is pending, after one is concluded, or if there is no related criminal case at all [citations omitted]. But the Government nevertheless must prove two things: that a crime was committed, and that the property was derived from or used to commit that crime.
>
> As in a criminal forfeiture case, the Government must establish the second element – the nexus between the property and the offense – by a preponderance of the evidence. But in contrast to a criminal case, it need only establish the first element – that a criminal offense was committed – by a preponderance of the evidence as well, not beyond a reasonable doubt.
>
> For example, if the Government brings a forfeiture action against real property in New York, alleging that it was purchased with the proceeds of a foreign criminal offense, it would have to prove, by a preponderance of the evidence, that the foreign offense occurred and the real property was traceable to the proceeds of that offense.[9]

While the lower standard of proof in civil forfeiture proceedings sometimes provides a reason to pursue civil asset forfeiture over criminal asset forfeiture,

7 Ibid, p 33. Mr. Cassella's evidence concerning the investigation of civil forfeiture matters is important in considering whether to expand the investigative powers of the BC Civil Forfeiture Office. I return to this issue later in this chapter.

8 Exhibit 969, Report for the Cullen Commission by Stefan Cassella, p 37.

9 Ibid.

Mr. Cassella gave evidence that civil forfeiture is a "much more limited tool" (in part, because of the inability to pursue a "value-based" money judgment)[10] and that US prosecutors generally reserve civil forfeiture for cases where a criminal prosecution is not possible or appropriate. Examples include cases where the wrongdoer is dead or incompetent to stand trial, where the defendant is a fugitive or a foreign national beyond the jurisdiction of the United States, where the limitation period for bringing a criminal prosecution has expired, where the government has recovered property that is demonstrably connected to a criminal offence but does not know who committed the crime, and where the evidence is insufficient to prove to the criminal standard (beyond a reasonable doubt) that the crime was committed by a particular defendant.[11]

The US also maintains an administrative forfeiture regime for property that is seized in connection with a law enforcement investigation. Once the property has been seized, the government commences the administrative forfeiture proceeding by sending a notice of intended forfeiture to anyone with a potential interest in contesting the action.

If nobody contests the forfeiture within a prescribed period of time, the property will be forfeited to the state. If, on the other hand, someone contests the forfeiture, the government must proceed under the criminal or civil asset forfeiture regime.[12]

The US Department of Justice publishes annual statistics regarding the value of assets recovered through the criminal and civil asset forfeiture process. Table 43.1 shows the total amount deposited into the Asset Forfeiture Fund from 2017 to 2021.[13]

Table 43.1: Amounts Deposited into the US Asset Forfeiture Fund, 2017–2021

Fiscal Year	Amount Deposited (US$)
2017	$1.622 billion
2018	$1.327 billion
2019	$2.215 billion
2020	$1.747 billion
2021	$1.443 billion

Source: https://www.justice.gov/afp.

10 As I understand it, these judgments allow the government to seek an order requiring the offender to pay to the government the value of an asset that cannot be located or is no longer available for forfeiture.

11 Exhibit 969, Report for the Cullen Commission by Stefan Cassella, pp 40–51; Evidence of S. Cassella, Transcript, May 10, 2021, pp 64–65. In order to ensure that prosecutors have the knowledge and skills to pursue these matters, money laundering and asset forfeiture issues form part of the basic training that all prosecutors receive when they are hired. Moreover, there are specialized money laundering and asset forfeiture courses available for those with a greater interest and a number of specialized money laundering and asset forfeiture prosecutors who and act as a resource for other prosecutors who may not have the same level of expertise: Evidence of S. Cassella, Transcript, May 10, 2021, pp 53–54.

12 Exhibit 969, Report for the Cullen Commission by Stefan Cassella, pp 52–53.

13 US Department of Justice, Asset Forfeiture Program, "Total Deposits & Expenses," online: https://www.justice.gov/afp.

The Department of Homeland Security and the Department of the Treasury also maintain a smaller fund that collects receipts from cases handled by those departments. As I understand it, the amount deposited into these funds annually is roughly one-third of the amount deposited into the Department of Justice's Asset Forfeiture Fund, which brings the total amount recovered through the criminal and civil asset forfeiture process at the federal level above $2 billion in each of the past five years.[14]

The United Kingdom

The United Kingdom has a comprehensive asset forfeiture regime that contains four key mechanisms for the seizure and forfeiture of unlawfully obtained assets: criminal asset forfeiture (known in the UK as confiscation proceedings); non-conviction based asset forfeiture (known in the UK as civil recovery); cash seizure and forfeiture; and taxation of unlawfully obtained profits.[15] It has also introduced amendments to the *Proceeds of Crime Act 2002* authorizing the High Court to make an unexplained wealth order (or UWO) if certain conditions are satisfied.[16]

Criminal Confiscation

A criminal confiscation order can be made where the accused has been convicted of a criminal offence and has benefited from the criminal conduct forming the basis of that conviction. Prior to making a forfeiture order, the court must determine whether the defendant has been living a "criminal lifestyle." If so, a "general criminal lifestyle confiscation" takes place and the court is entitled to assume that any property acquired by the accused within six years of the start of the criminal proceedings was obtained as a result of criminal conduct. If not, the court can only make a forfeiture order where it is satisfied that the defendant has received a benefit from the offence before the court.[17]

Civil Recovery

Civil asset recovery is governed by Part 5 of the *Proceeds of Crime Act 2002*, which allows for the recovery of property obtained through "unlawful conduct" committed in England, Northern Ireland, Scotland, or Wales. Helena Wood, an Associate Fellow of the Royal United Services Institute and an expert on civil forfeiture, characterized

14 Exhibit 969, Report for the Cullen Commission by Stefan Cassella, p 64.

15 Exhibit 374, Overview Report: Reports Related to Asset Forfeiture and Unexplained Wealth Legislation in Jurisdictions Outside of Canada, Appendix A, p 12. The genesis of this regime can be traced back to an influential report from former Prime Minister Tony Blair's Performance and Innovation Unit in 2000, which stated that there is "much to be gained from an approach to law enforcement that focuses on treating criminal organizations as profit-making businesses" (ibid, Appendix C, p 8).

16 *Proceeds of Crime Act 2002*, c 29.

17 Exhibit 374, Overview Report: Reports Related to Asset Forfeiture and Unexplained Wealth Legislation in Jurisdictions Outside of Canada, Appendix A, p 13; *Proceeds of Crime Act 2002*, s 6.

this regime as a "basic civil [forfeiture] regime which reduces the burden of proof on the authorities trying to … go against these assets."[18] However, she went on to describe the "slightly checkered" history of the Assets Recovery Agency, which was set up to administer the civil and criminal asset recovery process under the new legislation.[19]

The Assets Recovery Agency had been set up with a mandate to be self-funding within five years. However, it failed to anticipate the extent to which the *Proceeds of Crime Act* would be challenged in court and the cost burden associated with that litigation.[20] Moreover, the new agency was entirely reliant on referrals from other law enforcement agencies, which limited the types of cases it could take:

> One of the failures one might point to is around this slightly naive setting of a self-funding target by the then heads of the agency, which was ultimately doomed to failure, and again, it goes back to that point of not anticipating the litigious nature of those powers. People were perhaps always going to challenge them in the court because they could and they were so new and so novel. So that perhaps led to the downfall of the agency in that way.
>
> …
>
> The other thing I perhaps point to finally is around the model that was established for the Assets Recovery Agency. They were unable to initiate their own cases at the time. They were entirely relying on referrals from other law enforcement agencies, which limited the kind of cases they could take on. And often they were handed cases that perhaps law enforcement didn't want to deal with within their own law enforcement agencies which were perhaps of a lower level than were anticipated.[21]

In or around 2008, the Assets Recovery Agency was disbanded and the functions of that agency were transferred to a wider constituency of agencies including the Serious Organized Crime Agency (now the National Crime Agency), the Crown Prosecution Service, and the Revenue and Customs Protection Office (which has since been disbanded).[22] While the types of cases that can be generated by these agencies is much different from those referred to the Assets Recovery Agency before it was disbanded, Ms. Wood testified that "non-conviction based asset forfeiture in the UK [has] never really achieved the scale that was intended" and that the law enforcement agencies who received these asset forfeiture powers have never used them to the scale that was anticipated after the disbandment of the Assets Recovery Agency.[23]

18 Evidence of H. Wood, Transcript, December 15, 2020, p 24.

19 Ibid.

20 Ibid, pp 24–25.

21 Ibid, pp 30–31.

22 Ibid, p 25.

23 Ibid, pp 24–26.

Cash Seizure and Forfeiture

The *Proceeds of Crime Act 2002* also contains a regime for the seizure of cash suspected to be proceeds of crime or intended for use in unlawful conduct (such as cash seized before it is used to make a drug purchase).[24]

Cash forfeiture proceedings are civil proceedings, and the civil standard of proof (balance of probabilities) applies to proceedings brought under those provisions.[25]

Taxation Powers

One of the more interesting elements of the *Proceeds of Crime Act 2002* is the use of tax enforcement laws as a means of deterring and punishing criminals. These provisions arose from the realization that criminal organizations generate billions in untaxed revenue, and that the usual tools used by the UK tax authority (known as Inland Revenue) to raise assessments against those shown to have undeclared income are of little utility when dealing with those involved in sophisticated criminal activity.[26]

The *Proceeds of Crime Act 2002* allows the National Crime Agency to take over the functions of the UK tax authority and carry out tax investigations where there are reasonable grounds to suspect that income or a gain accruing to a person arises, in whole or in part, as a result of that person or another person's criminal conduct.[27]

Unexplained Wealth Orders

On January 31, 2018, the *Proceeds of Crime Act 2002* was amended to introduce unexplained wealth orders as an additional tool to combat organized crime and other forms of criminality.[28] The introduction of unexplained wealth orders was prompted by concerns about high-end money laundering in the United Kingdom, especially from jurisdictions afflicted by widespread corruption. Ms. Wood explained:

> The UK's got a very active civil society contingent. Some organizations you'll be familiar with from Canada, such as Transparency International. The UK chapter is very, very active. And others like Global Witness, Spotlight on Corruption and other corruption bodies. There'd been a growing disquiet generally about growing evidence of grand corruption wealth landing primarily in London but also in the wider UK, particularly real estate market and growing kind of levels of investigative journalistic material coming out about London as a kind of centre for the proceeds of

24 Exhibit 374, Overview Report: Reports Related to Asset Forfeiture and Unexplained Wealth Legislation in Jurisdictions Outside of Canada, Appendix A, p 14.

25 Ibid, p 73.

26 Ibid, p 15.

27 Ibid.

28 Exhibit 382, Unexplained Wealth Orders – UK Experience and Lessons for BC (October 2020), p 5.

> crime or money laundering and criminality more generally. And I think that led to this groundswell of disquiet.[29]

In the United Kingdom, unexplained wealth orders are primarily an investigative tool that allow an enforcement authority (defined as the National Crime Agency, Her Majesty's Revenue and Customs, the Serious Fraud Office, and various other law enforcement agencies) to apply for an order requiring a person to provide information concerning the nature and extent of that person's ownership interest in a particular property and how they were able to purchase that property.[30] Section 362A provides:

> **362A Unexplained wealth orders**
>
> (1) The High Court may, on an application made by an enforcement authority, make an unexplained wealth order in respect of any property if the court is satisfied that each of the requirements for the making of the order is fulfilled.
>
> …
>
> (3) An unexplained wealth order is an order requiring the respondent to provide a statement—
>
> (a) setting out the nature and extent of the respondent's interest in the property in respect of which the order is made,
>
> (b) explaining how the respondent obtained the property (including, in particular, how any costs incurred in obtaining it were met),
>
> (c) where the property is held by the trustees of a settlement, setting out such details of the settlement as may be specified in the order, and
>
> (d) setting out such other information in connection with the property as may be so specified.

Section 362B sets out the criteria that must be satisfied before the court can make an unexplained wealth order. In basic terms, the court must be satisfied that:

- there is reasonable cause to believe that the respondent "holds" the property and that the value of the property is greater than £50,000;

29 Evidence of H. Wood, Transcript, December 15, 2020, pp 37–38. See also Exhibit 382, Unexplained Wealth Orders – UK Experience and Lessons for BC, pp 7–8.

30 Exhibit 382, Unexplained Wealth Orders – UK Experience and Lessons for BC, p 6. For the proposition that unexplained wealth orders are an investigative tool see Evidence of H. Wood, Transcript, December 20, 2020, p 11 ("… speaking in the UK context, the unexplained wealth order is purely an investigative tool. It sits under part 8 of the *Proceeds of Crime Act 2002* with a range of other investigative tools that you may be familiar with from your domestic legislation, such as production orders, disclosure orders, account monitoring orders. So it should absolutely in the UK context be seen as an investigative tool to be used to gather information and evidence to support a wider investigation").

- there are reasonable grounds to suspect that the known sources of the respondent's lawfully obtained income would have been insufficient to allow the person to obtain the property; and
- the respondent is a politically exposed person or there are reasonable grounds to suspect that (a) the respondent is, or has been, involved in serious crime, or (b) a person connected with the respondent is, or has been, involved in serious crime.

Where the recipient of an unexplained wealth order fails, without reasonable excuse, to comply with the requirements of that order, a presumption arises that the property was obtained through unlawful conduct, and the state can bring civil recovery proceedings under Part 5 of the *Proceeds of Crime Act 2002*.[31] Note, however, that the presumption arising under that provision is rebuttable, meaning that the recipient of the unexplained wealth order is still able to rebut (or disprove) the presumption by tendering evidence that tends to show that the property was not obtained through unlawful conduct.[32] Ms. Wood explained the operation of these provisions as follows:

> Then if we move on to 362C … In subsection 2, what we see is the real sanction for non-compliance with the unexplained wealth order. Sub-section (1) details what non-compliance is, and it says that if the respondent fails without reasonable excuse to comply with the requirements imposed by an unexplained wealth order, then the sanction envisaged in subsection (2) kicks in, and that is that the property is to be presumed to be recoverable property for the purposes of part 5, *Proceeds of Crime Act*. And that is the civil forfeiture legal framework … So in other words, the property that you have not explained, if you have not responded to an unexplained wealth order in relation to property, that property is deemed to be … the proceeds of crime.
>
> It is then subject to further civil forfeiture process, and it is a rebuttable presumption, so it would be possible in further civil forfeiture process to bring further evidence that shows that the property is not in fact the proceeds of crime. But the presumption is triggered by non-compliance with the unexplained wealth order.[33]

Where the recipient of an unexplained wealth order *does* respond within the timeframe set out in the order, the information provided by the recipient can be used in civil recovery proceedings (though it is unlikely that the state would proceed with such proceedings if the recipient can show that the property was purchased with legitimate funds). It is also important to note that, with certain exceptions, the information provided by the recipient cannot be used in criminal proceedings against that person.[34]

31 Exhibit 382, Unexplained Wealth Orders – UK Experience and Lessons for BC, p 5.

32 *Proceeds of Crime Act 2002*, s 362C(2).

33 Evidence of H. Wood, Transcript, December 15, 2020, pp 54–55.

34 Ibid, p 58.

Unexplained wealth orders are almost invariably accompanied by an interim freezing order that prevents the property owner from transferring the property. Both orders can be sought on an *ex parte* basis, meaning that notice is not generally given to the recipient. Where an interim freezing order has issued, the state has 60 days from receipt of a response to determine whether to commence civil recovery proceedings.[35]

When unexplained wealth orders were first introduced, the expectation was that approximately 40 such orders would be issued per year. However, there are only four cases in which unexplained wealth orders are known to have issued, and concerns have been raised about the "long and winding route to the actual reversal of the burden of proof."[36] Anton Moiseienko, a research fellow at the Royal United Services Institute and an expert on financial crime, expressed this point as follows:

> I don't want to foreshadow too much by way of discussion what other countries are doing, but [you may] come to the conclusion that in some cases it is okay to reverse the burden of proof – for example when there's an overwhelming public interest in making sure that public officials can account for their wealth. Or perhaps there are other safeguards in place; for instance, [if] you have to justify your belief that someone is involved in serious and organized crime and you provide evidence to court of that, then maybe that is enough of a triggering event in order to have the reversed burden of proof. It's not entirely clear why the UK has chosen such a difficult and complicated approach to that. And I think that might be in the end one of the reasons why unexplained wealth orders will not lead to significant confiscations of criminal wealth.[37]

It strikes me that these are largely design issues and that there are a number of demonstrable benefits associated with the use of unexplained wealth orders. These include the ability to get behind complex ownership structures and the potential deterrent effect on those who are considering the investment of dirty money in a jurisdiction. Mr. Moiseienko referred to news reports suggesting that some people are reconsidering the investment of dirty money in the UK and suggested that "clients from certain high-risk jurisdictions [are] coming to their lawyers in London and asking [whether they are] going to be hit with an unexplained wealth order."[38]

While I appreciate that reports referred to by Mr. Moiseienko are anecdotal and that there is no empirical evidence with respect to the impact of unexplained wealth orders

35 Exhibit 382, Unexplained Wealth Orders – UK Experience and Lessons for BC, pp 5–6.

36 Evidence of A. Moiseienko, Transcript, December 15, 2020, p 82. For the number of unexplained wealth orders that have issued, see Evidence of H. Wood, Transcript, December 15, 2020, p 62; Exhibit 382, Unexplained Wealth Orders – UK Experience and Lessons for BC, pp 14–15. Note, however, that this evidence is based on publicly available information and it may be that other unexplained wealth orders have issued.

37 Ibid, pp 82–83. Concerns were also raised about the difficulty in determining what constitutes non-compliance with an unexplained wealth order: see Exhibit 382, Unexplained Wealth Orders – UK Experience and Lessons for BC, pp 11–12.

38 Evidence of A. Moiseienko, Transcript, December 15, 2020, p 84.

on the investment of illicit funds in the UK (or any other country), there is evidence that those involved in money laundering activity often change their behaviour in response to changing legal and regulatory requirements.[39] I expect that the introduction of unexplained wealth orders in the UK likely did have the effect of deterring some organized crime groups from investing money in that jurisdiction. I return to this subject below.

The Republic of Ireland

The Republic of Ireland is widely regarded as a model asset forfeiture jurisdiction because of the structure, organization, and operation of its asset forfeiture agency (known as the Criminal Assets Bureau).[40] The Criminal Assets Bureau was established in the wake of two high-profile murders including the death of investigative journalist Veronica Guerin, who had been reporting on the activities of a notorious organized crime figure and who was murdered on her way home from traffic court. There was also a high level of public concern about the accumulation of wealth by certain criminals who were living in impressive properties and claiming social welfare payments from the state.[41] Ms. Wood testified that these events led to a high level of public criticism and a "groundswell of … cross-party political public support" that has protected the bureau from funding cuts and led to a much better resourced system:

> [O]ne of the strengths that really backs up the Irish system is just the groundswell of kind of cross-party political public support for their action. And that could be seen in the kind of background and context in which their non-conviction based forfeiture system was implemented in the first place, being on the back of a very high-profile murder of a journalist in Ireland by serious and organized criminals which led to a level of public opprobrium that meant that political action against the issue was perhaps inevitable …
>
> And I mention that because I think it's protected the Criminal Assets Bureau. That kind of level of political and public support has protected them through … various levels of public austerity over the past years that we've seen globally. That budget has been protected, and I think that's a really key factor when we compare it perhaps to the UK system more broadly. The UK system has broadly been under-resourced and it's left it open to challenge by high-profile cases where the UK system has been outgunned legally in resourced terms. The same can't be said in Ireland where they have a much better resourced system that's predicated on this kind of groundswell of public support for what they do.[42]

39 See, for example, the discussion of geographic targeting orders in Chapter 18.

40 Exhibit 382, Unexplained Wealth Orders – UK Experience and Lessons for BC, pp 22–23.

41 Evidence of C. King, Transcript, December 16, 2020, pp 15–17.

42 Evidence of H. Wood, Transcript, December 15, 2020, pp 92–93.

The Criminal Assets Bureau is an independent statutory body with the power to hold and dispose of land (or an interest in land) and to acquire, hold, and dispose of any other property. Importantly, it is also a multi-agency body made up of investigators from the national police force (An Garda Síochána), the customs service, the social welfare agency, and the tax authority. Kevin McMeel, the current legal officer of the Criminal Assets Bureau, described the multi-agency structure of the bureau as follows:

> The Criminal Assets Bureau as a structure -- and this is something that we cherish and champion over here -- is a multi-agency body. It comprises … the police force in Ireland, the An Garda Síochána, … the customs service, which is part of the revenue … the … Irish Department of Social Protection, which is our social welfare agency [and] … our tax revenue body.
>
> And they all essentially come together to make the Criminal Assets Bureau, but the bureau itself is a separate independent statutory body.[43]

One of the benefits of that model is that it allows for immediate and real-time information sharing among the representatives of the four member agencies and allows for a multifaceted response to organized crime:

> [Y]ou can imagine [that] somebody is on social welfare and they have declared no tax in the previous years and, to use a very far side example, they're driving a Range Rover. And they can be asked by those three individuals at interview … how do they afford the Range Rover. Now, they could turn around and they could say, I'm not telling you. And the fact that they have refused to answer that question can be … stated in an affidavit in our civil proceedings …
>
> But let's say they say they turn around and they say well, actually I've been washing windows for the last 10 years. Well, that would immediately cause a concern for the revenue inspector who's saying … well, if you've been washing windows for the last 10 years, well, then … you haven't paid any income tax in relation to that. And then that would generate an income tax bill or may generate an income tax bill with considerable interest and penalties. They might have been better off saying nothing. And similarly, if they say either of those two answers, it might have implications from a social welfare perspective if they've been [claiming social welfare payments] at the same time.
>
> So I think that in essence it's kind of a three-pronged approach, but it works because it means that the individual has, in essence, nowhere to hide.[44]

43 Evidence of K. McMeel, Transcript, December 16, 2020, pp 25–26.

44 Ibid, pp 33–34.

All of the police officers assigned to the Criminal Assets Bureau retain their powers of arrest and can conduct criminal investigations based on the information they receive through their involvement with the bureau. Likewise, the tax commissioners assigned to the bureau ensure that the income generated by organized crime groups is properly taxed, and the social welfare representatives ensure that members of these groups are not unlawfully claiming social welfare payments. However, the focus of the bureau is to "deny and deprive" organized crime groups of the profits of their unlawful activity.[45]

In order to carry out that mandate, the bureau has extensive investigative powers, including the power to apply for search warrants and production orders. Mr. McMeel testified that the investigative capacity given to the Criminal Assets Bureau is something that sets it apart from other jurisdictions, such as British Columbia, where the Civil Forfeiture Office is largely reliant on referrals from law enforcement and has limited powers to conduct its own investigations.[46] He also testified that the bureau has a roster of 474 divisional asset profilers, who assist with the identification of targets for investigation.[47] Most of these profilers are local police officers who have a "strong sense of what's going on … in the community" and are "out and about policing, searching, [and] investigating."[48] They receive training from the bureau as well as access to some of its databases, which they can use to conduct local investigation into unlawfully obtained assets. Where they uncover something significant, a referral is made to the bureau.[49]

When the bureau believes that a particular asset was obtained or received as a result of a criminal offence, it can apply for forfeiture of that asset under the *Proceeds of Crime Act 1996*. In broad terms, there are three stages in a civil forfeiture action brought pursuant to that statute. At the first stage, the bureau can apply for an interim order prohibiting any person from disposing or otherwise dealing with the property for a period of 21 days. The application is normally brought *ex parte*, and the order can contain "such provisions conditions and restrictions as the court considers necessary or expedient."[50] If the bureau brings an application for an interlocutory order within 21 days of the issuance of that order (see below), the order remains in effect until the final determination of that application. If no such application is brought, the order will expire.

At the second stage of the process, the bureau can apply for an "interlocutory order" declaring that the property constitutes proceeds of crime or was acquired, in whole or in part, using proceeds of crime. Mr. McMeel testified that the term "interlocutory" is somewhat misleading and that this is the main hearing of the action. Moreover, the statute contains a reverse-onus provision that shifts the burden to the property owner

45 Ibid, pp 30–31, 46, 134, 143–44.

46 Ibid, pp 143–44.

47 Ibid, p 70.

48 Ibid, p 71.

49 Ibid, p 71. While these profilers assist with the identification of local targets, the bureau also makes use of other sources. For example, it relies on information provided by the national intelligence service to identify high-end targets.

50 *Proceeds of Crime Act 1996*, s 2(a).

where it "appears to the court" that the property constitutes proceeds of crime or was purchased using proceeds of crime.[51] Mr. McMeel testified that "belief" evidence from the Chief Bureau Officer indicating that the property is proceeds of crime, or was purchased using proceeds of crime, is sufficient to shift the onus to the property owner even where the belief expressed by the Chief Bureau Officer is based on hearsay:

> [P]ursuant to section 8 of the Proceeds of Crime Act there is – belief evidence led. And … it's exclusively the Chief Bureau Officer who … provides belief evidence, although I know the Act provides for a senior revenue officer as well to provide that. But in all of the cases that have been taken by the bureau since its inception, it's been the Chief Bureau Officer who provides that belief.
>
> Now, the belief evidence is very narrow. If the Chief Bureau Officer believes something to be the proceeds of crime and the value is not below the threshold amount … that constitutes evidence of the fact, but it's open to rebuttal. And it must be reasonably grounded, but that belief evidence can be grounded in hearsay evidence. And that is crucial to our success as well …
>
> Once the belief evidence is accepted, and that's a big … step, but once that is accepted as being reason to be grounded, the onus then shifts on the respondent to show why it's not the proceeds of crime. Now, some people think that there's a reversal of the burden of proof. That's not the case, but there is a shifting of the burden of proof once we establish on a *prima facie* basis that the belief evidence is reasonably grounded.[52]

A number of academic commentators – including Colin King, director of postgraduate research studies at the Institute of Advanced Legal Studies at the University of London and an expert in non-conviction based asset forfeiture – have criticized the admissibility of belief evidence on the basis that it is "impossible to effectively challenge belief evidence under cross-examination" and that the courts have been "overly acquiescent" in accepting such evidence.[53] These concerns are particularly acute where the belief evidence is based on evidence given by secret and unidentified informants (which seems to be relatively common). While recognizing the validity of these concerns, Mr. McMeel testified that it is rare for the Criminal Assets Bureau to proceed only on the basis of belief evidence and that most civil forfeiture cases proceed in the same manner as any other civil action:

> In reality I've never – and I've been practicing this for eight and a half years and I have been involved … in one capacity or another in every case that the bureau has prosecuted during that time. So we're talking about hundreds of

51 Ibid, s 3(1).

52 Evidence of K. McMeel, Transcript, December 16, 2020, pp 48–49.

53 Evidence of C. King, Transcript, December 16, 2020, p 104.

> cases. And I've never seen a case which was prosecuted solely on the basis of belief evidence. And even when we do incorporate hearsay evidence or intelligence in the belief evidence, there is always other evidence which would support that contention. And the kind of things that would inform the belief of a Chief Bureau Officer would be the obvious things, the kind of things that would be admissible in court anyway. For example, there's, as we've had before, 1.2 million euros in cash found in the back of the truck. That is self-evidently suspicious. And the fact that the person that has that in the back of their truck is not in any gainful employment, and that is something that would inform the chief's belief that that is the proceeds of crime. The fact that that person has been claiming the dole over that period and the fact that that person may have known criminal associates – and this is where we're getting into the hearsay element or the intelligence element aspect of it – all of those factors would combine to ground the belief of the chief bureau officer.
>
> Now, the effect of that is – in an ordinary hearing is very straightforward. The hearing is heard like any civil action. The Criminal Assets Bureau provides its evidence. And the court will invariably reserve judgment if … there is a case put up by the defence. And in that judgment it will say that it found that the belief was well grounded or not. But during the course of the hearing, the bureau just puts forward all its evidence, and the respondent then puts forward all its evidence. And invariably in my experience … the practicalities of the case are very much the same as any civil case.[54]

Mr. McMeel also defended the provision on the basis that "the person who is in … possession, power and control of a particular asset is uniquely well placed to evidence the provenance of that asset" and that "[t]he vast majority of people, if not everybody, that own assets legitimately are able to evidence the source of those assets."[55]

At the third stage of the process, the bureau must wait seven years to allow any person with an interest in the property to assert a claim. If no such claim is received within that time, the bureau can apply for a final disposal order allowing the property to be sold.[56]

All funds recovered through the sale of that property are sent to a central revenue fund, something that differentiates the Irish system from other jurisdictions, such as British Columbia, where the funds recovered through the sale of unlawfully obtained assets are distributed by the Civil Forfeiture Office and used to defray its operating costs. Mr. King testified that this is one area where there was complete unanimity:

> In Ireland all the money that is recovered is sent back to the central fund. … [The Criminal Assets Bureau] does not get any share of recovered

54 Evidence of K. McMeel, Transcript, December 16, 2020, pp 98–100.

55 Ibid, pp 119–20.

56 *Proceeds of Crime Act 1996*, s 4(1); Evidence of K. McMeel, Transcript, December 16, 2020, p 53.

> money. It has been stressed that how recovered money is spent is a political decision, and [the bureau] is not a political group or a political unit – it is composed of police, revenue, social welfare officials, et cetera – and that they should not have any involvement in deciding how money is spent.
>
> When I spoke to participants in Ireland, this was the one area where there was almost complete unanimity. Everyone that I spoke to who expressed an opinion on this; only one person did not express an opinion. Everyone else agreed with the current approach in Ireland that when money is seized and there is the final court order, that the money should be sent back to the minister to the central fund, and whatever happens after that is none of [the Criminal Asset Bureau's] business. And that viewpoint was aired by officials in [the bureau] and defence solicitors, barristers who work on both sides.[57]

Moreover, Ms. Wood testified that the Irish funding model changes the focus of the Criminal Asset Bureau and allows it to focus on cases that have the greatest *community impact* as opposed to the cases that are the most "commercially viable":

> The whole discussion in Ireland isn't around whether "POCA [*Proceeds of Crime Act*] pays for POCA," which has become a bit of a term in the UK. It's … taking it where the asset has a wider community benefit. So in their kind of adoption model of cases, they don't simply look at whether it's … commercially viable … which is the way the commercial litigator would look at it. They look at in terms of the wider community impact.
>
> So, for example, if it was to cost a million pounds to take away a million-pound property, then within the Irish system that would be absolutely fair. That's not to say those principles don't apply in Britain, but I think going back to the legacy that the UK system operates under due to the legacy of the Assets Recovery Agency, there is still this notion that the impact of asset recovery should be measured in financial terms rather than in the more difficult to measure community impacts or dismantling of criminal schemes terms. I think that the UK continues to labour under that position that "POCA should pay for POCA" when absolutely that's not the legislative intention of any of these provisions across the world.[58]

While I accept that Ireland is considered by many to be a model asset forfeiture jurisdiction, the constitutional constraints present in the Canadian context – including constraints on the exchange of tactical information – would make it difficult to transpose that model to British Columbia. A legal opinion prepared for the Commission by the Honourable Thomas A. Cromwell, CC, reviews some of the constitutional

57 Evidence of C. King, Transcript, December 16, 2020, pp 128–29. See also Evidence of H. Wood, Transcript, December 15, 2020, p 95.

58 Evidence of H. Wood, Transcript, December 15, 2020, p 95–96.

challenges associated with tactical information sharing between the Civil Forfeiture Office, law enforcement agencies, and tax authorities.[59]

Australia

Australia introduced its first criminal property confiscation legislation in 1979 by way of amendments to the *Customs Act 1901*, which permitted the imposition of financial penalties against those who engaged in unlawful narcotic trafficking.[60] In the mid-1980s, the federal and state governments began introducing comprehensive proceeds of crime legislation as part of a concerted effort to curb the drug trade and respond to the threat posed by transnational organized crime. Lionel Bowen, former deputy prime minister and federal attorney general, made the following comments with respect to the federal *Proceeds of Crime Bill* when it was introduced for second reading:

> The Proceeds of Crime Bill provides some of the most effective weaponry against major crime ever introduced into this Parliament. Its purpose is to strike at the heart of major organized crime by depriving persons involved of the profits and instruments of their crimes. By so doing, it will suppress criminal activity by attacking the primary motive – profit – and prevent the re-investment of that profit in further criminal activity.[61]

From the late 1980s onwards, most state and federal jurisdictions augmented their criminal confiscation regimes with non-conviction-based asset forfeiture schemes that allow for the confiscation of property on the civil standard of proof and in most cases, on the basis of "unlawful" rather than "criminal" conduct.[62] Broadly speaking, there are four circumstances in which these statues allow for the confiscation of property:

- where the property is used in connection with the commission of a prescribed offence (something known as "crime-used property confiscation");
- where the property is obtained or derived from the commission of a specified offence (something known as "crime-derived property confiscation");
- where a person's wealth exceeds the value of his or her lawfully acquired property (something known as "unexplained wealth order confiscation"); and
- where a person is a declared or taken to be a declared drug dealer (something known as "drug trafficker confiscation").[63]

59 A copy of that opinion can be found at Appendix I. In addition, submissions were made by the Province of British Columbia and the BC Civil Liberties Association in response to that opinion, and those submissions have been posted to the Commission's website.

60 Exhibit 376, Overview Report: Selected Writings of N. Skead, Appendix D, p 177; Evidence of N. Skead, Transcript, December 17, 2020, p 8.

61 Exhibit 376, Overview Report: Selected Writings of N. Skead, Appendix D, p 177.

62 Ibid.

63 Evidence of N. Skead, Transcript, December 17, 2020, pp 15–28; Exhibit 376, Overview Report: Selected Writings of N. Skead, Appendix D, p 178.

For most forms of confiscation, there are conviction-based regimes, non-conviction-based regimes, and hybrid regimes.[64] The breadth of some of these legislative provisions have caused some to raise concerns about disproportionate and unjust outcomes. For example, the drug trafficking confiscation schemes enacted in Western Australia and the Northern Territory go beyond property that is derived from drug trafficking offences and target everything that is owned or controlled by the respondent without many of the procedural safeguards present in other jurisdictions.[65] Dr. Natalie Skead, a professor of law and dean of the University of Western Australia Law School, provided a number of startling examples of the potential injustice that can arise from these provisions. [66]

Australia was one of the first jurisdictions to use unexplained wealth orders as a tool in combatting organized crime. At the federal level, the *Proceeds of Crime Act 2002 (Commonwealth)* allows the court to issue an order, known as a preliminary unexplained wealth order, requiring a person to appear before the court to enable the court to decide whether such an order should be made. Where the court is satisfied that there are reasonable grounds to suspect that the respondent's total wealth exceeds the value of the person's wealth that was lawfully acquired, the court *must* make the order.[67]

In principle, that provision allows for the issuance of an unexplained wealth order without any requirement to show that the property owner was involved in criminal activity or that he or she received any financial benefit from that activity. Moreover, the order applies to the entirety of the respondent's wealth and is not limited to a specific asset.[68]

If the respondent does not make an application within 28 days showing why a final order should not be issued, the court will issue a confiscation order requiring the respondent to pay the difference between the person's total wealth and the amount of that wealth that is not derived from criminal activity.[69]

At the state level within Australia, the structure of the regime is largely the same, though there are important differences in the threshold requirements for the issuance of an unexplained wealth order. In Western Australia, there is no threshold for the issuance of such an order; once the application is filed, the burden immediately shifts to the respondent to prove that their wealth was lawfully obtained.[70] In South Australia, the state must show that it "reasonably suspects that a person has wealth that has not been lawfully acquired.[71] In New South Wales, Queensland, and Victoria, the state must establish a "reasonable suspicion" that the respondent has, at any time before the making of the order, engaged in serious criminal activity or acquired property from any such activity.[72]

64 Ibid, pp 15–17.

65 Evidence of N. Skead, Transcript, December 17, 2020, pp 31–32, 36–39.

66 Ibid, pp 39–40.

67 Exhibit 382, Unexplained Wealth Orders – UK Experience and Lessons for BC, pp 23–24.

68 Evidence of H. Wood, December 16, 2020, p 100.

69 Exhibit 382, Unexplained Wealth Orders – UK Experience and Lessons for BC, pp 23–24.

70 Evidence of N. Skead, Transcript, December 17, 2020, pp 46–47.

71 Exhibit 382, Unexplained Wealth Orders – UK Experience and Lessons for BC, pp 24–25.

72 Ibid.

On their face, these provisions would seem to be an extraordinarily powerful tool in the fight against organized crime. However, the number of unexplained wealth orders issued by federal and state courts is extremely low, and it is "generally accepted that [the regime] has not been very successful."[73] One of the primary reasons for the lack of success is the difficulty of proving the quantum of unexplained wealth. Dr. Skead testified that the law enforcement agencies charged with administering this scheme do not have the time, money, or expertise to bring these applications and that it is a "complex, lengthy, and very expensive process with no guarantee of success."[74] She also stated that pinning down the extent of a person's wealth is particularly difficult when dealing with criminals, who do not have a steady stream of predictable income:

> Typically, these actions are not brought against somebody like me who earns a salary and has a steady stream of predictable income. That's easy to trace. It is a person, firstly, whose wealth is very difficult to pin down. So even just establishing the wealth, so to speak, of the respondent is a complex and difficult exercise. Then going through the process of earmarking how much of that wealth was lawfully acquired and how is another complex exercise. The balance then is unexplained. [75]

The New South Wales Crime Commission has found a measure of success in creating specialized teams to deal with forfeiture issues. However, the success of that initiative is limited, and it appears that unexplained wealth orders remain an underutilized tool.[76]

One of the lessons that can be drawn from the Australian experience is the need to carefully consider the prerequisites for the issuance of an unexplained wealth order.

Unlike the approach in the UK and the Republic of Ireland, the Australian regime is focused solely on the respondent's wealth and allows for the issuance of an unexplained wealth order without the need to establish any link between the property and any unlawful activity. While an exclusive focus on wealth gives the state another route to the forfeiture of unlawfully obtained wealth, it is a complex, lengthy, and expensive process that may not be worth the cost. Likewise, the low threshold for the issuance of an unexplained wealth order (which requires only a reasonable suspicion that the respondent's total wealth exceeds the value of the person's wealth that was lawfully acquired) raises civil liberties concerns and undermines many of the safeguards "which have evolved at common law to protect innocent parties from the wrongful forfeiture of … property."[77]

Another lesson that can be drawn from the Australian experience is the difficulty in proving that the respondent's total wealth exceeds the value of the person's wealth that was lawfully acquired (which seems to be why unexplained wealth orders remain an underutilized tool).

73 Evidence of N. Skead, Transcript, December 17, 2020, p 65.

74 Ibid, p 56.

75 Ibid, pp 54–55.

76 Ibid, pp 59, 61.

77 Exhibit 376, Overview Report: Selected Writings of N. Skead, Appendix B, p 489.

Manitoba

Manitoba's civil forfeiture legislation is largely modelled on the BC statute.[78] The purpose of that legislation is twofold: (a) to prevent people who engage in unlawful activities (and others) from keeping property that was acquired as a result of those activities; and (b) to prevent property from being used to engage in unlawful activities.[79]

Under section 3 of the *Criminal Property Forfeiture Act*, the director of the Manitoba Criminal Property Forfeiture Unit may commence proceedings in court seeking an order forfeiting property to the government where he or she is satisfied that property is proceeds of unlawful activity or an instrument of unlawful activity.[80]

The proceedings can be commenced by action or application and must name as parties the owner of the property, any person in possession of the property, any person with a prior registered interest in the property, and any other person whom the director believes may have an interest in the property.[81]

The Manitoba statute also contains an administrative forfeiture regime. It is similar to the BC model (and other administrative forfeiture models across Canada). In basic terms, that regime applies to property other than real property valued at $75,000 or less that is in the possession of a law enforcement agency.[82] In such cases, the director can commence administrative forfeiture proceedings by fulfilling three different notice requirements. First, the director publishes notice of the administrative forfeiture proceedings in a newspaper of general circulation throughout the province. Second, he or she files a notice of administrative forfeiture against the subject property in the personal property registry. Third, the director gives written notice to the person from whom the property was seized, the law enforcement agency that seized the property and any other person whom the director believes may have an interest in the property.[83]

A person who claims to have an interest in the subject property may oppose forfeiture by submitting a written notice of dispute to the director within 60 days of receiving notice. Where a notice of dispute is received, the director can either commence civil forfeiture proceedings against the property in accordance with the regular process or discontinue the forfeiture proceedings. Where a notice of dispute is *not* received by the deadline, the subject property is automatically forfeited to the government.[84]

78 Evidence of M. Murray, Transcript, May 5, 2021, pp 6–7.

79 *Criminal Property Forfeiture Act*, CCSM c C306, s 2.

80 Ibid, s 3.

81 Ibid, s 5.

82 Ibid, s 17.2(1).

83 Ibid, ss 17.3, 17.4.

84 Ibid, ss 17.7, 17.8.

Melinda Murray, executive director of the Manitoba Criminal Property Forfeiture Unit, testified that the purpose of the administrative forfeiture regime was to streamline the forfeiture of property in cases where the forfeiture order is unopposed:

> The rationale for the administrative forfeiture process was [that] we were seeing a lot of … cases going to default in the judicial stream. And so there was such a high number that … the idea was to try to streamline and render this more efficient and more cost efficient. So under the judicial process of course there's legal fees attached and court resources that are expended on proceeding in that fashion, and because of the high number of defaults that were occurring and especially in low-value cases, the administrative forfeiture regime came about to reduce that cost and the resource intensiveness as well as the inefficiency.[85]

Unlike the BC Civil Forfeiture Office, the Manitoba Criminal Property Forfeiture Unit is not a self-funded agency, meaning that its operating costs are paid by government rather than the sale of assets that have been forfeited to the government. While the unit conducts a cost-benefit analysis in deciding whether to pursue a particular asset for forfeiture, the primary considerations are the strength of the evidence and the interests of justice (which includes factors such as fairness and proportionality).[86]

Ms. Murray testified that there have been cases where the unit has lost money pursuing a particular asset because of the high public interest in proceeding. For example, the unit lost money pursuing a Hells Angels clubhouse because of the high public interest in "ridding the neighbourhood" of that property.[87] Likewise, the unit spent a considerable amount of money pursuing the assets of an individual who had defrauded a church in order to return those funds to the church.[88]

While the Criminal Property Forfeiture Unit receives most of its files from law enforcement referrals and does not conduct any proactive investigations, it takes steps to build out the more complex files it receives by looking at open-source and subscription databases that would allow it to locate additional assets:

> Generally speaking … we do not lack for work, and so there hasn't been the ability to start looking for targets, so to speak. So, what will happen in more high-value complex files is we will look at open-source databases or subscription databases where we may locate further assets that a defendant may have when we do those sort of … information gathering. So, the police might know about two homes and a bank account and two vehicles, but we may discover that the defendant actually has three homes

85 Evidence of M. Murray, Transcript, May 5, 2021, pp 11–12.

86 Ibid, pp 23–25.

87 Ibid, p 26.

88 Ibid, p 26.

> or four homes once we look into open-source information. So, we'll add that to our forfeiture proceedings if we feel we have the evidence to do so.[89]

One of the most important aspects of the Manitoba regime is the ability to apply for a preliminary disclosure order before the commencement of proceedings. Such orders require the person described in the order to provide the following information:

- the nature and extent of the person's interest in the property that is the subject of the proceeding;
- the particulars of the person's acquisition of the property, including how any costs incurred in acquiring the property were met;
- the sources and amounts of the person's lawfully obtained income and assets;
- if the person holds the property, or any part of it, in trust for another person, the details of the trust and the identity of the beneficial owners; and
- any other information specified by the court.[90]

A preliminary disclosure order can be made on application without notice to the property owner or any other person. However, there must be reasonable grounds to suspect that:

- the person named in the order is the owner of the property or has possession of the property;
- the fair market value of the property exceeds $100,000;
- the person's known sources of income and assets would have been insufficient to enable the respondent to acquire the property; and
- the person, or a person who does not deal with the respondent at arm's length, is or has been involved in unlawful activity.[91]

If the person does not provide the information and documents within the time period specified in the order, there is a rebuttable presumption that the property that is subject to the order is proceeds of unlawful activity or an instrument of unlawful activity.[92]

Ms. Murray testified that most if not all of the information contained in a preliminary disclosure order could be obtained at an examination for discovery, and that the purpose of the provision is to obtain the information at the "front end" in order

89 Ibid, pp 36–37.

90 *Criminal Property Forfeiture Act*, s 2.3(1).

91 Ibid, s 2.3(6). The court must also be satisfied that the information and documents to be provided under the order would assist the director in deciding whether to commence forfeiture proceedings under section 3.

92 Ibid, s 17.18.

to determine whether to proceed with a forfeiture action.[93] She also gave the following example of the utility of preliminary disclosure orders in obtaining information about criminal assets:

> We had a case … [the] first week that I started … where … there was a homicide of a rival drug gang. And … the police had determined that there was drug trafficking as part of that. So, one of the four individuals charged with the homicide. Also we knew from police that this individual did not work, did not have a job at all and that they received information or found information that he had bank accounts, over $500,000 in … 13 different bank accounts, some with his family, jointly owned bank accounts, and that they were living in a residence that was worth $600,000, yet these individuals, the parents and the defendant or the accused in the criminal case … were collecting what we call employment insurance assistance, so "EIA" in Manitoba.
>
> And so, this would be the perfect example of what we would want to perhaps obtain information as to where this wealth was acquired in order to determine if it's legitimate wealth and there's obviously the ability for them to advise us as to legitimacy of the income. We would then not seek forfeiture if the evidence or the information provided to us was adequately indicated that it was legitimate. But if it's not legitimate, then we would take a closer look at that information and determine whether we'd proceed with forfeiture under section 3 and file a statement of claim.[94]

Finally, she emphasized that information provided in response to a preliminary disclosure order is subject to use immunity can only be used in connection with civil forfeiture proceedings and cannot be provided to the police or any other person.[95]

British Columbia

The BC *Civil Forfeiture Act* came into force on April 16, 2006, and was modelled on the Ontario *Remedies for Organized Crime and Other Unlawful Activities Act* (commonly referred to as the *Civil Remedies Act*).[96] While the BC statute does not contain an express statement of purpose, the minister of public safety and solicitor general made the following comments about the legislation when it was introduced for second reading:

> With this new legislation we will be taking the profit out of illegal activity. It will be another tool to deter and prevent fraud, theft and a host of other illegal activities, and it will enable the recovery of ill-gotten gains and will assist in providing compensation to eligible victims.

93 Evidence of M. Murray, Transcript, May 5, 2021, p 48.

94 Ibid, pp 49–50.

95 Ibid, p 55; *Criminal Property Forfeiture Act*, s 2.3(12).

96 SO 2001, c 28; Exhibit 378, Civil Asset Forfeiture in Canada, p 9; Exhibit 373, Overview Report: Asset Forfeiture in British Columbia, pp 19–20.

> The moneys recovered through forfeiture will compensate eligible victims and will be used to support further crime prevention initiatives. The moral and legal underpinnings of civil forfeiture are very clear. Civil forfeiture is similar to the civil remedy against unjust enrichment. It takes back assets derived from illegal conduct. No one should be allowed to get rich as a result of breaking the law. No one, I hope, can or will seriously argue that point.[97]

In *British Columbia (Director of Civil Forfeiture) v Onn*, 2009 BCCA 402, the British Columbia Court of Appeal held that the policy rationale for the statute was threefold:

- to take the profit out of unlawful activity;
- to prevent the use of property to unlawfully acquire wealth or cause bodily injury; and
- to compensate victims of crime and fund crime prevention and remediation.[98]

The *Civil Forfeiture Act* is divided into eight parts and is supplemented by the *Civil Forfeiture Regulation*, BC Reg 164/2006. I discuss each of these parts below.

Part 1

Part 1 of the *Civil Forfeiture* Act defines various terms used in the legislation including the terms "unlawful activity," "proceeds of unlawful activity," and "instrument of unlawful activity."

In basic terms, there are three categories of unlawful activity under the statute:

- unlawful activity occurring within the province, defined as an act or omission that, at the time of occurrence, was an offence under an Act of Canada or British Columbia;
- unlawful activity occurring in another province, defined as an act or omission that, at the time of occurrence was an offence under an Act of Canada or an act of the other province (as applicable) and would be an offence in British Columbia if it occurred in this province; and
- unlawful activity occurring in another country, defined as an act or omission that, at the time of occurrence was an offence under an Act of that country and would be an offence in British Columbia if it occurred in this province.[99]

97 Exhibit 373, Overview Report: Asset Forfeiture in British Columbia, para 55.

98 *British Columbia (Director of Civil Forfeiture) v Onn*, 2009 BCCA 402, para 14. Another reason to pursue civil asset forfeiture is to prevent the profits of unlawful activity from being reinvested in the criminal enterprise through the purchase of weapons, drugs, and other instruments of crime: Exhibit 378, Civil Asset Forfeiture in Canada, p 4.

99 *Civil Forfeiture Act*, s 1. Note, however, that the definition of unlawful activity excludes acts or omissions that are offences under a corporate regulation as well as acts or omissions that would be an offence under an enactment of any jurisdiction prescribed under the *Civil Forfeiture Act*.

"Proceeds of unlawful activity" is defined to include the whole or a portion of any right, title, interest, estate, or claim to property, that is acquired, directly or indirectly, as a result of unlawful activity. It also includes any increase in the value of property that results, directly or indirectly, from unlawful activity; the decrease in any debt obligation secured against the property (such as a mortgage) that results, directly or indirectly, from unlawful activity; and any property realized from the sale of the property.[100]

"Instrument of unlawful activity" is defined as property that has been used to engage in unlawful activity, or is likely to be used to engage in unlawful activity, which

- resulted in or was likely to result in the acquisition of property or an interest in property, or
- caused or was likely to cause serious bodily harm.[101]

Part 2

Part 2 of the *Civil Forfeiture Act* sets out the process for seeking a forfeiture order. Section 3(1) provides that the "director" appointed in accordance with section 21(1) may apply for an order forfeiting to the government the whole or a portion of an interest in property that is proceeds of unlawful activity.[102]

Section 3(2) allows the director to apply for an order forfeiting property that is an instrument of unlawful activity.[103]

Where an application is filed under these provisions, the director must name as a party and give notice to the registered owner of the property and any other person who the director has "reason to believe is an unregistered owner of the interest in property."[104]

Section 5 provides that where proceedings are commenced under sections 3(1) or 3(2) of the Act, the court must, with certain exceptions, make an order forfeiting to the government the whole or the portion of an interest in property that the court finds is proceeds of unlawful activity or an instrument of unlawful activity.[105]

Part 3

Part 3 of the *Civil Forfeiture Act* deals with interim preservation orders for property

100 Ibid.

101 Ibid. Note, however, that the interpretation of this provision is the subject of ongoing litigation: see *British Columbia (Director of Civil Forfeiture) v Angel Acres Recreation and Festival Property Ltd.*, 2020 BCSC 880 (currently under appeal).

102 *Civil Forfeiture Act*, s 3(1).

103 Ibid, s 3(2).

104 Ibid, s 4.

105 Ibid, s 6. For commentary on this provision see *British Columbia (Director of Civil Forfeiture) v Wolff*, 2012 BCCA 473, para 38 where Madam Justice Newbury held that relief should only be granted under this provision where a forfeiture order would be "manifestly harsh and inequitable."

that may be subject to a forfeiture order. Section 8 allows the director to apply for an interim preservation order in relation to property that is the subject of legal proceedings under section 3, either on his or her own initiative or with the consent of one or more of the parties to that proceeding.[106]

Section 8(3) sets out a non-exhaustive list of orders that can be sought by the director under that provision. These orders include:

- an order restraining the disposition or transmission of the property or the whole or the portion of the interest in property;
- an order for the possession, delivery to the director, or safekeeping of property;
- an order appointing a person to act as a receiver manager for property or the whole or a portion of an interest in property;
- an order for the disposition of the property or the whole or the portion of the interest in property in order to better preserve the value of the property or the whole or the portion of the interest in property;
- an order directing that the money arising from the disposition of the property or the whole or the portion of an interest in the property be paid into court pending the conclusion of the proceeding under section 3;
- for the purpose of securing performance of an obligation imposed by an order made under Part 2 or 3, an order granting to the director a lien for an amount set by the court on property or the whole or the portion of an interest in property;
- an order the court considers appropriate to prevent the property from being removed from British Columbia or used to engage in unlawful activity;
- an order the court considers appropriate for the preservation of the property or the rights of creditors and other interest holders; and
- any other order that the court considers appropriate in the circumstances.[107]

Unless it is clearly not in the interests of justice, the court must make the interim preservation order sought by the director if it is satisfied that there is a serious question to be tried with respect to the following issues:

- whether the whole or the portion of the interest in property that is the basis of the application is proceeds of unlawful activity; or
- whether the property that is the basis of the application is an instrument of unlawful activity.[108]

106 *Civil Forfeiture Act*, ss 8(1), 8(2).

107 Ibid, s 8(3).

108 Ibid, s 8(5).

On May 16, 2019, the provincial government introduced new provisions intended to give the director enhanced powers to restrain property before and during a civil forfeiture action. These powers include section 11.02, which permits the director to seek an order restraining the disposition of property, mandating the disposition of property, preventing the property from being removed from British Columbia, or making any other order that the court considers appropriate *before* proceedings are commenced under section 3(1).[109]

The new provisions also allow the director to seek an order requiring any person to disclose to the director any information or records in the custody or control of that person that are reasonably required by the director in order to exercise the director's powers or perform the director's functions and duties under the relevant legislation.[110]

Part 3.1

Part 3.1 of the *Civil Forfeiture Act* creates a simplified administrative forfeiture regime for property, other than real property, that is valued at $75,000 or less and is in the possession of a public body such as a municipal police department. The purpose of these amendments was to create a more streamlined process for the forfeiture of low-value matters – such as small amounts of cash seized from local drug dealers – which are unlikely to be defended but require significant time and expense to process.[111] Section 14.02 provides:

> **14.02** (1) This Part applies if
>
> (a) the director has reason to believe that
>
> (i) the whole or a portion of an interest in property, other than real property, is proceeds of unlawful activity, or
>
> (ii) property, other than real property, is an instrument of unlawful activity,
>
> (b) the director has reason to believe that the fair market value of the property referred to in paragraph (a) (i) or (ii) is $75,000 or less,
>
> (c) the property referred to in paragraph (a) (i) or (ii) is in British Columbia and is in the possession of a public body, and
>
> (d) the director has no reason to believe that there are any protected interest holders in relation to that property.[112]

109 Ibid, s 11.02.

110 Ibid, ss 11.01, 22.02.

111 Exhibit 373, Overview Report: Asset Forfeiture in British Columbia, para 72. See also Evidence of P. Tawtel, Transcript, December 18, 2020, pp 57–60.

112 *Civil Forfeiture Act*, s 14.02. "Public body" is defined in section 14.01 as an entity with which the director has an information-sharing agreement under section 22(4) or a public body prescribed by regulation. At present, the bodies prescribed by regulation include entities such as the Ministry of Finance, the Insurance Corporation of British Columbia, the BC Financial Services Authority, the Ministry of Public Safety and Solicitor General, the BC Lottery Corporation, and the BC Securities Commission: *Civil Forfeiture Regulation*, s 8(1).

Where the director intends to pursue administrative forfeiture under these provisions, it must file a notice of forfeiture in the personal property registry and give written notice of forfeiture to certain individuals and entities including:

- the person from whom the property was seized;
- any person claiming to be lawfully entitled to possession of the property;
- a person whom the director has reason to believe may be a registered or unregistered owner of an interest in the property; and
- the public body in possession of the property.[113]

Under section 14.07, a person who claims to have an interest in the subject property may dispute forfeiture by filing a notice of dispute within 30 days (the dispute period). The notice of dispute must be accompanied by a solemn declaration identifying:

- the name of the person disputing forfeiture;
- the nature of the person's interest in the property; and
- the reasons for disputing forfeiture.[114]

If the director receives a notice of dispute within the dispute period and still wishes to pursue forfeiture of the property, it must commence forfeiture proceedings under section 3:

> **14.08** Within 30 days of receiving a notice of dispute under section 14.07, the director must do the following:
>
> (a) commence proceedings under section 3 or withdraw from proceeding under this Act in relation to the subject property;
>
> (b) give notice to the public body and each known interest holder of the direction taken under paragraph (a).

If, however, the director does not receive a notice of dispute within seven days of the expiry of the dispute period, the property is forfeited to the government for disposal by the director without the need to commence proceedings under section 3.[115]

While forfeiture of the subject property is deemed to be immediate, section 14.11 gives an added layer of protection to property owners who fail to deliver a notice of dispute within the 30-day timeframe contemplated by section 14.07. Any such person

113 *Civil Forfeiture Act*, s 14.04. Under section 14.04(1)(c), the director is also required to publish a formal notice of forfeiture in the *BC Gazette* or a newspaper of general circulation in British Columbia that circulates in or near the area in which the property was seized.

114 *Civil Forfeiture Act*, s 14.07.

115 Ibid, s 14.09.

may commence legal proceedings for the value of the claimant's interest in the subject property at the time of forfeiture or the liquidated value of the subject property that the government received upon disposition of the subject property (whichever is lesser).[116]

However, the claimant must first establish that the failure to deliver a notice of dispute was not willful or deliberate, and that legal proceedings were commenced as soon as possible after the claimant learned of forfeiture. It is also open to the director to defend the proceeding on the basis that the whole or a portion of the claimant's interest in the subject property is proceeds of unlawful activity or an instrument of unlawful activity.[117]

Part 4

Part 4 of the *Civil Forfeiture Act* addresses the standard of proof in civil forfeiture proceedings and creates a number of statutory presumptions to assist the director in establishing that property subject to forfeiture is either proceeds of unlawful activity or an instrument of unlawful activity.

Section 16 provides that findings of fact in proceedings under Part 2 or 3 or section 14.11 and the discharge of any presumption are to be made on the balance of probabilities. Moreover, section 17 provides that proof that a person was convicted, found guilty, or found not criminally responsible on account of a mental disorder in respect of a criminal offence that falls within the definition of "unlawful activity" is proof that the person engaged in that activity and can be proven by filing a certificate signed by an officer having custody of the record of the court where the person was found guilty.[118]

Section 18 provides that unlawful activity may be found to have occurred even if the person or persons alleged to have committed that offence have not been criminally charged or have been acquitted of a criminal offence.[119]

Section 19 creates a statutory presumption that any property acquired by a person after participating in unlawful activity that resulted in or is likely to have resulted in the person receiving a financial benefit is proof – in the absence of evidence to the contrary – that the property is proceeds of unlawful activity.[120]

Section 19.01 creates a statutory presumption for property owned or controlled by members of criminal organizations (as defined in section 467.1 of the *Criminal Code*). In basic terms, it provides that any property owned or controlled by a member of a criminal organization, or property transferred by a member of a criminal organization for less than fair market value is presumed to be proceeds of unlawful activity in the

116 Ibid, s 14.11.
117 Ibid, s 14.11.
118 Ibid, s 17.
119 Ibid, s 18.
120 Ibid, s 19.

absence of evidence to the contrary.[121] One of the primary purposes of that provision is to address the prevalence of nominee ownership within criminal organizations.

Interestingly, section 19.03 creates a statutory presumption for cash or negotiable instruments found in close proximity to a controlled substance, or bundled or packaged in a manner that is not consistent with standard banking practices.[122]

While not directly relevant to money laundering, the *Civil Forfeiture Act* also contains a number of statutory presumptions relating to instruments of unlawful activity. One is section 19.04, which provides that a motor vehicle, trailer, vessel, aircraft, or other conveyance is presumed to be an instrument of unlawful activity where certain types of firearms, controlled substances, and drug trafficking equipment are found inside. Another is section 19.05, which provides that a motor vehicle is presumed to be an instrument of unlawful activity where the driver fails to stop within a reasonable period of time after being signalled or requested to stop or uses the motor vehicle to flee from the peace officer.

Part 5

Part 5 of the *Civil Forfeiture* Act contemplates the appointment of a director of civil forfeiture to carry out certain powers, duties, and functions under the statute, including the collection, use, and disclosure of information; the commencement of legal proceedings under section 3; and the management and distribution of property forfeited to the government. At the time of writing, the director of civil forfeiture is assisted by a team of nine staff members who work out of the Civil Forfeiture Office in Victoria as well as two program managers who have been seconded to the RCMP and the Vancouver Police Department to facilitate the exchange of information between law enforcement and the Civil Forfeiture Office.[123] Philip Tawtel, director of civil forfeiture, described the role of these program managers as follows:

> The first responsibility or duty they have is to be a primary point of contact for the police within that department to facilitate the police's understanding of the Civil Forfeiture Office and how the process to make a referral can be done. Those positions also facilitate the referrals of files from that department to the CFO, albeit indirectly. They cannot make a direct referral from them to the CFO. They are a CFO staff member. What they can do is they can compile the necessary package for review by a member of that police department who's authorized to make a referral. So they work alongside other police officers who are assigned to the asset forfeiture unit, and … their role is to … facilitate a referral to our office.

121 Ibid, s 19.01. Section 19.02 provides that proof that a person was convicted, found guilty or found not criminally responsible on account of a mental disorder in respect of a criminal organization offence is proof – in the absence of evidence to the contrary – that the person is a member of a criminal organization.

122 Ibid, s 19.03.

123 Evidence of P. Tawtel, Transcript, December 18, 2020, pp 12, 14.

> The second role they have is to assist … our office, with going back to those police departments if there are questions or follow up. So they're a point of contact for the director as well, and they may know who to reach out to within that department to follow up with the director's question.
>
> And finally, as I mentioned earlier, their last role is really to act as an educator and to facilitate an understanding of the office to the police officers in that department.[124]

When the Civil Forfeiture Office receives a file from law enforcement, it is assessed in accordance with an internal file acceptance policy, which mandates that all files referred to the Civil Forfeiture Office be reviewed in accordance with the following criteria:

- public interest factors such as actual or potential harm to individuals (particularly vulnerable individuals such as the elderly), the use of firearms or other weapons in the underlying criminal activity, the involvement of gangs or organized crime, money laundering, the presence of hard drugs, financial exploitation of vulnerable individuals, and harm or potential harm to law enforcement;
- the strength and adequacy of the available evidence (i.e., the likelihood of a successful forfeiture application);
- financial considerations (i.e., the estimated cost of obtaining a successful forfeiture as compared with the estimated financial benefit); and
- the interests of justice (i.e., whether it is in the interest of justice to pursue forfeiture in that particular case).[125]

While it is important for the Civil Forfeiture Office to be "judicious" in making file acceptance decisions, Mr. Tawtel explained that there are cases where the office will accept a file even if the costs of pursuing forfeiture will exceed the expected recovery:

> As a self-funding office, we have a responsibility to be judicious in how we make our decisions. So, it is important that we cover our costs … And while the costs aren't excessive and typically forfeitures far exceed the costs of running the office, we still take a close look and we scrutinize the value of the asset against the likely cost of the litigation.
>
> Now, that said, where the public interest is high, we will take on files where it's relatively clear from the outset that the cost is going to exceed the recovery.
>
> …

124 Ibid, pp 12–13.

125 Exhibit 389, Affidavit No. 1 of Philip Tawtel, exhibit E, p 54; Evidence of P. Tawtel, Transcript, December 18, 2020, pp 35–36.

> So [an] actual example – and it's easy to give one because it's happened more than a handful of times – would be the nuisance house in the community where there's a high volume of attendance of calls by the police, there's been serious crime, there's been drug trafficking, there's been assaults, there's been a number of very bad crimes taking place on the property, and those properties are frequently underwater. The value of the property is less than the mortgage. And in those cases, we will look at pursuing forfeiture, paying out the innocent interest holder, and getting that … house out of that community the best we can.
>
> Now, as noted, we know from the outset that there is going to be either no equity or a very small amount of equity to be taken from the property, and the legal costs will far exceed that. That said, we consider that a tremendous win for the community, and the anecdotal feedback we've had from the community is that was important to do.[126]

Importantly, the office relies exclusively on referrals from law enforcement agencies and does not generate any of its own files. Mr. Tawtel explained that the Civil Forfeiture Office does not have the investigative tools to be able to conduct a successful police investigation.[127] He also emphasized the need for caution in giving the Civil Forfeiture Office the ability to investigate unlawful activity in a manner similar to law enforcement:

> Well, obviously if you're putting investigators out on the street to conduct surveillance, there's a whole host of things that you will have to look at, which is: are they peace officers; what powers do they have; what protection do they have; what infrastructure do they have; … do [they] seize things; when they seize things, do they become exhibits. So, you're almost photocopying very much a policing model into the office. You have to have that infrastructure. And … one of the things is you don't want to be … stepping on – and I'll use that word "stepping on" – ongoing other investigations that you may not be aware of that police departments are doing.
>
> So, it's easy for … one police department to know what another police department may be working on because they have that natural integration, they can see [the information on police databases], they have a sense that they won't step on another investigation. If the [Civil Forfeiture] office goes down this sort of investigative capacity issue, we have to be careful that we aren't doing that. We don't want to ever be in a position where we're stepping on an ongoing criminal investigation. That's very important to us. And so, I think … there's going to have to be a lot of examination of what the scope and framework would be for an investigative capacity for the office.[128]

126 Evidence of P. Tawtel, Transcript, December 18, 2020, pp 35–37.

127 Ibid, pp 19–21 ("a successful police investigation requires the ability to meet with confidential informants to conduct surveillance, to issue special types of orders, tracking orders or surreptitious search warrants. So there is a whole infrastructure that would be required for the office to do that and the office simply does not have the tools or the legal structure for that").

128 Evidence of P. Tawtel, Transcript, December 18, 2020, pp 81–82.

From 2006 to 2019, the Civil Forfeiture Office obtained approximately $114 million in forfeited assets, including approximately $13.4 million in 2019 and $10.7 million in 2018.

Table 43.2 sets out the referrals received and accepted, as well as the recoveries from civil forfeiture, each year between 2006 and 2019.[129]

Table 43.2: Civil Forfeiture Office Referrals and Recoveries, 2006–2019

Year	Referrals Received	Referrals Accepted	Administrative Forfeiture	Recoveries from Forfeiture
2006	31	9	0	$62,357.06
2007	72	58	0	$2,925,748.42
2008	107	70	0	$2,580,128.84
2009	154	113	0	$2,854,102.07
2010	158	124	0	$4,894,756.57
2011	322	244	103	$14,454,324.17
2012	525	425	304	$9,462,495.20
2013	553	484	389	$12,064,310.35
2014	674	626	483	$11,083,795.31
2015	755	692	553	$12,431,010.55
2016	1,002	840	761	$7,610,681.23
2017	1,017	894	785	$9,831,725.02
2018	1,071	961	841	$10,694,244.68
2019	1,128	1,027	882	$13,472,014.31

Source: Exhibit 389, Affidavit No. 1 of Philip Tawtel, Exhibit H, p 66.

When viewed in light of the huge volume of illicit funds generated in this province each year, these numbers are surprisingly small. I expect that an increased focus on money laundering / proceeds of crime issues by law enforcement agencies will substantially increase the number and quality of referrals to the Civil Forfeiture Office. However, it is essential that the Civil Forfeiture Office take meaningful steps to "build out" the files it receives from law enforcement, in order to ensure that it more comprehensively targets unlawfully obtained assets and criminal instruments identified in the investigation or connected to the targets of the investigation (and their associates).

Organized crime groups, and others involved in serious criminal activity, including money laundering, should know that their actions will be the subject of focused attention by law enforcement. They should know that the assets they obtain from their

129 Exhibit 389, Affidavit No. 1 of Philip Tawtel, Exhibit H, p 66.

unlawful activity will be identified and vigorously pursued by a robust civil forfeiture agency, which uses the powerful tools at its disposal to deprive them of the profits of their unlawful activity and the instruments used to obtain those profits.

Mr. Tawtel was asked about the addition of investigators and analysts who would work to trace unlawfully obtained assets and instruments of crime. He said this was the "piece of the puzzle that's missing."[130] He also suggested that the addition of these capabilities would greatly assist the Civil Forfeiture Office in fulfilling its mandate:

> That's the piece of the puzzle that's missing. Between the director and counsel there was a piece missing, and that piece missing is financial investigators and analysts who could facilitate the tracing while the director is busy working on files coming into the office. So, if the director and counsel are left alone to do that work, it's a lot like trying to change a tire while the car is moving. There's just too much happening and too much volume of work coming in.
>
> So I would agree with you that now that we've familiar with the legislative tools that have been provided to us … having those positions would support that work.[131]

While these investigators should not be given traditional law enforcement powers, they should make use of information in government and commercial databases – such as the Land Owner Transparency Registry - as well as other open-source information concerning the activities and assets of the individuals that are the subject of law enforcement referrals. The Civil Forfeiture Office should not be shy to bring in outside expertise, such as forensic accountants or investigators, to support their efforts to identify and target illicit assets and build their case against them. It should also, with the assistance of counsel, leverage the relatively new powers in sections 11.01 to 11.04 and 22.02 to 22.03 of the *Civil Forfeiture Act* to identify and target additional assets.

I see it as an essential step in the fight against money laundering that law enforcement agencies make money laundering / proceeds of crime issues a priority in investigations into profit-oriented criminal offences. The Civil Forfeiture Office must expand its focus from the forfeiture of the instruments of crime and low-value assets that were identified incidentally in law enforcement investigations, to the identification and forfeiture of significant and high-value assets owned or controlled by those involved in serious criminal activity *even if those assets have not been identified by law enforcement.*

I therefore recommend that the Civil Forfeiture Office significantly expand its operational capacity by adding investigators and analysts capable of identifying and targeting unlawfully obtained assets and instruments of unlawful activity beyond those identified in the police file.

130 Evidence of P. Tawtel, Transcript, December 18, 2020, pp 47–48.

131 Ibid, pp 47–48.

Recommendation 99: I recommend that the Civil Forfeiture Office significantly expand its operational capacity by adding investigators and analysts capable of identifying and targeting unlawfully obtained assets and instruments of unlawful activity beyond those identified in the police file.

Part 6

Part 6 of the *Civil Forfeiture Act* establishes a process for the distribution of funds following a final order of forfeiture under section 5 or the deemed forfeiture of property under section 14.10. In basic terms, any amounts received by the director through the civil forfeiture process (whether through the forfeiture of cash, the disposition of property, or a settlement agreement) must be paid into a special account in the consolidated revenue fund. Under section 27, the director may make payments out of the civil forfeiture account for any of the following purposes:

- compensation of eligible victims;
- prevention of unlawful activities;
- remediation of the effect of unlawful activities;
- administration of the statute, including any costs related to the preservation, management, or disposition of property;
- compliance with a court order; or
- other prescribed purposes (with the approval of the Minister of Finance).

From 2006 to 2019, the Civil Forfeiture Office obtained approximately $114 million in forfeited assets. Of those funds, it distributed approximately $55 million in crime prevention grants and $1.7 million in victim compensation (primarily to senior citizens who were victims of fraud). The remaining funds were used to run the office.

One of the benefits of the self-funding model adopted in British Columbia is that the Civil Forfeiture Office has control over its budget and does not rely on government to fund its operations. At the same time, the experiences of other jurisdictions – including the UK, Ireland, and Manitoba – suggest that the government-funding model would give the Civil Forfeiture Office more flexibility to pursue files that will cause significant disruption to organized crime groups – even if those cases are not "commercially viable" in the sense that the value of the asset exceeds the costs of pursuing a forfeiture action.

After considering the relative benefits of the two models, I believe that the province should transition from a self-funding model to a government-funded model similar to that in place in Ireland and Manitoba. The primary purpose of civil asset forfeiture is to serve the public interest by ensuring that the profits of unlawful

activity do not accrue and accumulate in the hands of those who carry out such activity, and the Civil Forfeiture Office should be free to pursue cases that have the greatest impact on organized crime groups, regardless of whether those cases are commercially viable.

I also expect that the increased law enforcement focus on money laundering issues / proceeds of crime recommended in Chapter 39, and the expanded role of the Civil Forfeiture Office in targeting illicit assets, will lead to the seizure and forfeiture of a significantly increased volume of illicit assets (and, in turn, revenue). The government should determine the allocation of that revenue. It may be, for example, that some of the proceeds generated from the sale of unlawfully obtained assets could appropriately be used to fund core government services such as health care.

I therefore recommend that the Province transition the Civil Forfeiture Office from a self-funded agency to a government-funded agency, in which the revenue generated by the Civil Forfeiture Office flows to government.

Recommendation 100: I recommend that the Province transition the Civil Forfeiture Office from a self-funded agency to a government-funded agency, in which the revenue generated by the Civil Forfeiture Office flows to government.

Of course, the risk of moving to a government funding model is that the operations of the Civil Forfeiture Office are not properly resourced. It is essential that the Province ensure that the Civil Forfeiture Office has the resources and personnel necessary to identify, target, and pursue unlawfully obtained assets.

Part 7

Part 7 of the *Civil Forfeiture Act* contains a number of general provisions, including a regulation-making power that was used by the provincial government to enact the *Civil Forfeiture Regulation*. It also provides that the limitation period for commencing legal proceedings is 10 years from the date on which the unlawful activity occurred.

Unexplained Wealth Orders

On November 22, 2019, the BC Ministry of Finance prepared a briefing document for the deputy minister recommending that the Province proceed with the development of an unexplained wealth order regime in British Columbia.[132] The briefing document suggested using the UK's unexplained wealth order legislation as a model and the proposal was subsequently approved by the deputy minister.[133] However, I understand

132 Exhibit 62, Ministry of Finance Briefing Document – Unexplained Wealth Orders (November 22, 2019).
133 Ibid, p 6.

that the development of that regime was put on hold to allow this Commission to study and make recommendations on this issue.[134]

After reviewing the international evidence with respect to unexplained wealth orders, and the challenges experienced by the Province in targeting money laundering and proceeds of crime, I am persuaded that such orders are a useful and effective tool in the fight against money laundering, and that the Province should proceed with its plan to introduce an unexplained wealth order regime similar to that in place in the UK.[135]

In the United Kingdom, unexplained wealth orders are primarily an investigative tool that allow an enforcement authority (defined as the National Crime Agency, Her Majesty's Revenue and Customs, the Serious Fraud Office, and various other law enforcement agencies) to apply for an order requiring a person to provide information concerning the nature and extent of that person's ownership interest in a particular property, and how they obtained that property.[136] Such applications are filed before civil forfeiture proceedings are commenced and are almost invariably accompanied by an application for a restraint order preventing the property from being sold or transferred.

Under the UK system, where the recipient of an unexplained wealth order fails, without reasonable excuse, to comply with the requirements of that order, a presumption arises that the property was obtained through unlawful conduct. Note, however, that the presumption arising under that provision is rebuttable, meaning that the recipient of the unexplained wealth order is still, in the civil recovery proceedings, able to rebut the presumption by tendering evidence establishing that the property was *not* obtained through unlawful conduct.[137]

While the primary purpose of the UK legislation was to address the movement of illicit wealth into London through the purchase of real estate and other high-value goods, I see merit in the use of unexplained wealth orders to address the accumulation of illicit wealth by organized crime groups and others involved in serious criminal activity in this province. There are often circumstances in which law enforcement agencies have reasonable grounds to suspect that a particular asset *was* obtained or derived from the commission of a criminal offence, but simply do not have the evidence required to prove that fact to the civil standard of proof. Through the introduction of an unexplained wealth order regime, the state can require a property owner to produce information concerning the provenance of a suspicious asset (which may assist the authority in deciding whether to pursue civil forfeiture).

134 Evidence of M. Sieben, Transcript, June 12, 2020, p 21.

135 I would, however, change some of the prerequisites for the issuance of such an order to allow the Civil Forfeiture Office to make more effective use of unexplained wealth orders in British Columbia.

136 For the proposition that unexplained wealth orders are an investigative tool, see Evidence of H. Wood, Transcript, December 20, 2020, p 11 ("… speaking in the UK context, the unexplained wealth order is purely an investigative tool. It sits under part 8 of the *Proceeds of Crime Act 2002* with a range of other investigative tools that you may be familiar with from your domestic legislation, such as production orders, disclosure orders, account monitoring orders. So it should absolutely in the UK context be seen as an investigative tool to be used to gather information and evidence to support a wider investigation").

137 *Proceeds of Crime Act 2002*, s 362C(2).

Where the asset was purchased with legitimate funds, it should not, in most cases, be difficult for the property owner to furnish evidence of that fact. People who legitimately own valuable assets, such as houses and luxury vehicles, are "uniquely well placed" to establish the provenance of those assets[138] and it is difficult to think of a situation where a person who owns a valuable asset would be unable to furnish evidence as to the source of that asset.[139] In providing this evidence, the owner of the asset would likely *avoid* the prospect of civil forfeiture proceedings. Where, however, an asset was purchased with illicit funds, the inability to account for the provenance of the asset will allow the Civil Forfeiture Office to target that asset in a civil forfeiture proceeding.

While unexplained wealth orders could be used in a wide variety of circumstances, they may be particularly useful in targeting the assets of individuals further up the criminal hierarchy, who are often involved in highly lucrative but less visible forms of criminal activity. If used properly, unexplained wealth orders also allow authorities to address problems such as nominee ownership, where those involved in criminal activity put unlawfully obtained assets into the hands of a family member or associate who is not involved in criminal activity with a view to insulating the asset from a forfeiture order.

An unexplained wealth order issued to a person suspected to be a nominee owner will force that person to provide evidence with respect to the nature of their interest in the property and provenance of the asset, or risk having the asset forfeited to the state in accordance with the *Civil Forfeiture Act*.

Another benefit of unexplained wealth orders is that they may discourage foreign corrupt officials and others involved in criminal activity from moving their illicit wealth to British Columbia through the purchase of real estate and other valuable assets.

One thing that has become apparent during the Commission process is that many of those involved in profit-oriented criminal activity are – especially at the higher end – rational actors who are aware of the different regulatory requirements in different jurisdictions, and consider those differences in determining where to place and launder their ill-gotten gains. Faced with the prospect of having to prove the provenance of a particular asset to avoid a forfeiture order, these offenders may choose to place their wealth in another jurisdiction.

While some have suggested that unexplained wealth orders give rise to concerns about the presumption of innocence and the right to silence,[140] it is important to understand that the *Civil Forfeiture Act* does not impose any criminal penalties, and that any information provided in response to such an order cannot be used in a criminal prosecution. Moreover, I agree with Ms. Murray's view that most, if not all, of the information provided in response to an unexplained wealth order could be obtained through the civil discovery process once a civil forfeiture action has been commenced.

138 Evidence of K. McMeel, Transcript, December 16, 2020, p 53.

139 Even if documents are not available to show the provenance of a particular asset, an affidavit setting out the circumstances in which the property was purchased should be sufficient to comply with the order.

140 Closing submission, BC Civil Liberties Association, pp 12–14.

I am strengthened in my view that unexplained wealth orders are a viable solution by a legal opinion on the constitutionality of a UK-style unexplained wealth order regime prepared for the Commission by the Honourable Thomas A. Cromwell, CC.[141]

I therefore recommend that the Province proceed with its plan to develop an unexplained wealth order regime in British Columbia.

Recommendation 101: I recommend that the Province proceed with its plan to develop an unexplained wealth order regime in British Columbia.

Like the regime in place in the United Kingdom, the new regime should allow the Civil Forfeiture Office to apply for an order before the commencement of civil forfeiture proceedings requiring the person identified in the order to produce information and documents concerning:

- the nature and extent of the person's ownership interest in the property;
- the source of any funds used to purchase the property;
- the particulars of any trust arrangements concerning the property; and
- any other information specified by the court.

It will be important that such orders are sought with a high degree of specificity to avoid any uncertainty about whether the order has been complied with. Experiences of other jurisdictions have shown that where orders are drafted with insufficient particularity, non-compliance is difficult to establish.

Where the person does not provide the required information within the time period set out in the order, a presumption should arise that the property was obtained or derived as a result of unlawful activity. The legislation should also include significant consequences for the provision of false or misleading information,[142] and make it clear that any information provided in response to the order cannot be used against the person in a criminal prosecution.

The Province will have work to do in drafting or amending legislation to support the new regime. I do not intend to set out in detail the architecture of the regime the Province should implement. I will, however, offer my thoughts on some of the features

141 A copy of that opinion is attached as Appendix I. Submissions in response to the opinion were made by two participants – the Province and the BC Civil Liberties Association. Both of those submissions have been posted on the Commission's website.

142 In Manitoba, those who provide false or misleading information are liable, in the case of an individual, to a fine of not more than $10,000, or to imprisonment for a term of not more than six months (or both), or, in the case of a corporation, to a fine of not more than $25,000. In British Columbia, significantly higher penalties will be necessary to have any real deterrent effect.

I believe would enhance the regime and which I would encourage the Province to consider.

Legal Standard for Issuance of an Unexplained Wealth Order

While the international experience shows that different standards could be adopted for the issuance of an unexplained wealth order, I tend to think that a reasonable suspicion standard is the best fit for British Columbia. I view unexplained wealth orders primarily as an *investigative* tool that allows the Civil Forfeiture Office to gather evidence about the provenance of specific assets and make informed decisions about whether or not to pursue a civil forfeiture action. By setting a relatively low standard for the issuance of such an order, the Civil Forfeiture Office will be able to cast a wider net and pursue information about a larger number of assets than it would if a higher standard was adopted (such as reasonable grounds to believe). I note that it is always open to the owner to avoid the presumption by responding to the order with evidence of lawful ownership.

I also note that the reasonable suspicion standard is employed to obtain information in various other contexts, including under the *Criminal Code*, where the ultimate outcome could be a criminal conviction and a loss of liberty.

Who Should the Order Apply To?

I tend to think that both politically exposed persons[143] and those involved in unlawful activity should be brought within the regime. However, the criteria for issuance of an unexplained wealth order should be different for each category of recipient.

For politically exposed persons, I tend to think that the order should issue where there are reasonable grounds to suspect that (a) the person is a politically exposed person; and (b) the person's known sources of income and assets would have been insufficient to enable them to acquire the property legitimately.

For those involved in unlawful activity, it makes sense for the order to issue where there are reasonable grounds to suspect that the legal or beneficial owner of the property has been involved in unlawful activity that resulted in or is likely to have resulted in the person receiving a financial benefit within the past 10 years. For persons in this category, I would not be inclined to include a requirement to prove that the person's known sources of income and assets would have been insufficient to enable them to acquire the property.

The UK and Australian experiences demonstrate that it is extraordinarily difficult to prove that the respondent's known sources of income and assets would have been

143 For the purpose of this discussion, I will use the term politically exposed person to include politically exposed persons and heads of international organizations, as well as family members and close associates of politically exposed persons and heads of international organizations.

insufficient to enable him or her to acquire the property, particularly where the potential recipient is a criminal who does not "earn a salary [or have] a steady stream of predictable income."[144] Moreover, it would be difficult, if not impossible, to make out this requirement where the target also runs a legitimate business.

It is also essential that the provision be drafted so that it addresses the problem of nominee ownership, where a person involved in profit-oriented criminal activity puts *legal* ownership of the property in the name of another person to insulate the property from a potential forfeiture order. The legal owner of the property may not be involved in any criminality and may have legitimate sources of income or wealth. Nevertheless, the order should be available to target such assets.

It is also important to address the situation where a criminal "gifts" an asset obtained from criminal activity to a friend or family member (such as a spouse, child, or parent). In my view, the Province has a legitimate interest in seeking forfeiture of that asset even where the recipient is not holding the property as a nominee owner.

Monetary Threshold

I would suggest that the unexplained wealth order regime be reserved for assets with a fair market value of $75,000.00 or more. That is, the state should be required to establish that the fair market value of the property exceeds $75,000. I have suggested a $75,000 threshold to ensure that the provision is only used to target higher value assets. I also note that in respect of assets worth less than $75,000.00 (except real property), the administrative forfeiture provisions in the *Civil Forfeiture Act* already provide for an efficient method of targeting those assets.

Time Limitation

One concern associated with unexplained wealth orders is the challenges faced by owners required to establish the legitimacy of property acquired many years ago: witnesses with relevant information may no longer be available or documents may have been lost or destroyed.

I would therefore encourage the Province to consider limiting the reach of the legislation to assets acquired by the respondent within a prescribed time period.

Conclusion

I strongly believe that the civil asset forfeiture regime is an underutilized tool in the fight against money laundering, and that more should be done to identify and target unlawfully obtained assets owned or controlled by those involved in criminal activity.

144 Evidence of N. Skead, Transcript, December 17, 2020, pp 54–55.

While I anticipate that a by-product of the increased law enforcement focus on money laundering / proceeds of crime issues will be an increase in referrals to the Civil Forfeiture Office, it is important for the Civil Forfeiture Office to be more proactive in identifying and targeting unlawfully obtained assets owned or controlled by organized crime groups and others involved in serious criminal activity.

Unexplained wealth orders will provide a useful tool to the Civil Forfeiture Office in carrying out that work. However, they cannot be viewed as a substitute for the significant investigative and analytical work that must be undertaken by that office.