Civil Forfeiture and Money Laundering Cases: An Emerging Role for Investigative and Forensic Accountants

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Contents

Executive Summary:

Canada's legal system codifies criminal law at the federal level, while civil laws are the responsibility of the provinces and territories. This division has given rise to a situation where provincial civil forfeiture regimes can target property that is the instrument or the proceeds of crime, separate and apart from any criminal proceedings against the related individuals.

As Canada continues to struggle with the criminal prosecution of money laundering offences, civil forfeiture is increasingly being seen as a way to target money launderers by seizing their ill-gotten gains. Critics, meanwhile, have called civil forfeiture a punitive alternative to criminal prosecution which does not provide those targeted with the same level of protections under the *Charter of Rights and Freedoms* as in criminal cases.

In British Columbia, the Civil Forfeiture Office has started pursuing proceeds of crime cases, including those involving money laundering. Money laundering cases are complex, and civil forfeitures in these cases will require expertise from trained experts in financial investigations.

The skills of the investigative and forensic accountant can help identify assets that are the proceeds of unlawful activity, and help prove that those assets are in fact the proceeds of unlawful activity. Using their expertise in areas such as asset tracing and indirect methods of proving income, investigative and forensic accountants have an important role to play in civil forfeiture cases involving money laundering.

Objectives and Methodology:

The objective of this report is to examine the emerging use of civil forfeiture in cases of money laundering, focusing on British Columbia. The report begins with a definition and brief history of civil forfeiture in Canada, including a review of its past uses and effectiveness. The developing use of civil forfeiture in money laundering cases is then examined and compared with criminal money laundering prosecutions. The use of civil forfeiture in money laundering cases in the United States and the United Kingdom is considered, and differences between civil forfeiture regimes in various provincial jurisdictions in Canada, particularly British Columbia and Ontario, are reviewed. The report then examines criticisms of civil forfeiture and the way it has been applied.

In the next part of the report, a detailed review of a failed criminal prosecution involving money laundering in BC is undertaken. While the criminal case collapsed, the civil forfeiture matter is ongoing, and the BC Civil Forfeiture Office's involvement in the case is examined.

The BC Civil Forfeiture Office is analyzed, from the office's structure and operations, to the tools it has available to enforce the BC *Civil Forfeiture Act*, and how these are used in cases of money laundering.

Finally, the report looks at the role of the investigative and forensic accountant ("IFA") in civil forfeiture cases involving money laundering in British Columbia. Objectives for the IFA are considered, and some tools to achieve those objectives are studied. The report looks at some potential problems that could be encountered by the IFA, and a possible future tool to combat money laundering in the form of Unexplained Wealth Orders.

The methodology employed to create this report included a document and literature review of publicly available materials including academic literature and reports, government commissioned reports and inquiries, civil forfeiture laws and regulations, news stories, website postings, legal case rulings, affidavits, and transcripts of testimony. A list of references can be found at the end of this report.

The main research questions this report seeks to answer are:

1. Why are civil forfeiture regimes, and British Columbia's in particular, being increasingly used to seize assets in cases involving criminal money laundering?
2. What role(s) could investigative and forensic accountants play in these cases?

Civil Asset Forfeiture Defined:

Civil asset forfeiture, also referred to as non-conviction based (or "NCB") forfeiture, is a remedial statutory device designed to recover the instruments used to facilitate unlawful activity, as well as the proceeds of unlawful activity.[i]

As civil law, civil asset forfeiture is under provincial jurisdiction, with each province and territory responsible for establishing their own laws.

In *British Columbia (Director of Civil Forfeiture) v. Onn, 2009 BCJ No. 1867*, Justice Garson stated "The purpose of the [BC Civil Forfeiture] Act is threefold:

(a) to take the profit out of unlawful activity;

(b) to prevent the use of property to unlawfully acquire wealth or cause bodily injury; and

(c) to compensate victims of crime and fund crime prevention and remediation."[ii]

While the origins of Canada's forfeiture laws can be traced back to the Criminal Code of 1892 *(Criminal Code, 1892, S.C. 1893, c. 32, s. 569)*, civil forfeiture laws are much more recent. Alberta and Ontario were the first provinces to enact civil forfeiture regimes in 2001. Other provinces followed, with Manitoba enacting legislation in 2004, British Columbia in 2005, Saskatchewan in 2005, Nova Scotia in 2007, Quebec in 2007 and New Brunswick in 2010. The only provinces without civil forfeiture laws enacted are Prince Edward Island and Newfoundland and Labrador.[iii] Nunavut is the first Canadian Territory to have passed civil forfeiture legislation in 2017.

The various acts by province and territory are as follows:

Alberta	Victims Restitution and Compensation Payment Act, S.A. 2001, c. V-2.5 2001
British Columbia	Civil Forfeiture Act, S.B.C. 2005, c. 29
Manitoba	Criminal Property Forfeiture Act, C.C.S.M. 2004, c. C306
New Brunswick	Civil Forfeiture Act, S.N.B. c.C-4.5, 2010
Nova Scotia	Civil Forfeiture Act, S.N.S. 2007, c.27
Nunavut	Unlawful Property Forfeiture Act, SNu 2017, c. 14
Ontario	Civil Remedies Act, 2001, S.O. 2001, c. 28
Quebec	Act respecting the forfeiture, administration, and appropriation of proceeds and instruments of unlawful activity, R.S.Q. c. C-52.2
Saskatchewan	Seizure of Criminal Property Act, S.S. 2009, c. S-46.002 (formerly S.S. 2005, c. S-46.001)

Civil forfeiture laws are considered to be *in rem*, a Latin term meaning "against a thing."[iv] The property itself is the subject of the proceedings, not the person using or owning the property.

The Use and Effectiveness of Civil Forfeiture Legislation:

In evaluating the effectiveness of civil forfeiture legislation, the total recoveries are one measure of the success in applying these laws. In comparing British Columbia and Ontario, the BC Civil Forfeiture Office ("CFO") had, from 2006 until 2017 (12 years), received over 4900 file referrals from law enforcement agencies, resulting in the forfeiture of $73 million.[v] By 2020, the total recoveries from the CFO have increased to approximately $114 million in forfeited assets. Of this total, approximately $55 million was spent on crime prevention grants, and $1.7 million went to compensating victims. [vi]

In comparison, Ontario's Civil Remedies for Illicit Activities Office (CRIA) has from 2001 to 2014 (14 years) recovered total proceeds of $39 million.[vii]

A large majority of cases in both provinces have involved cash seizure and drugs.[viii]

There is limited information regarding the effectiveness of civil forfeiture regimes in reducing crime. Research from the US, Australia, and the UK has found that civil forfeiture regimes have little impact on criminal organizations. As of yet, none of Canada's provincial civil forfeiture regimes have had their effectiveness reviewed by provincial auditor generals. [ix]

In court, civil forfeiture laws were challenged as unconstitutional in the case *Chatterjee v. on Ontario (Attorney General), 2009 SCC 19, [2009] 1 S.C.R. 624*. The Supreme Court of Canada found that the forfeiture provisions under the *Ontario Civil Remedies Act* are constitutional. The court noted there is a degree of overlap between federal and provincial powers, "and if the enactments of both levels of government can generally function without operational conflict they will be permitted to do so."[x] The practical and

intended effect of civil forfeiture laws is to take the profit out of crime and to deter its present and would-be perpetrators, and the court viewed these as valid provincial objects.[xi]

British Columbia's Civil Forfeiture Office has a program of administrative forfeiture, in addition to judicial forfeiture, as set out in Part 3.1 of the BC *Civil Forfeiture Act* ("CFA"). Introduced in 2011, administrative forfeiture applies to assets in the hands of a government agency worth less than $75,000, where there is not a charge, and excludes real property. Administrative forfeiture allows the CFO to forfeit property directly without requiring a court process, unless the forfeiture is disputed. Approximately 80% of property in administrative forfeiture is not disputed, so court time and costs are reduced through this process.[xii]

Very few cases of civil forfeiture end up in court, with most either uncontested or settled beforehand. In the vast majority of both administrative and judicial civil forfeiture cases, the CFO succeeds in realizing some level of forfeiture.[xiii]

The Anti-Money Laundering Connection:

Money laundering is a criminal offence in Canada under Section 462.31 of the *Criminal Code*.

Money laundering is defined as the process used to disguise the source of money or assets derived from criminal activity.[xiv] In practice, this means making money obtained through criminal activity appear as if it came from legitimate means. This is achieved in three steps:

1. Placement: Where the launderer introduces illegal profits into the financial system.
2. Layering: Where the launderer engages in activities to distance the funds from their source.
3. Integration: Where the funds re-enter the legitimate economy. The launderer may choose to invest the funds into real estate, luxury assets, or business ventures.[xv]

In 2000, the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act (S.C. 2000, c. 17)* ("PCMLTFA") was passed to help detect and deter money laundering and the financing of terrorist activities.[xvi] The act established the Financial Transactions and Reports Analysis Centre of Canada ("FINTRAC"), Canada's Financial Intelligence Unit ("FIU"), as the agency responsible for the collection, analysis and disclosure of information to assist in the detection, prevention and deterrence of money laundering and terrorist financing in Canada and abroad.[xvii]

The offence of money laundering is prosecuted at the federal level. Under the *Criminal Code*, money laundering offences are subject to criminal asset forfeiture provisions under Section 462.37. If an offender is convicted of money laundering, then a forfeiture ordered may be imposed if the court is satisfied, on a balance of probabilities, that the property was obtained through the commission of the offence. Without a conviction, the court must be satisfied beyond a reasonable doubt that the property is proceeds of crime. These standards for criminal forfeiture are higher than for provincial civil forfeiture regimes. Unlike civil forfeiture, criminal forfeiture is an *in personam* order, an action against the person.

Differences between criminal and civil asset forfeiture:

	Criminal forfeiture	***Civil forfeiture***
Action	Against the person (*in personam*): part of the criminal charge against a person.	Against the thing (*in rem*): judicial action filed by a government against the thing.
Timing	Imposed as part of a criminal sentence.	Filed before, during, or after criminal conviction, or even if there is no criminal charge against a person.
Forfeiture	Forfeits defendant's interest in the property.	Forfeits the thing itself, subject to innocent owners.

[xviii]

Proceeds of crime or unlawful activity targeted by civil forfeiture laws are proven based on a balance of probabilities, whether or not there is a successful criminal prosecution.

FINTRAC assists in the detection, prevention and deterrence of money laundering and the financing of terrorist activities by collecting information from reporting entities. Reporting entities that are required under the PCMLTFA to report suspicious transactions, large cash transactions, electronic funds transfers, terrorist property and casino disbursements consist of:

- Financial entities such as banks;
- Life insurance companies, brokers, and agents;
- Money services businesses;
- Agents of the Crown that sell money orders;
- Accountants and accounting firms carrying out certain activities on behalf of clients;
- Real estate brokers, sales representatives and developers carrying out certain activities;

- Casinos;
- Dealers in precious metals and stones; and
- Public notaries and notary corporations in BC when carrying out certain activities on behalf of clients.

FINTRAC analyzes information received and discloses the results to appropriate law enforcement authorities when it determines that there are reasonable grounds to suspect that the information would be relevant to investigating or prosecuting a money laundering offence or a terrorist activity financing offence.[xix]

Law enforcement agencies investigate the money laundering offences, and may also refer their findings to the provincial civil forfeiture office. In British Columbia, the BC Civil Forfeiture Office makes a determination whether statutory criteria for civil forfeiture are met, and the office has sole discretion in deciding whether to proceed with a case. In contrast, enforcement agencies in Ontario refer files to the Ministry of the Attorney General, which acts as a gatekeeper in determining whether statutory criteria are met for civil forfeiture. The approved referrals are then sent to Ontario's Civil Remedies for Illicit Activities Office.[xx] These processes allow a provincial civil forfeiture matter to proceed independently of a law enforcement agency's criminal investigation.

When the BC CFO was first established, the focus of the program was generally on property that was alleged to have been the instrument of unlawful activity, with the exception of cash and luxury vehicles that were also proceeds of unlawful activity.[xxi] The cases dealt primarily with the drug trade.

Civil forfeiture is increasingly being used as a tool in the fight against money laundering. In particular, the third phase of money laundering – integration, where the proceeds of crime are invested in other assets, is an area where civil forfeiture laws may be an effective instrument to seize ill-gotten gains.

Over the past few years, the BC CFO has been evolving from focusing reactively on "instruments of crime" to focusing proactively on "proceeds of crime," specifically targeting money laundering cases. These cases are generally more complex and will require trained financial investigators, including specifically forensic accountants, to engage in them.[xxii]

Criminal Money Laundering Prosecutions:

Canada's success rate in criminal money laundering prosecutions is poor. From 2000 to 2016, 321 of 1130 criminal cases resulted in a guilty verdict, or about 28%. The average conviction rate for criminal cases as a whole is closer to 63%.[xxiii]

In contrast, the "U.K. and the U.S. have been far more successful in prosecuting money launderers. Between 1999 and 2007, there were 7,569 money-laundering prosecutions in the U.K., resulting in 3,796 convictions (a roughly 50 per cent conviction rate). The most recent data available from the U.S. Department of Justice show that in 2015, 727 people were prosecuted for money laundering, with 615 being convicted – a rate of 85 per cent."[xxiv]

For BC in particular, the criminal case numbers are very low, with just 50 money laundering cases submitted to the BC Prosecution Service in total between 2002 and

2018. Of 34 accused being charged with at least one count of money laundering, only 10 were found guilty.[xxv]

The Financial Action Task Force ("FATF"), in its 2016 Mutual Evaluation Report, found that "Law enforcement results are not commensurate with the ML ["money laundering"] risk and asset recovery is low."[xxvi]

Criminal money laundering cases are notoriously difficult to prosecute. Canada's "extensive pre-trial disclosure requirements tend to bring complex laundering cases to a grinding halt."[xxvii]

"Money-laundering cases often involve millions of documents, overwhelming the time and staff that police and prosecutors can devote. The Supreme Court of Canada has recently imposed strict time limits on trials [in *R. v. Jordan (2016)*]. And reporting requirements in casinos, the land title office and luxury retail still have a long way to go to effectively track sources of cash."[xxviii]

Investigators from various police agencies interviewed in Dr. Peter German's *Dirty Money – Part 2* reported that "obtaining evidence sufficient to meet the burden of proof to obtain a conviction of laundering was onerous; that the return on investment of scarce police resources was low; that a case can typically take two years to conclude in court; and that storage costs will continue to accumulate for seized and restrained assets throughout the court process. As a result, a referral to the CFO was often viewed as a more efficient and effective strategy than to pursue criminal forfeiture."[xxix]

Civil Forfeiture in Money Laundering Cases in Other Countries:

United States of America

In the United States, the U.S. Department of Justice ("DOJ") has been using civil forfeiture as a tool specifically for money laundering enforcement.[xxx] As in Canada, U.S. federal civil forfeiture is an *in rem* action. Under 18 U.S.C. §§ 981(a)(1)(A) and 981(a)(1)(C), if property is determined to be the proceeds of "specified unlawful activity," ("SUA"), or if property is "involved in" money laundering violations, then such property is subject to civil forfeiture. The U.S. government pursues claims both within the U.S. and abroad. 28 U.S.C. § 1355 – allows the U.S. government to bring claims of civil forfeiture against property located outside of the U.S. While the DOJ may also prosecute individuals under criminal law, "civil forfeiture allows the DOJ to deprive bad actors of their illicit gains without subjecting the DOJ to the "beyond a reasonable doubt" standard of proof for criminal cases, or to issues involving the extradition of individuals to the United States."[xxxi]

United Kingdom

The power to recover assets in the U.K. derives from the *Proceeds of Crime Act 2002* ("POCA"). The *Criminal Finances Act 2017* introduced new asset recovery and investigation powers in POCA, and made amendments to existing powers. Unlike in Canada, where civil forfeiture is part of provincial jurisdiction, the POCA includes non-conviction based asset recovery powers.

In the U.K., the *Criminal Finances Act* was passed "to tackle money laundering, corruption, and terrorist financing."[xxxii] One notable new tool used to enforce the act has been the Unexplained Wealth Order ("UWO"). If a person is suspected of being

involved in criminal activity, and that person's procurement of assets is disproportionate to their income, enforcement agencies may apply to the High Court to issue a UWO. The UWO requires the respondent to explain how they obtained the property in question. If the respondent fails to provide an explanation, the property is presumed to have been obtained through ill-gotten gains, and the respondent's interest in the property is subject to civil recovery (the U.K. term for civil forfeiture).

UWOs have also been implemented in Australia, but are not in use in Canada. The 2019 report *Combatting Money Laundering in BC Real Estate,* from an expert panel chaired by Maureen Maloney, recommended that the BC government consider introducing Unexplained Wealth Orders in BC to complement the provinces civil forfeiture legislation.[xxxiii]

Overview of Differences Between Criminal Forfeiture and Civil Forfeiture Laws in Ontario and British Columbia:

Rule	***Criminal Code & Case Law***[xxxiv]	***Civil Remedies Act, 2001 (ON)***[xxxv]	***Civil Forfeiture Act [SBC 2005] CHAPTER 29 (BC)***
Property subject to forfeiture	Any property, benefit or advantage, within or outside Canada, obtained or derived directly or indirectly as a result of the commission in Canada or elsewhere of an indictable offence (**s. 462.3(1)**) Any property, within or outside Canada, that is used or intended to be used that is used in any manner in connection with the commission of an indictable offence (**s. 2**)	Real or personal property, and includes any interest in property acquired, directly or indirectly, in whole or in part, as a result of an offence under an Act of Canada, Ontario or another province or territory of Canada, or elsewhere (**s. 2**)	The whole of an interest, or the portion of an interest in property that is proceeds of unlawful activity. Also applies to property that is an instrument of unlawful activity. Applies only with respect to property or an interest in property located in British Columbia. (s.**3**)
Standard of proof for forfeiture	If convicted, then it is proof on a balance of probabilities that property is proceeds of crime, otherwise it is proof beyond a reasonable doubt (**s. 462.37(1)-(2)**)	The balance of probabilities applies to all proceedings (**s. 16**)	Findings of fact in proceedings and the discharge of any presumption are to be made on the balance of probabilities. (s. **16**)
Applicable Rules of Evidence	The criminal law rules of evidence apply to all proceedings. (*R. v. Mac*)	The rules of the civil court apply to all proceedings. (**s. 15.6**)	Supreme Court Civil Rules (s.**15.01**)

In British Columbia, the *Civil Forfeiture Act* has provisions that presume that property is the proceeds of unlawful activity in certain cases, and it is the responsibility of the respondent seeking to keep their property to challenge the forfeiture order and justify why they should keep their property.[xxxvi] Furthermore, civil forfeiture cases do not require criminal charges or conviction. Section 18 of the CFA states "an unlawful activity may be found to have occurred even if (a) no person has been charged with an offence that constitutes the unlawful activity, or (b) a person charged with an offence that constitutes the unlawful activity was acquitted of all charges in proceedings before a criminal court or the charges are withdrawn or stayed or otherwise do not proceed." There is a 10-year limitation of commencing civil forfeiture proceedings from the time the alleged unlawful activity occurred.

Unlike British Columbia, Ontario does not have provisions for administrative forfeiture for smaller, undisputed claims.

New Tools for the BC CFO

In November 2019, the BC *Civil Forfeiture Act* was amended to grant new powers to the CFO. A Director of the CFO now has the power to deliver a notice to a financial institution under Form 5, compelling the institution to deliver certain non-financial information to confirm the existence of a bank account. If appropriate, a Director may then seek a court order restraining the assets so they cannot be dissipated. Form 6 was also introduced as a notice to produce information about registered interest holders in a property.

Rebuttable presumptions were created as part of the 2019 amendments. These include that cash in excess of $10,000 found in proximity to a controlled substance, or bundled or

packaged in a manner not consistent with standard banking practices is proof, in the absence of evidence to the contrary, that the cash or negotiable instruments are proceeds of unlawful activity. Similarly, if a firearm, controlled substance, or other equipment relating to trafficking a controlled substance is found in a vehicle, it is considered proof, in the absence of evidence to the contrary, that the motor vehicle or trailer is an instrument of unlawful activity. Use of a motor vehicle to flee from a peace officer, or failing to stop for a peace office, results in a similar presumption that the motor vehicle is an instrument of unlawful activity.

Criticism of Civil Forfeiture:

In his thesis *Forfeited: Civil Forfeiture and the Canadian Constitution*, Joshua Krane argues that "Canadians have failed to heed warnings from the U.S. about the dangers of civil forfeiture and have failed to put in place adequate safeguards to protect the rights of Canadians."[xxxvii]

He contends that civil forfeiture regimes are an end-run around the protections provided under criminal law. "By creating forfeiture regimes using the property and civil rights power, the provinces legislated around many of the procedural and evidentiary standards imposed by the courts as well as by Parliament itself."[xxxviii]

Krane argues that civil forfeiture has a primarily punitive, rather than a remedial, purpose, which should make it a matter of criminal law, where there is a presumption of innocence and the protection of the *Charter*. Furthermore, the provincial civil legislation, such as Ontario's *Civil Remedies Act, 2001*, completely overlaps with the *Criminal Code* provisions for forfeiture.

There is no enshrined property right in the Canadian constitution. The *Canadian Charter of Rights and Freedoms* provides legal rights to those "charged with an offence," under Section 11. Since civil forfeiture laws are *in rem*, no person is charged, and the rights of the property owners are less clear. In *R. v. Wigglesworth*, the Supreme Court of Canada found that *Charter* rights might apply to civil proceedings where the defendant is not "charged with an offence," but faces a consequence which is punitive in nature.[xxxix] Nevertheless, individuals fighting civil forfeiture applications do not have the same level of procedural protections that accused criminals have.

In their 2017 article *Civil Forfeiture in Canada*, authors From, Bolger and Phillips claim that while civil forfeiture laws "were originally intended to deter crime and compensate victims," the purpose has changed and the laws have "instead become a supplement or alternative to the criminal law."[xl] Individuals can have their property forfeited, even if they have not been convicted of a crime. The authors contend that civil forfeiture "should only be available after a property owner has been found guilty of a provincial offence." They also argue that judges should be able to impose proportionality on forfeiture orders, to make the "punishment" fit the "crime."

The BC Civil Liberties Association ("BCCLA") has criticized the BC *Civil Forfeiture Act* as imposing punishments for alleged unlawful conduct without criminal convictions or due process. Their position is that "the presumption of innocence is a core value under the *Charter of Rights and Freedoms*, but civil forfeiture creates a presumption of guilt"[xli] under certain provisions in the CFA.

Other criticisms from the BCCLA include that the self-funding model may pervert the purpose of CFO; the cost of defending against a claim is high and legal aid is not

available in civil forfeiture matters, creating barriers to justice for poorer people; and that the overall effectiveness of civil forfeiture in reducing crime is questionable.[xlii]

The Hells Angels Challenge the Law

On June 11, 2020, the BC Supreme Court ruled that the CFO could not seize three Hells Angels clubhouses based on a belief that they would be used for future criminal activity.[xliii] The court found that "the future instrument of unlawful activity provisions of the Act are in pith and substance legislation in relation to criminal law which, by reason of s. 91(27) of the *Constitution Act, 1867*, falls within the exclusive jurisdiction of the federal government."[xliv] That portion of the law was therefore unconstitutional and struck down. Civil forfeiture based on past criminal activity remains unchanged.

The court battle with the Hells Angels lasted for years, with the Nanaimo clubhouse case originally launched in 2007. "Joseph Arvay, lead lawyer for the Hells Angels in the case, said not only was the law unconstitutional, but the office's interpretation of the legislation was an overreach. As well, he added, the office had "all the resources imaginable" to prove the clubhouses were instruments of crime and failed to do so."[xlv]

Letting Money Launderers off the Hook

Criticism has come from another direction, as well. Dr. Peter German, while investigating money laundering in British Columbia, found that there were chronic staffing shortages in the Federal and Serious Organized Crime Unit of the RCMP. The small number of officers in the unit were simply forwarding files to the CFO, and not pursuing criminal charges against money launderers. German argues that civil forfeiture is not a substitute for criminal prosecutions, and does not adequately punish offenders.[xlvi]

Charter Issues

Some civil forfeiture cases have been challenged under Section 8 of the *Charter*, which gives the right to be secure against unreasonable search and seizure. A case in British Columbia where the criminal charges were stayed after evidence was collected based on a flawed search warrant, resulted in the civil forfeiture case being dismissed. The court found that "exactly the same *Charter* principles apply to the manner in which that evidence is obtained as would be applicable in a criminal case."[xlvii]

In the case of the Hells Angels clubhouses, the court found that "in some circumstances, the relationship between the police and the CFO with the attendant possibility of conflict arising from the intersection of criminal law substance and procedure and civil forfeiture law substance and procedure may require not only evidentiary oversight by the Court but also engage *Charter* scrutiny."[xlviii]

The relationship of the *Charter* with civil forfeiture is still being examined by the courts, as more individuals defending their property in civil forfeiture cases are alleging violations of their *Charter* rights, as has occurred in the case study this report will examine next.

A Case Study:

The Vancouver Model

The Vancouver Model is a term coined by Dr. John Langdale of Macquarie University in Australia. It refers to a complex network of criminal alliances involving underground banks in BC's lower mainland. The underground banks launder money to and from China and other countries tied to North American illegal drug networks. Canadian real

estate, casinos and other businesses are linked to the network.[xlix] Under the model, organized crime profits from services at both ends of the transactions "referred to often as 'clipping the ticket both ways'."[l]

Dr. Peter German, who authored the 2019 report *Dirty Money – Part 2, Turning the Tide - An Independent Review of Money Laundering in B.C. Real Estate, Luxury Vehicle Sales & Horse Racing*, described the model as follows:

"In the Vancouver Model, Mainland Chinese citizens seek to relocate some of their wealth from China to Canada. They either wish to avoid currency controls or the eye of government. In China, they turn over the sum to be transferred to an underground banker, who notifies a correspondent underground banker in Greater Vancouver that the funds have been obtained and that a similar amount can be provided to the Chinese citizen upon arrival in Vancouver. No money moves between the countries, in hard cash or electronically. There will be a settling of accounts between the two bankers, possibly after the Chinese banker has arranged for the purchase of drugs or other illegal product to be shipped to his Canadian colleague or that person's designate. These arrangements can become very complex and involve multiple transactions, crime groups, and countries."[li]

The source of the Canadian cash provided to the Chinese citizen in Canada may come from the drug trade, the underground economy, or legitimate sources.

E-Pirate

On October 15, 2015, RCMP conducted 10 raids in the Richmond, BC, area as part of an investigation into an underground bank operating under the Vancouver Model. The investigation was dubbed "E-Pirate" by the RCMP, and centered on Silver International

Investments Ltd. ("Silver International") and Asian organized crime groups alleged to be involved in a $500-million-plus money laundering operation.[lii]

In the E-Pirate raids, RCMP seized 132 computers and cellphones, yielding 30 terabytes in data. Seized ledgers suggested that Silver International laundered $220 million in cash in BC, and sent over $300 million offshore in only one year.[liii] The investigation found that Silver International had access to "cash pools" in numerous locations, aside from China, including Mexico City and Bogota in Colombia.[liv] Most of Silver International's cash deposits were bundles of cash that appeared to be delivered in methods consistent with drug trafficking.[lv]

The FATF, in its 2018 report *Professional Money Laundering*, included a summary of the E-Pirate investigation into Silver International, with names redacted, as an example of underground banking used by professional money launderers. They describe the operation as follows:

"Subject X and his network of associates in British Columbia, Canada, are believed to have operated a PMLO ["Professional Money Laundering Organization"] that offered a number of crucial services to Transnational Criminal Organisations including Mexican Cartels, Asian OCGs ["Organized Crime Groups"], and Middle Eastern OCGs. It is estimated that they laundered over CAD 1 billion per year through an underground banking network, involving legal and illegal casinos, MVTSs ["Money Value Transfer Services"] and asset procurement. One portion of the ML ["Money Laundering"] networks illegal activities was the use of drug money, illegal gambling money and money derived from extortion to supply cash to Chinese gamblers in Canada.

Subject X allegedly helped ultra-wealthy gamblers move their money to Canada from China, which has restrictions on the outflow of fiat currency. The Chinese gamblers would transfer funds to accounts controlled by Subject X and his network in exchange for cash in Canada. However, funds were never actually transferred outside of China to Canada; rather, the value of funds was transferred through an Informal Value Transfer System. Subject X received a 3- 5% commission on each transaction. Chinese gamblers were provided with a contact, either locally or prior to arriving, in Vancouver. The Chinese gamblers would phone the contact to schedule cash delivery, usually in the casino parking lot, which was then used to buy casino chips. Some gamblers would cash in their chips for a "B.C. casino cheque", which they could then deposit into a Canadian bank account. Some of these funds were used for real estate purchases. The cash given to the high-roller gamblers came from Company X, an unlicensed MVTS provider owned by Subject X. Investigators believe that gangsters or their couriers were delivering suitcases of cash to Company X, allegedly at an average rate of CAD 1.5 million a day. Surveillance identified links to 40 different organisations, including organised groups in Asia that dealt with cocaine, heroin, and methamphetamine.

After cash was dropped off at Company X, funds were released offshore by Subject X or his network. Most transactions were held in cash and avoided the tracking that is typical for conventional banking. Subject X charged a 5% fee for the laundering and transfer service. As the ML operation grew, the money transfer abilities of Company X became increasingly sophisticated to the point where it could wire funds to Mexico and Peru, allowing drug dealers to buy narcotics without carrying cash outside Canada in order to cover up the international money transfers with fake trade invoices from China.

Investigators have found evidence of over 600 bank accounts in China that were controlled or used by Company X. Chinese police have conducted their own investigation, labelling this as a massive underground banking system."[lvi]

The Criminal Investigation

On March 1st and 2nd, 2021, the Commission of Inquiry into Money Laundering in British Columbia ("the Cullen Commission") heard testimony regarding project E-Pirate. The investigation involved the RCMP, municipal police forces, the B.C. Gaming Policy and Enforcement Branch, FINTRAC, B.C. Lottery Corp., and others.[lvii] Up to 300 investigators were working on E-Pirate at "the height" of the investigation[lviii], the largest and most complex investigation into casino money laundering to-date. Months of surveillance and investigating culminated in the October 15th, 2015, raids on homes, two illegal casinos, a travel firm, and Silver International.

The RCMP was initially reluctant to pursue the investigation. The B.C. Lottery Corp. over the course of two years eventually pressured the RCMP into starting E-Pirate.[lix] B.C. Lottery Corp. reported that since June 2012 there had been 140 suspicious transactions reported to law-enforcement totalling $23.5 million involving Paul King Jin, one of the central figures in the scheme, without any response from the RCMP.

Early in the investigation, FINTRAC was not monitoring Silver International at all, as the company was not registered as a Money Services Business, and under the Vancouver Model, no funds were actually being transferred to or from China. Silver International registered with FINTRAC in December 2015, two months after the police raids had already been executed.[lx]

Charges were laid September 28, 2017, for various criminal offences against Caixuan Qin and Jian Jun Zhu, the Vancouver couple who ran Silver International. Charges were not filed against Paul King Jin, despite his involvement precipitating the case.

The Criminal Case Falls Apart

On November 22nd, 2018, the crown stayed the charges against Caixuan Qin and Jian Jun Zhu. While the Public Prosecution Service of Canada has not disclosed the reasons for staying the charges, the RCMP completed an internal review in the investigation that indicated certain problems. Postmedia investigated how the case fell apart, and found that:

"RCMP investigative standards were not always met, that there were leadership problems resulting in breakdowns of supervision over investigative teams, and that in some instances proper documentation wasn't kept.

But the biggest complication in the case was the inadvertent disclosure of unredacted files to Silver's defence team and concerns that some of the information could identify confidential informants.

Most of the problems stemmed from a lack of experience on a criminal case of that magnitude, the sources said.

In the end, it was senior federal Crown prosecutors who made the decision to pull the plug. RCMP executive officers in B.C. agreed with the call."[lxi]

A civilian support staff person had inadvertently copied over redacted files prepared for disclosure with unredacted copies.

"Investigators working on E-Pirate continued to assert that the inadvertent disclosure was not a major issue and shouldn't affect the prosecution.

But Mountie specialists who manage confidential informants were meeting separately with [Federal Crown Prosecutor] Loda and expressing their concerns about the disclosed material. They said the E-Pirate investigators wouldn't be in a position to assess the risk to confidential informants because detailed information about informants is withheld from others in the RCMP."[lxii]

On November 22nd, 2018, Federal Crown Prosecutor Gerry Sair advised the court that the Crown would direct a stay of proceedings on all counts.

Global News also investigated the collapse of the case and found that:

"Some experts familiar with the E-Pirate investigation, who could not be identified, believe Canada's justice system is under-resourced to investigate and prosecute complex money laundering cases. Not only is the RCMP lacking the leadership direction and human resources to investigate such cases, but prosecution services lack the employees needed to vet evidence, and Canadian judges are not trained to handle highly technical money laundering cases, one expert on E-Pirate said.

Several E-Pirate and Asian-organized crime experts interviewed by Global News have said that current disclosure rules and court proceedings time limits set by the Supreme Court of Canada stack the deck in favour of defence lawyers and transnational organized crime groups. The situation is so bad — according to one veteran drug-trafficking officer in Vancouver who could not be identified due to an ongoing real estate money laundering probe by B.C.'s government — that ***civil forfeiture actions are now often seen as the***

only viable option for police to hinder the growth of organized crime groups." (Emphasis added.)[lxiii]

BC Civil Forfeiture Office Involvement

During the criminal investigation, numerous items were seized relating to Silver International, including various amounts of currency seized from Silver International's offices (which included two million, seventy-five thousand, two hundred and fifty-five Canadian dollars ($2,075,255) and various other sums of currency), the real property, a safety deposit box at Royal Bank, The Style Travel Inc.'s offices, and a safety deposit box at Bank of China, along with $17,800 in River Rock Casino Chips, 94 gift cards, and miscellaneous personal property.[lxiv]

After the stay of criminal proceedings in November of 2018, "the persons from whom the property was seized, and that includes the companies acting through their principals, primarily Ms. Qin, applied under Section 490 of the *Criminal Code* for the return of the property that had been seized during the investigation. That application came before the Associate Chief Justice in Vancouver on November 28th and she granted the order."[lxv]

The property, specifically the cash, was ordered returned pursuant to Section 490(11) and (12) of the *Criminal Code*.

On December 19, 2019, the Director of Civil Forfeiture commenced proceedings under the *Civil Forfeiture Act* by notice of civil claim, and applied for an interim preservation ("IPO") order to stop the return of the seized property. The application judge took issue with the fact that he was being asked to rule on a preservation order when another judge had already issued an order to return the property, and that the application was made in

an *ex parte* hearing, with only counsel for the Director of Civil Forfeiture appearing. However, the judge did grant the order on the basis that "there is a sufficient difference between the criminal process under Section 490 and the civil process under the *Civil Forfeiture Act*" that he was satisfied that he was not purporting to frustrate the Associate Chief Justice's order.[lxvi]

After the initial interim preservation order, several extensions were later granted under s. 9(2) of the BC *Civil Forfeiture Act* with the defendants' consent. In 2019, the Director of Civil Forfeiture applied for an indefinite IPO until the civil forfeiture matter was settled. On September 12, 2019, Justice Holmes granted a partial IPO, but ordered the cash to be returned. The judge found that the Director of Civil Forfeiture had mislead the application judge regarding the law, albeit not deliberately, in the initial *ex parte* IPO hearing, and ruled that since the cash was ordered returned under Section 490 of the *Criminal Code*, an IPO under the *Civil Forfeiture Act* could not supersede that order.[lxvii]

The Director of Civil Forfeiture appealed the exclusion of the cash from the IPO to the British Columbia Court of Appeal, and obtained a stay for the exclusion of cash in the September IPO on October 15, 2019: "The order was to apply to the funds as well as the other assets. There were serious questions to be tried concerning the relationship between a return order under s.490 of *Criminal Code* and an interim preservation order under the *Civil Forfeiture Act*. Irreparable harm to the Director and through him, the public interest, would ensue if a stay were not granted since the funds would no doubt be quickly dissipated or placed beyond the jurisdiction of the Court if they were to be released immediately to the defendants. For the same reason, the balance of convenience also favoured the Director's position."[lxviii]

In August of 2020, the appeal by the Director of Civil Forfeiture of the September 2019 IPO was successful, and the indeterminate order was granted. The court found that "the application judge had jurisdiction to issue a preservation order despite the existence of the s.490 order, as the two regimes were legally distinct. The Director's interest in preserving the cash property and purposes of the Act were factors of significance given the apparent strength of the evidence of unlawful activity and amount of money involved."[lxix]

In their court filings, the respondents Zhu and Qin noted "are no longer charged with any criminal offence in relation to those matters described in the notice of civil claim." They also alleged that their *Charter* rights were violated in the October 2015 searches.

"Zhu and Qin denied that Silver International laundered criminals' cash. They denied that the second company, Style Travel, also laundered funds.

They also denied any link to cocaine, marijuana bud, a hand-stun device, counterfeit identification cards, a credit-card skimmer and eight boxes of rifle cartridges seized by police during the 2015 searches."[lxx]

The Net Widens

In 2019, the BC Civil Forfeiture Office added additional properties related to the E-Pirate investigation to the list of assets it sought to seize. Following a Postmedia investigation published in April 2019 that found 20 Lower Mainland properties valued at more than $43 million linked to those accused in the RCMP's E-Pirate investigation, the Civil Forfeiture Office sought to seize a West Vancouver home valued at $3.24 million. The house was owned by Yuanyuan Jia, the niece of Paul King Jin, one of the central figures

involved with Silver International. The CFO alleged that "Mr. Jin is the beneficial or true owner of the Chelsea Court Property. Ms. Jia acted as a nominee owner or owner of convenience on behalf of Mr. Jin."[lxxi] Jia was also listed as the owner of a Richmond condominium valued at $764,000, which the CFO also filed claim against.

In August 2020, the Director of Civil Forfeiture filed an additional claim against a commercial property from where Paul King Jin's gym, Jin's World Champion Club, operated, stating that the $7.7 commercial building was the proceeds of crime.

Stephen Hai Peng Chen, also known as Hoy Pang Chan, is another target of the CFO as a result of the E-Pirate investigation. An analysis of ledgers seized at Silver International during the October 2015 raids indicated that Chen deposited $5.31 million and withdrew $2.27 million between June 1 and Oct. 1, 2015. The RCMP used the information as part of a criminal investigation into Chen for drug trafficking. Early in 2019, the CFO used this information to apply to seize two of Chen's properties in Vancouver worth a combined $2.7 million.[lxxii]

Chen is challenging the seizure, claiming that his rights were violated under the *Canadian Charter of Rights and Freedoms* during the raid of Silver International. The case raises questions about the relationship between the police and the CFO, and the interplay of civil forfeiture and the Charter. If the case does eventually go to trial, it would be one of the few that has: BC CFO Executive Director Phil Tawtel testified to the Cullen Commission that only 10 to 15 forfeiture claims have gone to trial in the past 15 years.[lxxiii]

Dangerous Liaisons

Just before the Cullen Commission got underway in October of 2020, Jian Jun Zhu and Paul King Jin were shot in a targeted attack at a restaurant in Richmond. Zhu died of his injuries, while Jin survived.[lxxiv]

Richard Yen Fat Chiu, believed to have laundered money through Silver International, was found murdered and burned in Colombia in June of 2019.[lxxv]

The FATF alleges that Silver International was a hub performing crucial drug-trafficking and global money transfer services for Chinese Triads, Mexican Cartels, and Middle Eastern organized crime groups. FINTRAC notes that money laundering is tied to other crimes, and "with these types of crimes, there are victims, there is often violence, and there is real social harm."[lxxvi] The collapse of the criminal case leaves civil forfeiture as the federal and provincial governments' only remaining response to this criminal network.

Where Things Stand

As of the writing of this report, the civil forfeiture case against Qin, Zhu's Estate and Silver International is still ongoing. This case represents new territory in some ways, with high value properties and links to international money laundering and organized crime. Testifying at the Cullen Commission in March of 2021, RCMP Cpl. Melvin Chizawsky called the referral for civil forfeiture "Our tool of last resort."[lxxvii]

The Silver International case may represent the biggest test to date of a new focus of the BC Civil Forfeiture Office to combat money laundering.

The BC Civil Forfeiture Office:

The BC Civil Forfeiture Office Structure

The CFO is headed by the Executive Director, who reports to the Assistant Deputy Minister of the community safety and crime prevention branch. The Assistant Deputy Minister reports to the Deputy Solicitor General, who in turn reports to the Solicitor General of British Columbia.[lxxviii]

Two Directors report to the Executive Director. They have the full authority of the "statutory director," that is the director of civil forfeiture as defined in the *Civil Forfeiture Act*.

The CFO has two staff members seconded to the Vancouver Police Department and the RCMP "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."[lxxix] Their role is to, firstly, facilitate referrals to the CFO, and secondly, to assist with follow-up from the CFO going back to the police departments.

The CFO cannot initiate investigations on its own; the starting point for a file must be a referral from an enforcement agency such as the police. While the legislation does not prevent the office from self-generating files, the CFO does not have the resources to conduct its own investigations.[lxxx]

The office is self-funding from the proceeds of forfeited properties.

There are a total of 10 staff in the Victoria office:

- The Executive Director
- The two Directors

- A Program Manager overseeing the administrative forfeiture program
- 6 administrative staff who support the operations and administration of the office.[lxxxi]

The CFO does not have any forensic accountants or investigators on staff. There are no lawyers on staff, as the CFO uses lawyers provided by the Attorney General's ministry. In addition to lawyers from the Ministry of the Attorney General, the CFO can also engage private firms in Vancouver and Victoria when there is an excess volume of files.[lxxxii]

Including both judicial and administrative forfeiture proceedings, the CFO commenced over 1,000 actions in 2019.[lxxxiii]

The CFO examines open-source information and subscription services to determine ownership of assets, for example the Land Title Office for a property, or the Insurance Corporation of British Columbia ("ICBC") for a vehicle.[lxxxiv]

The CFO can target property in British Columbia that relates to crimes that have occurred outside of BC, but the vast majority of referrals to the CFO relate to unlawful activity within the province, and the majority of referrals are based on drug investigations.[lxxxv]

In the past, the main focus of civil forfeiture has been the instruments of unlawful activity, but as the CFO has taken on more complex cases in recent years, the focus has shifted more to the proceeds of unlawful activity. Tracing the proceeds requires examining bank accounts and searching for assets beyond what is included in the police referral for the file.[lxxxvi] To date this tracing has been performed primarily by the Directors and the Directors' counsel.

In his testimony to the Cullen Commission, Executive Director Phil Tawtel was asked directly if the effectiveness of the CFO could be enhanced by adding investigative and forensic accountants ("IFAs") to its staff. He responded in part: "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."[lxxxvii] While the CFO does not employ IFAs directly, it does sometimes engage outside forensic accountants to assist with the most complex files in tracing proceeds of crime. The CFO does not request police departments to do work on behalf of the office.[lxxxviii]

The extent of work done by the police on asset tracing for their criminal investigations can vary widely. The CFO faces the challenge of tying assets to criminal offences, which becomes more difficult on more complex cases. Mr. Tawtel testified at the Cullen Commission that: "the higher up you go in an organization, the more the wealth is insulated. So it's easy to tie in a thousand dollars taken off a drug trafficker on the street who's in a car with score sheets, guns, and the drugs beside him. I mean, the cash is right literally physically in proximity to the trafficker.

It's far more difficult when you're going up the ladder to the top echelon and they have purposely, not accidentally, created the insulation that's needed so that their assets are not the target of either criminal or civil forfeiture proceedings. And so in order to pursue that, there is a significant amount of work, whether it's criminal or civil forfeiture, a significant amount of work that needs to be done to trace that and show that in fact those homes, those bank accounts are in fact the proceeds of unlawful activity and that money laundering techniques were employed to purposely evade forfeiture."[lxxxix]

In his affidavit to the Cullen Commission, Mr. Tawtel stated in paragraph 57:

"Additional resources will be required as the Civil Forfeiture Office continues to evolve from an entity that initially reactively focused on instrument-based cases to an entity that proactively focuses on proceeds based money-laundering cases. In particular, the Civil Forfeiture Office will need individuals who are trained in conducting financial investigations."

Tools to Improve the Effectiveness of the CFO

The BC Civil Forfeiture Office is limited in its ability to investigate independently. The following are three areas the CFO has identified where greater access to information would be of benefit in pursuing cases:

- The CFO does not have the ability to access tax information from the Canada Revenue Agency. The only way it can obtain information about an individual's or a corporation's income is through the discovery process in litigation.
- Likewise, the CFO has no ability to receive information directly from FINTRAC. All information from FINTRAC must be requested by police departments as part of their investigations, and then shared with the CFO.
- The lack of information regarding beneficial ownership in land and corporate registries has posed a challenge to the CFO in tracing assets.

The Cullen Commission of Inquiry into Money Laundering in British Columbia is currently ongoing, with the final report not expected until December 2021. In its interim report, issued in November of 2020, the commission identified a number of issues it is

examining that may affect the future of civil forfeiture as a tool in the fight against money laundering in BC, including:

- unexplained wealth orders, including the advisability and viability of such orders in the Canadian context and the policy considerations surrounding their implementation;
- whether the BC Civil Forfeiture Office should be given enhanced investigative powers, including the autonomy and capacity to identify its own targets;
- whether the BC Civil Forfeiture Office would be more effective if staffed with investigators, analysts, and other professionals (and, if so, what special status, if any, should they be given);
- whether there are ways to enhance information sharing and other forms of cooperation between the BC Civil Forfeiture Office and other relevant agencies;
- whether the self-funding model currently being used in British Columbia is the most efficacious way of combatting money laundering; and
- the impact of any changes to the BC civil forfeiture model on the liberty and privacy interests of BC residents.[xc]

An Examination of the Role of the IFA in Civil Forfeiture Cases: Consultant vs Expert Witness:

As previously noted, the BC CFO does not currently employ IFAs directly, so the nature of the engagement of an IFA to work on a civil forfeiture matter should be considered. The IFA's involvement in a legal case can be in one of two capacities: as a consulting expert, or as a testifying expert (an expert witness). Reports prepared as a consulting

expert are generally protected by litigation privilege. "Litigation privilege relates to a lawyer's developing a theory of a case, consulting with experts, assembling documents, and interviewing witnesses."[xci] The role is primarily to advise the lawyer representing the Director of the CFO.

A testifying expert, on the other hand, produces reports that are not privileged and are meant to serve the court, rather than one side in a dispute. In British Columbia, a testifying expert's report, working papers, drafts, reference materials and correspondence can all be producible for trial.[xcii] *Standard Practices for IFA Engagements* state that IFA expert witnesses "have a duty to provide independent assistance to the Tribunal by way of objective unbiased testimony in relation to matters within their expertise." The IFA should never assume the role of an advocate for one side or the other.[xciii]

The principles for expert testimony are set out in case law, significantly *R. v. Mohan, [1994] 2 S.C.R. 9*. The case established that, in order for an expert's opinion to be admissible four criteria must be satisfied: (a) relevance; (b) necessity in assisting the trier of fact; (c) the absence of any exclusionary rule; and (d) a properly qualified expert. Later cases have further refined the rules for expert testimony, including the need for independence.

Given the differences in the roles, it is important to clearly establish the role of the IFA in a civil forfeiture engagement through a carefully worded engagement letter. With so few civil forfeiture matters actually going to court, the role of the IFA will most likely be as a consulting expert, but consideration must be given if there is even a chance that the role will change to that of a testifying expert later in the process.

As money laundering cases are inherently more complex than the typical "instruments of unlawful activity" forfeitures, the possibility that a case will require a testifying expert should not be overlooked, and the engagement should be structured accordingly.

Resources Available to the IFA:

The CFO is more limited than law enforcement agencies in its investigative capacity. Unlike the police, the CFO does not employ "active" investigatory techniques including:

- surveillance
- searches and seizures
- the use of informants

FINTRAC does not share information directly with the CFO. The Canada Revenue Agency ("CRA") does not share information with the CFO. As a civil process, civil forfeiture investigations involving unlawful acts in foreign countries do not have access to the provisions of Mutual Legal Assistance Treaties to obtain legal assistance from the other countries. The BC CFO is a member of the Camden Asset Recovery Inter-agency Network ("CARIN"), an informal multi-national network focusing on communication and cooperation between members in asset tracing, freezing, seizure and confiscation. The CFO must establish its own information sharing partnerships with foreign law enforcement agencies.

The limitations of the CFO's investigative tools is one of the reasons that the office does not self-generate files, and instead works entirely from referrals from law enforcement agencies.[xciv] This makes the referred police files the first essential source of information to the IFA.

The CFO has Information Sharing Agreements ("ISAs") with every police force in the province, outlining the authority to share information with the CFO, the authorization under the Freedom of Information and Protection of Privacy Act to share the information, and other provisions.[xcv] The police files contain the evidence that would have influenced a referral to the CFO in the first place, and may include documents from FINTRAC, and reports relating to surveillance, searches, and seizures.

Depending on the referral, the level of asset tracing performed by the police may vary. The RCMP's Federal Serious and Organized Crime unit engages forensic accountants, so complex file referrals from this unit may already have extensive and detailed asset tracing work completed. Large police forces, such as the Vancouver Police Department, may also have forensic accounting work already incorporated into the investigations.[xcvi]

Obtaining Additional Information

The newer tools in the CFA introduced in 2019, Form 5 and Form 6, are similar in some ways to production orders, although a better analogy is with the powers of the CRA to issue "requirements" to third parties in non-criminal investigations (e.g. income tax audits). Form 5 is limited in that it only requires a financial institution to provide:

- particulars of an account (account number, transit number, and institution number);
- the type of account, whether it is an active account; and
- the name and address of all account holders.

Detailed records of transactions are not included in the provisions of the form. That information would require a court order, which would be issued under S. 11.01 of the BC

Civil Forfeiture Act "if the court is satisfied that the information or records are reasonably required by the director in order to exercise the director's powers or perform the director's functions and duties under this Act."

If an IFA were to find evidence of an account or a property that appeared to be proceeds or the instrument of unlawful activity, the information could be provided to the Director of Civil Forfeiture, who could then provide an order under Form 5 or Form 6 to obtain additional information. That information could, in turn, lead to a request for a court order to obtain detailed records, as well as an IPO.

Similarly, Form 6 requires a registered interest holder in a property to provide "any and all particulars related to your interest in the Property" for the purpose of administering the *Civil Forfeiture Act*.

In addition to these tools, the IFA may turn to records available to the CFO to assist with the tracing of assets. These records include:

- Land title registries
- Corporate registries
- Motor vehicle registries
- Personal property registries
- Public court records
- Business permits and licenses
- Building permits
- Information through Internet searches

The Disclosure Process

Another key source of information for the IFA comes from the disclosure process. In defending against a civil forfeiture claim, the respondents must provide documentation to the court, which is shared with the lawyers representing the Director of Civil Forfeiture. The necessity of producing this information is a key reason that so many civil forfeiture actions are unchallenged. Unlike criminal cases, which do not require the defendant to disclose information, civil forfeiture makes disclosure requirements of both the CFO and the respondent. Many criminals would rather lose the property than produce records showing how they generated their income, and potentially exposing themselves to further prosecution. Information supporting legitimate income might include income tax returns and notices of assessment, employment records, details of inheritances, loan agreements, bank statements and other financial records.

The new provisions of the CFA added in 2019 require the respondent to demonstrate that the property in question was not the proceeds or instrument of unlawful activity in certain circumstances. The rebuttable presumptions, where "absence of evidence to the contrary" the property is considered instruments or proceeds, create a "reverse onus" requirement for the respondent to provide evidence that can be examined by the CFO.

This information may not only provide evidence to show whether or not a property was acquired from the proceeds of unlawful activity, but may also provide links to other previously unknown assets. Information produced in disclosure may be analyzed by the IFA to assist in the tracing of assets.

Potential Objectives for IFA Involvement:

Two key areas where the IFA can contribute in cases of civil forfeiture involving money laundering include:

1. The identification of assets that are the proceeds of crime.
2. Establishing proof that identified assets are proceeds of crime.

The following is an examination of two significant tools that an IFA can use to fulfill these objectives. Asset tracing is an example of a tool that can be used to identify proceeds of crime. Indirect methods of establishing income are examples of tools that can be used to establish proof of proceeds of crime.

Asset Tracing

The first example of a significant way that an IFA may contribute to the investigation is asset tracing: determining how proceeds of unlawful activity have been spent. Identifying and tracing assets has been identified by the CFO as a challenge in complex cases.[xcvii] Asset tracing is an exercise in following the money generated by unlawful activity by linking assets to the activity through evidence of transactions, agreements, and other documentation. Steps include identifying the assets from the available records, then verifying the ownership of the asset. This step has proven to be a challenge in Canada, and in BC in particular, due to a lack of regulation requiring beneficial ownership to be disclosed for real estate and corporations.[xcviii] The federal government has been examining placing additional requirements for reporting the beneficial ownership of corporations.[xcix] BC implemented the *Land Owner Transparency Act* ("LOTA") on November 30, 2020, with requirements for existing interests in land to become compliant

by November 30, 2021. The Expert Panel on Money Laundering in BC Real Estate, in its report *Combatting Money Laundering in BC Real Estate*, stated "not only will LOTA allow money laundering and market manipulation to be more easily detected, but that will reduce the attractiveness of BC as a jurisdiction for money laundering, especially in real estate."[c] It remains to be seen if it will be helpful in investigations, but it may become a valuable tool in asset tracing.

While proof of ultimate beneficial ownership has shown to be difficult to establish beyond a reasonable doubt, the civil standard of proof on a balance of probabilities allows some inferences to be drawn and may therefore be a more successful approach in dealing with laundered money that has been invested into other assets.

Demonstrating a link between funds generated by unlawful activity and the funds used to purchase an asset can be difficult with limited information. The more complete the documentation available in the case, the more robust the asset tracing results will be.

The IFA's role in asset tracing is that of an analyst. The CFO's legal representative from the Attorney General's office would share evidence collected in a case from the referring file, the CFO's research, and the disclosure process (if it has occurred or begun), and request that the IFA examine the data for links, patterns, and relationships to understand sources and uses of funds. The analysis may lead to identifying previously unknown assets connected to the case, as well as increasing the understanding of how known assets relate to the case.

Indirect Methods of Demonstrating Income

Another objective that an IFA might be tasked with in relation to civil forfeiture is ascertaining a respondent's income and establishing whether it is from lawful or unlawful sources. This information would then be used to determine whether assets acquired by the respondent are the proceeds of unlawful activity.

Direct methods of income verification are only reliable when books and records are available and reliable. This is not expected to be the case where money laundering is suspected. Indirect methods can help prove how much wealth was accumulated and what was the likely source of the funds.

There are several indirect methods of proving income, including:

- Cash method
- Bank deposits method
- Expenditures method, and
- Net worth method

The advantage of indirect methods is that they can be used when evidence is circumstantial, and inferences must be made to support the calculations. They are especially useful when transactions are difficult to trace, but there is apparent wealth that is greater than the reported income. Difficulties in tracing may arise from the use of cash or cryptocurrencies in transactions, or from other means of obfuscating transactions in the layering stage of money laundering.

Indirect methods have been used successfully in criminal tax evasion cases by both the IRS in the United States and the CRA in Canada. In the case *Ramey v. The Queen,*

[1993] 2 CTC 221, the judge stated in his ruling that "the net worth method of estimating income is an unsatisfactory and imprecise way of determining a taxpayer's income for the year. […] Such assessments may be inaccurate within a range of indeterminate magnitude but unless they are shown to be wrong they stand."[ci]

In *R. v. Hunter, [2008] O.J. No. 467*, the Ontario Court of Appeal reversed a lower court ruling and convicted the respondent for tax evasion based on a net worth statement prepared by the CRA. The court found that "The statement was an approximation because the respondent did not keep proper records and did not testify as to his net worth. The appellant submits that it is only if a net worth statement was so inaccurate that it totally undermined the conclusion that any tax was owed that the respondent should have been acquitted on the evidence. We have no evidence that the net worth statement here is grossly inaccurate."[cii]

In these cases, the net worth method was found to meet the "beyond reasonable doubt" threshold for proof. Tax agencies also routinely use this method in non-criminal income tax audits, and the method has been tested multiple times in the Tax Court of Canada. In *Truong V. The Queen*, *2018 DTC 5010*, the Federal Court of Appeal ruled the Tax Court of Canada made no error in accepting a net worth assessment from the CRA.[ciii] The Supreme Court of Canada summarily dismissed an appeal of the decision on October 18, 2018.

The application of the net worth method in civil forfeiture matters, where proof is at the civil court standard of "on a balance of probabilities," can effectively demonstrate whether assets identified are the proceeds of crime.

Applying the Net Worth Method

The basic formula for the net worth method is:

Add:	Assets
Subtract:	Liabilities
Equals:	**Net Worth**
Subtract:	Prior Year's Net Worth
Equals:	**Increase (Decrease) in Net Worth**
Add:	Adjustments for Personal Expenditures
Subtract:	Adjustments for Non-Taxable/Non-Reportable Items
Equals:	**Income per Adjusted Net Worth**
Subtract:	Reported Income
Equals:	**Unreported Income per Net Worth**[civ]

Although originally used to detect unreported taxable income in cases of tax evasion, the net worth can also show income from unlawful sources. The net worth does not consider the unrealized change in market value of assets, but rather examines the total funds available for purchases. Likewise, no consideration is given for amortization or depreciation of assets, as all assets are included at cost.

If large assets, such as real estate, are added during the year resulting in an increase in net worth, and after taking into account all adjustments and reported income from lawful sources, there is still an unexplained gap, that gap of unreported income is the proceeds of unlawful activity.

Adjustments for personal expenditures include personal living expenses, taxes, gifts made, and losses on dispositions of personal assets.

Adjustments for non-taxable and non-reportable items include tax free gains on dispositions (e.g. a principal residence), gifts received, inheritances, certain pensions, proceeds from life insurance, and proceeds from lottery or gambling winnings.

Loans receivable and payable must also be considered in the adjustments.

Typical defences for unexplained changes in net worth include:

- Claims that there was a large amount of cash on hand which the IFA has not considered in the beginning net worth.
- Claims that the unreported income amounts are actually gifts, loans, and inheritances.
- Claims that the respondent is a nominee of another individual, and that amounts belonged to the other individual should be excluded from the respondent's net worth.[cv]

Care must be taken by an IFA to ensure that these potential defences are considered and investigated as appropriate in the circumstances.

Potential Problems for the IFA in Civil Forfeiture Cases:

The biggest potential problem for the IFA working on a civil forfeiture case is missing information. Police referrals flow only one way: there is no going back and asking for additional information once the referral has been accepted by the CFO. With limited investigatory tools available, there is a risk that insufficient information will be available to identify and prove proceeds of unlawful activity. Disclosure may be incomplete as limited records may exist.

Money laundering is a crime where great effort has been placed in hiding the source of funds and obfuscating the ownership of assets. It is possible, with the tools and resources available, that the IFA will not be able to uncover links tying property to proceeds of crime.

A Potential New Tool Against Money Laundering

The Expert Panel on Money Laundering in BC Real Estate recommended that Unexplained Wealth Orders be implemented in BC as an additional tool against money laundering. UWOs are designed to "address money laundering in cases where it is not possible to tie assets to a specific crime." The panel further noted that "Unexplained Wealth Orders are also a useful tool in cases where the difficulty of gathering evidence in a foreign jurisdiction effectively precludes a criminal prosecution or the use of civil forfeiture."[cvi] It remains to be seen if UWOs will be implemented in BC, and what role the CFO will have in their application, but they would be a powerful tool in overcoming the problem of missing information.

Roles for the IFA in Defence Against Civil Forfeiture:

The use of IFAs by the CFO may also lead to their increased use in the defence against civil forfeiture. IFAs could be engaged to critique the work of the CFO, prepare counter-analysis, and rebut assumptions made in civil forfeiture actions. As the stakes are raised with high-value money laundering cases, the impetus will be created for more robust defences against civil forfeiture.

Conclusions:

The BC CFO has enjoyed a high rate of success in its civil forfeiture actions to date. Pursuing criminal charges and convictions in cases of money laundering has proven more challenging and has been far less successful. Reasons for this include:

- Difficulties obtaining adequate evidence for the "beyond a reasonable doubt" standard of proof.
- Disclosure difficulties with massive amounts of documents and defined time periods to complete.
- A bias to use police resources to investigate predicate offences, rather than pursue resource intensive investigations into associated money laundering offences.

As a result, civil forfeiture is increasingly being seen as an effective avenue to deny criminals the proceeds of their unlawful activity, where criminal cases and subsequent *Criminal Code* forfeitures have failed to do so. Civil forfeiture places disclosure obligations on respondents, requires a lower burden of proof based on a balance of probabilities, and in some cases, places the onus for proof on the respondent.

This is a developing area, with high profile cases such as Silver International as yet unresolved. The provincial government established the Commission of Inquiry into Money Laundering in British Columbia to evaluate and make recommendations to address money laundering in the province. The commission is expected to deliver its final report in December 2021. This follows other reports commissioned by the province, including *Dirty Money - Part 2*, by Dr. Peter German in 2019, and *Combatting Money Laundering in BC Real Estate,* by an expert panel chaired by Professor Maureen

Maloney, also in 2019. The CFO has been given new powers to help achieve its mandate, with revisions to the CFA passed in 2019. The expert panel recommended even more regulations and tools to fight money laundering, including the adoption of Unexplained Wealth Orders. Meanwhile, opposition voices have grown louder as critics argue that legal rights under the *Charter* are being bypassed by civil forfeiture regimes.

Cases involving money laundering tend to be much more complex than simple forfeitures of cash and narcotics related to low-level drug cases. As the CFO pursues these more complex cases, the need for the involvement of IFAs becomes apparent. IFAs offer tools and skills that can assist the CFO in both identifying assets linked to unlawful activities, and proving that those assets are, in fact, the proceeds of unlawful activities.

In this changing landscape, the expertise of IFAs will be necessary to help the CFO continue to transform into an organization capable of proactively targeting the proceeds of crime in money laundering cases.

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Appendix 1:

List of Acronyms:

BCCLA	BC Civil Liberties Association
CFA	Civil Forfeiture Act (British Columbia)
CFO	Civil Forfeiture Office (British Columbia)
CRIA	Civil Remedies for Illicit Activities Office (Ontario)
DOJ	Department of Justice (USA)
FATF	The Financial Action Task Force
FINTRAC	Financial Transactions and Reports Analysis Centre of Canada
FIU	Financial Intelligence Unit
IFA	Investigative and Forensic Accountant
IPO	Interim Preservation Order
IRS	Internal Revenue Service (USA)
ISA	Information Sharing Agreement
LOTA	Land Owner Transparency Act (British Columbia)
ML	Money Laundering
MVTS	Money Value Transfer Services
NCB	Non-Conviction Based
OCG	Organized Crime Group
PCMLTFA	Proceeds of Crime (Money Laundering) and Terrorist Financing Act
PMLO	Professional Money Laundering Organization
POCA	Proceeds of Crime Act (UK)
RCMP	Royal Canadian Mounted Police
SUA	Specified Unlawful Activity
UWO	Unexplained Wealth Order

Appendix 2:

The following are two flowcharts created by Patrick Daley for his report *Civil Asset Forfeiture: An Economic Analysis of Ontario and British Columbia*. They demonstrate the differences in process of the two province's civil forfeiture regimes.

With each province and territory responsible for their own civil processes, a number of differences can arise, even when the underlying legislation is similar.

Figure 1 – Flowchart Overview of the CRIA Process in Ontario (P. Daley)[cvii]

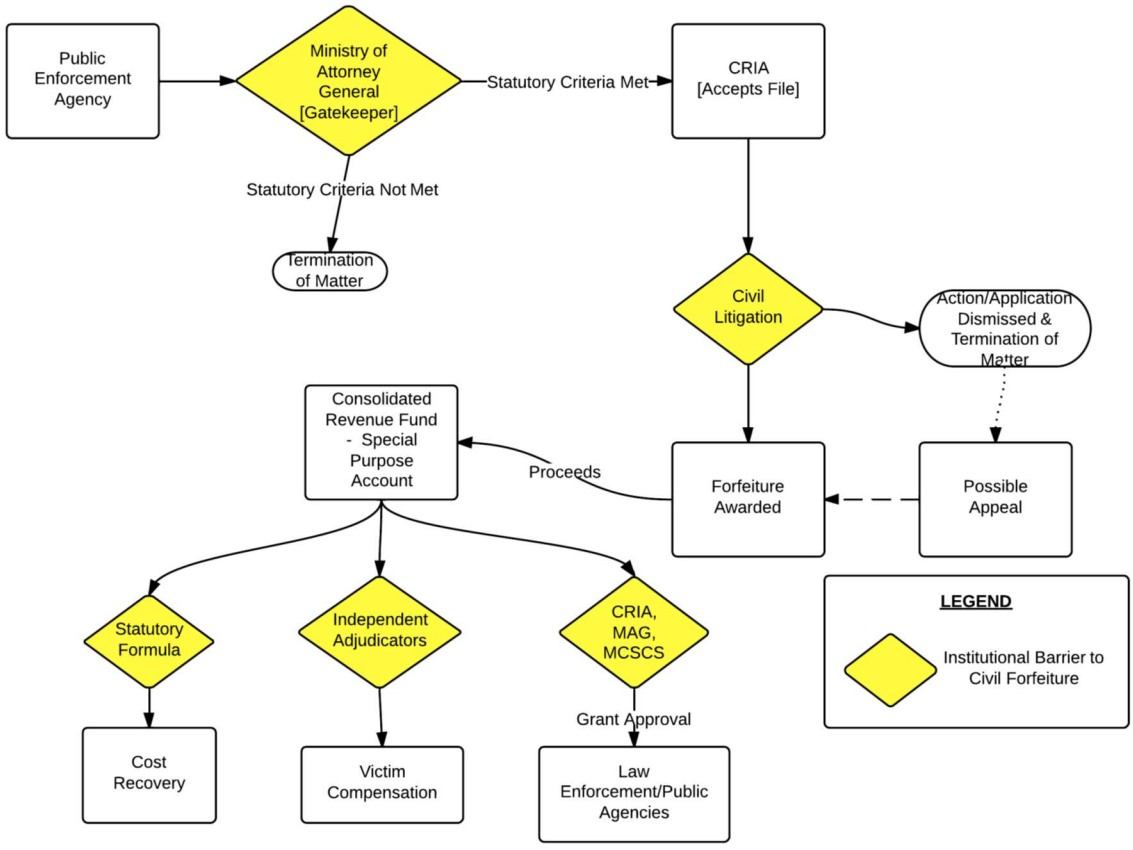
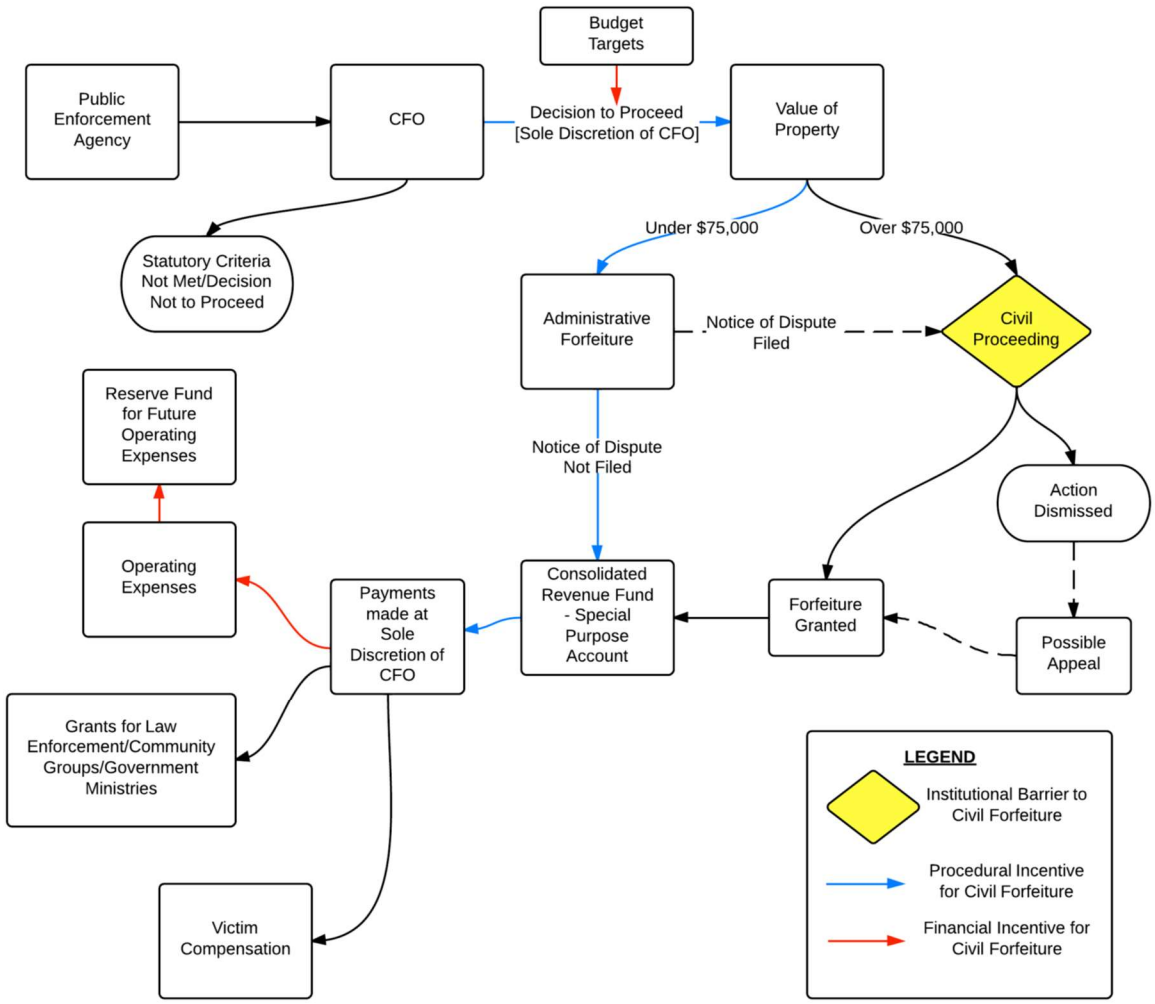


Figure 2 – Overview of CFO Process in BC (P. Daley)[cviii]



Key differences include the role of the Attorney General in referring files for civil forfeiture in Ontario, and BC's administrative forfeiture system.

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