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CIVIL ASSET FORFEITURE IN CANADA

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What's New in this Update:

- In my thirty-year career at the Attorney General here in Ontario, I consistently tried to recognize the many excellent colleagues and their amazing contributions to the teams I had the privilege of leading. On April 10, 2024, I was surprised and honoured to get my own shout-out in Winnipeg. From Hansard, the Hon. Matt Wiebe (Minister of Justice and Attorney General) at second reading of the *Unexplained Wealth Act*, Bill 30:

  > In assisting with drafting Bill 30, Manitoba Justice worked closely with Jeffrey Simser, one of Canada's leading experts in asset forfeiture and money laundering. He served as a lawyer and legal director with Ontario's Ministry of the Attorney General for over 30 years, and he recently appeared as an expert witness at the Cullen Commission of Inquiry into Money Laundering in British

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Columbia. His work and his expertise is second to none across the country, and I want to thank him for that work.

This continues to be a momentous year. In the shadow of a pending 2025 mutual evaluation of Canada's anti-money laundering (AML) system by the Financial Action Task Force, the federal government has introduced new AML measures in each of the last three successive federal budgets. 2024 was no exception: the federal government recognized, for the first time, the importance of civil forfeiture in the disruption of money laundering. The government indicated that Canada's financial intelligence unit, FINTRAC, would be empowered to share information with civil forfeiture units. Previous discussions with FINTRAC always ended with a negative shaking of the head: sorry, that's just not possible. Apparently, it is. The way in which this is implemented will be critical. FINTRAC has two primary roles. First, the agency is a regulator and oversees reporting entities, those are businesses and entities that might be susceptible to abuse at the hands of a money launderer. Banks and casinos are obvious inclusions; in 2024 we'll see the addition of the armoured car business (lots of cash handling) and mortgage administrators, brokers and lenders (our real estate sector is an attractive place to park dirty money). Those reporting entities have a myriad of regulatory obligations designed to deter money laundering (e.g., they must know their client) as well as reporting obligations (e.g., cash transactions over $10,000 and suspicious transactions). Those reports are submitted to FINTRAC to fulfill their second role, producing actionable intelligence for law enforcement. In theory, the financial intelligence unit's analysts will collate and produce original reports for police and others, putting money laundering suspects into the investigative radar, suspects that police would not otherwise have known about. In practice, FINTRAC has come to rely on disclosures from law enforcement before conducting an analysis. Known as voluntary information records or VIRs, police will disclose to the FINTRAC analysts' information about an investigative target. The analyst then collates that information with FINTRAC's vast database to determine whether a disclosure to police is legally merited. FINTRAC officials will need to implement information sharing carefully with civil forfeiture units. The financial intelligence unit will not be able to rely, as they do with police, on the VIR process. Once a matter enters into civil litigation, both parties are deemed by the rules of civil procedure to undertake to use the information they obtain only for the litigation in which they are engaged. A piece of evidence obtained in discovery cannot be shared with FINTRAC. Further, the risks are amplified. If FINTRAC were to obtain information from a civil forfeiture unit in violation of the deemed undertaking rule and then share it on to a police service, their subsequent investigation (or prosecution if there are charges) might be completely undermined. This kind

of risk is very dangerous, as it will lurk unbidden, potentially for years. Further, as civil forfeiture jurisdictions move towards the use of unexplained wealth orders or UWOs, FINTRAC will need to be further cognizant of the derivative use restrictions on information obtained (see for example section 2.8 of Manitoba's CPFA discussed at § 7:29.

Speaking of UWOs, Manitoba recently amended their preliminary disclosure order process. Also, since our last update, a third UWO was obtained in British Columbia (see § 4:30.30). The order relates to Quadriga CX, once one of Canada's largest crypto exchanges which, like the American exchange FTX, turned out to be a massive fraud ($169 million in losses). The founder, Gerald Cotten, allegedly died at the age of 30 in 2018 while vacationing in India. Investigations by a bankruptcy trustee and the Ontario Securities Commission yielded limited recoveries. In BC, a UWO has issued for a safety deposit box holding cash, gold bars, jewels and other valuables (worth about $600,000). The box belongs to Quadriga's co-founder, Michael Patryn, last seen in Thailand. Patryn has changed his name several times (aka Omar Dhanani, Omar Patryn). He was deported to Canada following his 18-month sentence served in the US for fraud and trafficking in stolen credit cards. Patryn/Dhanani faded into the background when Quadriga, at its height, contemplated raising funds in the capital markets (the co-founders figured his priors for fraud might be looked down upon by investors).

A pair of companion cases from the BC Court of Appeal, discussed at § 4:53, consider the unique and singular approach that the courts in that province have taken to Charter challenges. In other provinces, like Manitoba, Charter challenges are considered as part of the overall proceeding (see § 7:49). In BC, trial courts can "bifurcate" proceedings. In fact bifurcation is a misnomer, as matters are often split into three levels of hearing: (1) to consider whether there's a Charter breach at all (the Director is not entitled to discovery in many instances at this stage); (2) if there is a Charter breach, a second hearing can be ordered to consider remedies (it seems imperative that the Director would be entitled to discovery at that stage, but the extent of discovery is unclear); and (3) there will be a substantive forfeiture hearing. Apparently, some trial judges consider this an efficient process, The court of appeal, reasonably, did not want to interfere with a trial judge's discretionary ability manage a trial. The two decisions came to different outcomes. In the first, claimants in a traffic stop alleged Charter breaches by the police and in the second the owners of real property had weak arguments (the search of their property was authorized by warrant and posed very different issues).

A case out of Quebec is a reminder of the complexity for civil forfeiture cases following a criminal plea bargain. The accused had built a sophisticated marihuana facility, but at the time of arrest

he had only one marihuana plant in there. Charges were resolved and the restraint under the *Controlled Drugs and Substances Act* was lifted following a joint submission to the court. A civil forfeiture proceeding was brought, and the court had to consider the effect of the plea agreement. In Quebec, the court ruled that there was no division between the prosecutor (which was provincial, not the Public Prosecution Service of Canada) and the civil forfeiture lawyers (also provincial). The court then considered evidence, particularly from the defence lawyer, as to intent behind the plea agreement (of course they would not have agreed if they thought there might be a civil forfeiture action). The court ruled that the plea bargain meant a civil forfeiture proceeding could not be brought against the property. The court also refused to grant the damages requested by the property owner, saying that the actions of provincial officials did not merit damages. See the discussion at § 9:38; courts in Ontario and BC have taken a very different approach to this issue.