

**PROCEEDINGS AT HEARING
OF
DECEMBER 14, 2020**

COMMISSIONER AUSTIN F. CULLEN

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December 14, 2020

(Via Videoconference)

(PROCEEDINGS COMMENCED AT 9:30 A.M.)

THE REGISTRAR: The hearing is now resumed.
Mr. Commissioner.

THE COMMISSIONER: Thank you, Madam Registrar.

Yes, Mr. McCleery. Do you have conduct of
this evidence?

MR. McCLEERY: I do. Good morning, Mr. Commissioner.
Before we get to today's evidence, there is one
brief preliminary matter to address, which is
the filing of four overview reports --

THE COMMISSIONER: Yes.

MR. McCLEERY: -- connected to the topics of this
week's evidence. These have been circulated to
participants for comment, and feedback has been
considered in preparing the final version. I
understand Madam Registrar has a list of those
four reports.

THE COMMISSIONER: Thank you.

MR. McCLEERY: Mr. Commissioner, I'd ask that those
four reports be marked the next four exhibits.

THE COMMISSIONER: All right. That would be 373,
374, 375 and 376.

THE REGISTRAR: Yes. Thank you.

1 THE WITNESS: Jeffrey Simser, J-e-f-f-r-e-y
2 S-i-m-s-e-r.

3 THE REGISTRAR: Thank you.

4 **EXAMINATION BY MR. MCCLEERY:**

5 Q Good morning, Mr. Simser. Can you see and hear
6 me okay?

7 A Yes, I can. Thank you.

8 Q Mr. Simser, I'll begin with brief introductory
9 questions about your background and
10 qualifications.

11 MR. MCCLEERY: But first, Madam Registrar, can we
12 please pull up Mr. Simser's CV.

13 Q And, Mr. Simser, do you see a document on the
14 screen before you?

15 A Yes, I do. Thank you.

16 Q And is that a copy of your CV that you've
17 provided to the commission but with your email
18 address redacted?

19 A Yes, it is.

20 MR. MCCLEERY: Thank you. Mr. Commissioner, I'd ask
21 that be marked the next exhibit.

22 THE COMMISSIONER: 377.

23 THE REGISTRAR: 377.

24 **EXHIBIT 377: Curriculum Vitae of Jeffrey Simser**

25 MR. MCCLEERY:

1 Q Mr. Simser, you are a member of the Law Society
2 of Ontario with a Bachelor of Laws from Queen's
3 University and a Master of Laws from the Osgoode
4 Hall Law School; is that correct?

5 A That's correct.

6 Q And your CV, which has just been marked as an
7 exhibit, lists a number of publications on the
8 subject of civil asset forfeiture, including a
9 book titled "Civil Asset Forfeiture in Canada"?

10 A That's correct.

11 Q And that book is a loose-leaf text updated twice
12 annually that provides a comprehensive overview
13 of the law of civil asset forfeiture in Canada?

14 A Yes, it is.

15 Q In addition to that book your CV lists a number
16 of book chapters and peer-reviewed articles on
17 the subject of civil forfeiture as well as on
18 the subject money laundering; is that correct?

19 A That's correct.

20 Q And your CV also lists a number of symposia at
21 which you've presented, including regular
22 presentations to the International Symposium on
23 Economic Crime at Cambridge University; is that
24 right?

25 A That's correct.

1 Q And from 2000 to 2010 you led Canada's first
2 civil forfeiture litigation asset management
3 team as the founding legal director, civil
4 remedies for illicit activity with the Ontario
5 Ministry of the Attorney General; is that
6 accurate?

7 A That's correct.

8 Q And you also led the development of Ontario's
9 Civil Remedies Act 2001 as well as the
10 Prohibiting Profiting From Recounting Crimes Act
11 2002 and have provided support to other
12 provinces in the development of their own civil
13 forfeiture laws; is that correct?

14 A That's correct.

15 Q And you continue to practise law in Ontario but
16 not in a capacity related to asset forfeiture?

17 A No. I mean, I continue to update my book and I
18 have a huge interest in the subject, but yeah --
19 no, I don't have a different day job.

20 Q You are not appearing here today on behalf of
21 the government of Ontario, and your evidence is
22 not intended to represent the views of the
23 government of Ontario; is that fair?

24 A That's correct. The views will be personal and
25 they won't be either of the government of the

1 Ministry of the Attorney General.

2 Q Thank you very much. And, Mr. Simser, you've
3 prepared for the commission a report titled
4 "Civil Asset Forfeiture in Canada"; is that
5 correct?

6 A That's correct.

7 MR. McCLEERY: Madam Registrar, would you please pull
8 up Mr. Simser's report.

9 Q And, Mr. Simser, you see your report on the
10 screen before you?

11 A That's correct.

12 MR. McCLEERY: Mr. Commissioner, I'd ask that that
13 report be marked the next exhibit.

14 THE REGISTRAR: The next number is 378,
15 Mr. Commissioner.

16 THE COMMISSIONER: Thank you. I had some difficulty
17 unmuting myself. 378.

18 **EXHIBIT 378: "Civil Asset Forfeiture in Canada"**
19 **by Jeffrey Simser**

20 MR. McCLEERY: Thank you.

21 Q Mr. Simser, let's move, then, into the substance
22 of your evidence. This is the beginning of the
23 week of hearings on the subject of asset
24 forfeiture, so I thought we might start from the
25 very basics. I wonder if you can explain to us

1 in your words what civil forfeiture is and
2 contextualize it within -- distinguish it from
3 criminal prosecution and criminal asset
4 forfeiture.

5 A Sure. So civil forfeiture sometimes is just
6 called civil forfeiture, and in Europe it's
7 often referred to as non-conviction-based or NCB
8 forfeiture. And it's a statutory device. It
9 doesn't exist outside of a statute, and it's
10 designed to recover generally two types of
11 property. Proceeds of unlawful activity.
12 That's property that has as its provenance
13 unlawful activity, which is usually fairly
14 broadly defined across all the nine
15 jurisdictions in Canada. And then instruments
16 of unlawful activity. Those are things that
17 make the unlawful activity possible, if you
18 will.

19 And generally what happens is the civil
20 forfeiture is an in rem proceeding that
21 occurs -- in Ontario it would be the Superior
22 Court of Justice, so the higher level of trial
23 court, and it appears in a civil court on a
24 civil standard of proof.

25 In terms of where it fits, civil forfeiture

1 is one part of a continuum of possible remedies
2 that law enforcement and public officials have
3 if they're dealing with something that does
4 involve economic benefit derived from crime or
5 unlawful activity. So there are various kinds
6 of forfeiture provisions in the Criminal Code,
7 in the Controlled Drugs and Substances Act.
8 There are all kinds of regulatory forfeiture
9 provisions both in federal and provincial
10 statutory law. There's customs forfeitures as
11 well.

12 And this exists in a continuum. So it's not
13 a panacea; it's not everything in and of itself;
14 it's a tool or a remedy that works in certain
15 circumstances in certain kinds of cases.

16 Q Thank you. And generally speaking as it exists
17 in Canada, what's the purpose and the objectives
18 of civil asset forfeiture? What is the policy
19 goal it aims to achieve?

20 A Yeah, so -- and each jurisdiction has a slightly
21 different mix in terms of policy objectives.
22 So, for example, Alberta started as a tool to
23 put civil remedies in the hands of a prosecutor
24 who was seeking to enforce a restitution order
25 in a fraud case. But generally it is certainly

1 a way of dealing with victims of crime,
2 especially where the victims themselves don't
3 have the wherewithal to bring a civil proceeding
4 in superior court. It also is designed to take
5 property away that has as its provenance unlawful
6 activity. It's a way of defeating title to
7 something that otherwise would be in the hands
8 of someone who's there and the criminality has
9 created the wealth of the property.

10 And it's designed as -- and the Supreme
11 Court of Canada accepted this. It is designed
12 to do two other things. I think one is, you
13 know, the Supreme Court said in Chatterjee that,
14 you know, we can't pretend that there aren't
15 costs to the province; there are. And that is
16 part of the civil forfeiture system, and there
17 is a deterrence element to it. It's not
18 punitive or a punishment as it would be in the
19 criminal law, but there is some sense of civil
20 justice so that someone doesn't get to keep the
21 fruits of something that they've done to harm
22 the community or individual victims.

23 Q My question was focused on the purposes of civil
24 forfeiture in Canada. Are those -- does that
25 generally apply internationally as well? You

1 comment on some other jurisdictions outside of
2 Canada in your report, and I wonder if other
3 jurisdictions have pursued civil forfeiture for
4 different reasons or if those are largely
5 applicable internationally?

6 A Yeah, so internationally I think there's been a
7 significant movement, I would say in the last
8 10 years, or so to deal with what I call
9 kleptocracy, so corruption on a grand scale.

10 So if I'm in an African country, and I'm
11 looting treasury, and there have been some
12 really horrific frauds and thefts from
13 treasury -- or in eastern Europe or wherever; it
14 doesn't have to be in Africa -- I'm not going to
15 keep the money in the country that I live in
16 because I've probably ruined their economy, so I
17 want to put it somewhere safe. And so that's
18 been a huge focus internationally to follow
19 those assets.

20 And the World Bank -- I work with the World
21 Bank and the United Nations Office on Drugs and
22 Crime and others to try and deal with that. In
23 fact last week -- there's a World Bank group
24 called STAR, which is Stolen Asset Recovery
25 Network, and they've just issued a guide --

1 reissued a guide, a revised guide on asset
2 recovery, and NCB or civil asset forfeiture is a
3 very important part of that.

4 In some places, Ireland, for example,
5 taxation and the social welfare are very
6 important aims. I know you'll hear from some
7 Irish experts. So it goes beyond simply dealing
8 with the proceeds, but it also deals with
9 revenue and it deals with abuse of the welfare
10 system in Ireland.

11 So each jurisdiction is unique. And places
12 like the United States, which -- it's a massive
13 place. Obviously it's very fragmented, and it
14 goes across a range of things, everything from
15 stolen art -- there's a famous case involving
16 moon dust that had been donated to a country in
17 Central America and that it was being sold on
18 the open market. So there's all kinds of
19 interesting niches within -- that each country
20 has its own slightly different purpose.

21 Q Thank you. And as I believe you're aware,
22 obviously the central focus of this commission
23 is on the issue of money laundering. As we
24 discussed when reviewing your CV, you've
25 published on civil asset forfeiture as well as

1 the subject of -- sorry.

2 MR. McCLEERY: I'm just noticing -- Madam Registrar,
3 I see that Mr. Simser's report is still up. I
4 think we can probably take that down for the
5 time being. Thank you.

6 Q Back to my question, Mr. Simser. The central
7 focus of this commission is money laundering,
8 and I wonder if you might comment on the
9 relationship between civil asset forfeiture and
10 money laundering and the place of civil asset
11 forfeiture in trying to combat the problem of
12 money laundering.

13 A Sure. So, I mean, money laundering is -- it's a
14 nefarious and a very difficult activity to
15 really get at because what generally has
16 happened are two things. One is that the stream
17 of unlawful activity is separated out from the
18 dealing with the money of the unlawful activity,
19 if you will. And this is something that the
20 Columbian cartels pioneered about 25 years ago,
21 and it was a risk mitigation strategy for them.
22 They had different networks that ran their drug
23 couriers versus their money couriers because if
24 one was turned or exposed, it didn't threaten
25 the other.

1 And so what happens is money laundering by
2 its nature, you're removing one step away from
3 the people who are actually getting their hands
4 dirty, the people that are selling drugs, the
5 people that are actually committing the frauds
6 and all that sort of stuff. You're in a
7 separate flow. And we do criminalize that, but
8 it is very, very difficult to prosecute and it
9 takes a lot of wherewithal. It moves across
10 borders.

11 And so what civil asset forfeiture does is
12 it focuses in -- in the case of money
13 laundering, it focuses in on the very purpose of
14 why that money is flowing and where it's going
15 as opposed to the actors and the individuals
16 that are kind of behind it. And it is very
17 challenging because you can have a money
18 laundering flow that combines both a legitimate
19 and illegitimate aim. So you could have an
20 underground banking network that primarily deals
21 with, say, remittances back to China or the
22 Philippines or what have you, but then that also
23 is a way of shifting value through the system.
24 But what civil asset forfeiture does do is it
25 gives you an opportunity to get at that value in

1 the money laundering activity.

2 Q You mentioned the challenge, the difficulty of
3 prosecuting these types of offences criminally.
4 What is it about civil asset forfeiture that
5 perhaps relieves the state of some of the
6 challenges of -- that come with prosecution?

7 A So civil asset forfeiture focuses solely on the
8 asset and the nexus between that asset and
9 unlawful activity, and it is less concerned or
10 often not really concerned about who did what
11 and what the actors were in the chain. It's
12 more about finding the taint.

13 So a very simple example, if you have --
14 going back to my courier example. So if you
15 have a money courier for a drug network, you're
16 going to have a poorly paid guy. He may be
17 stopped on the road. Maybe he's drunk; maybe
18 he's stoned. Whatever. He's pulled over for
19 some reason. So he has a massive amount of
20 bundled money and absolutely no legitimate
21 explanation for its provenance. It may be
22 packaged. There's lots of things that a
23 well-trained investigator can do with that kind
24 of a fine.

25 And then there's -- you know, criminality.

1 I don't know who you'd convict. I don't know
2 that you'd convict him knowing that he was money
3 laundering. You might. I don't know. But you
4 don't really want to anyway; he's a foot
5 soldier. What you really want to do is you want
6 to get at that money and interdict it and pull
7 it out of the food chain.

8 The other side of this is as a
9 well-organized crime group, we'll distinguish
10 and make sure that the operating mind don't get
11 their hands dirty. They want to take the money
12 from the enterprise, but they don't necessarily
13 want to be facing jail time, so they will find
14 expendable foot soldiers to move in. And again,
15 civil forfeiture is a way of getting at that
16 part of that activity.

17 Q Thank you. In your report you focus on sort of
18 some of the recent evolution of Canadian civil
19 asset forfeiture. But you mention the origins,
20 at least, of the principles that underlie that
21 system that -- and trace those back nearly a
22 thousand years. I wonder if you might briefly
23 summarize those thousand years and tell us a
24 little bit about some of the ancient origins of
25 modern civil forfeiture law.

1 A Sure. I mean, if you think back a few centuries
2 ago, land -- lord of the land or whatever, that
3 land was a very important economic driver. And
4 one way that the king could ensure against
5 treason was to be able to threaten to take away
6 the land from one of his lords or whatever as a
7 mechanism to ensure loyalty to the Crown.

8 If we move a little further along in
9 history, sort of early globalization, perhaps,
10 if you have a ship that goes into harbour and it
11 deals with the ship's chandler or gets supplies,
12 the recourse to justice for that ship's chandler
13 was always very tricky because, you know, once
14 the ship leaves the harbour there's probably no
15 practical way for a small merchant in a small
16 port in, say, England to follow it.

17 And so what the courts did in response to
18 that is they created an in rem proceeding which
19 literally allowed the ship itself to be
20 interdicted and held until the debt or the civil
21 dispute was resolved.

22 And if we now move a little further along
23 into early American history, one of the very
24 first laws that was passed by the US Congress
25 was a civil forfeiture law. And one of the

1 problems that they had in their early history
2 was along the eastern and southern-eastern
3 starboard of the United States there was piracy.
4 And so what the civil forfeiture law said
5 essentially was that if you use a ship to attack
6 commercial shipping or even US navy shipping, it
7 can be forfeited in rem.

8 And that gave rise in 1827 to a case called
9 The Palmyra. The Palmyra had been commissioned
10 by the King of Spain. It went into the
11 Caribbean and then it harassed American shipping
12 up the coast. It was captured by the US Navy
13 and towed into Charleston. And the captain of
14 the ship appeared in court and said, look, you
15 can do whatever you want to me, I'm the pirate,
16 but I don't own the ship; the King of Spain owns
17 the ship; the King of Spain did not commit any
18 of the piracy. And the Supreme Court said no,
19 we can forfeit the ship in an in rem proceeding,
20 and it was forfeited. It was worth about
21 \$10,000 in 1827, so I would think that was the
22 fairly considerable amount of money it was
23 worth.

24 So those are some of the origins. I mean,
25 really to take us into the modern day you're

1 probably into the 1980s. There certainly were
2 uses of forfeiture. It protected -- customs was
3 a really important source of revenue for many
4 countries, including Canada and the United
5 States, so forfeiture provisions were used
6 there. Forfeiture provisions were used during
7 prohibition for violation of liquor laws and
8 things like that but its more modern use really
9 extends back to probably about 1984 and 1986 in
10 the United States.

11 Q Thank you. And then moving forward to what
12 we've seen recently in Canada. Your report
13 focuses on the -- sorry -- some of the
14 differences in the different Canadian
15 jurisdictions and sort of demonstrates how civil
16 forfeiture was enacted in different provinces in
17 fairly rapid succession beginning in 2001. I
18 wonder if you can help us to understand the
19 context in which this sort of rapid rise of
20 civil forfeiture occurred in Canada at that time
21 and why we see Canada going from basically no
22 civil asset forfeiture in 2000 to the majority
23 of provinces and territories within about
24 10 years having enacted some form of this
25 legislation.

1 A Yeah, so there's a couple of things that are
2 important background, I guess, to this. One is
3 that in 1989 the G7 created FATF, which is the
4 Financial Action Task Force, which was looking
5 at money laundering issues. And FATF then went
6 out and did what are called mutual evaluations.
7 And there were ones done of Canada, and the one
8 that probably is important in this conversation
9 was the one in 2008. And so you have this
10 international body that's looking at the various
11 things that are being done around money
12 laundering and we didn't really have a lot or
13 enough NCB. It certainly was a criticism of
14 FATF at the time.

15 But we were also developing this at a really
16 -- what I will say is a really exciting time.
17 So there were a number of things going on.
18 South Africa had just -- was coming into sort of
19 its newer modern history with the ANC, and in
20 1998 they'd passed a law -- a civil forfeiture
21 law. It actually is a proceeds of crime exodus,
22 criminal and civil forfeiture. There had been
23 events in Ireland in 1996 that led to the
24 creation of a civil forfeiture law there. The
25 Australians had been going for some time, which

1 was actually very useful for us from a policy
2 design perspective because there was a fairly
3 robust amount of jurisprudence out of Australia,
4 the various states.

5 And then really what was also exciting for
6 us was that the United Kingdom in 1998 sort of
7 put their first version -- it's quite different
8 from the one they have now, but their first
9 version of the Proceeds of Crime Act. And in
10 the United States there was a loud and noisy and
11 very vigorous debate around civil forfeiture
12 which led in 2000 to a statute called CAFRA, or
13 the Civil Asset Forfeiture Reform Act.

14 So what happened from a policy design
15 perspective for me as a lawyer was there was
16 just a very rich vein of things to look through
17 and think about and work off of, and it
18 wasn't -- they weren't all good. I mean, there
19 were things we said, we're not doing this or
20 we're not doing that. And we can probably get
21 into that in the course of this discussion.

22 So those are probably the two things.
23 They -- when we started in Ontario -- and the
24 third thing, I would suggest, is Chatterjee. So
25 Chatterjee was a case, a very early case -- I

1 think we started it around 2004, 2005 -- and we
2 were successful at trial, and it was a fully
3 formed constitutional challenge. And I think a
4 lot of -- there was a lot of scepticism in some
5 quarters about how this would actually work and
6 how it would roll out with the courts. And we
7 were successful at the court of appeal and
8 ultimately in 2009 at the Supreme Court of
9 Canada. But by the time we'd got there I think
10 there was an awareness, certainly amongst
11 lawyers, about, you know, this just might work,
12 and I think that was a factor as well.

13 Q And there are -- we'll go through some of the
14 different models of forfeiture in different
15 Canadian jurisdictions in a little bit. We know
16 that there are a few holdouts that remain in the
17 Atlantic provinces and in the north. I wonder
18 if we have any insight into some of the
19 considerations that may have motivated those few
20 remaining holdouts not to pursue this type
21 legislation at least to this point?

22 A Yeah, that's an interesting question, and I
23 don't know. I don't live in PEI or the Yukon or
24 whatever. I do know a couple of things. I know
25 the Yukon introduced legislation, and it very,

1 very quickly became controversial. It was
2 withdrawn, I think, at second reading. It was
3 very politically controversial. I'm not
4 really -- I don't know that community and I
5 don't know the politics of that community, so I
6 don't know why that was.

7 And I know recently, about a year or a year
8 and a half ago, there were a number of problems
9 in Prince Edward Island and there were lots and
10 lots of calls for a civil forfeiture law, the
11 Attorney General of PEI said that they would
12 look at it. Newfoundland and Labrador, I don't
13 really know why they're not there. And New
14 Brunswick and Nova Scotia have laws on the
15 books, but they're not really used very often,
16 at least as far as I can ascertain.

17 So I don't know why -- I don't know why
18 others are holding out per se. I know that
19 sometimes what happens is that there is a
20 catalyzing -- a catalytic event. In Ireland in
21 1996 it was the murder of a journalist who had
22 been the following an organized crime figure,
23 and there was outcry in the community to do
24 something. And he had been sort of beyond the
25 reach of the criminal justice system. He was a

1 really bad guy named Mr. Gilligan. And so they
2 were very quick. I recall talking to the
3 Attorney General lawyer who worked on it, and
4 she -- I think she did the civil forfeiture law
5 in about a month, which is really a remarkably
6 fast turnaround. But even in Ontario, I think I
7 probably had a bill in the house in about five
8 months, which also is pretty remarkable.

9 Q Okay. If we can turn your focus back, then, to
10 those Canadian provinces and territories that do
11 have this legislation. Your report focuses on
12 the difference between -- differences between
13 those different models. And I wonder before we
14 get into those differences if we can ask, you
15 know, in your view if there's sort of a common
16 core to Canadian civil forfeiture. And if we
17 were to try to speak of a Canadian model of
18 civil asset forfeiture, how -- you know, is
19 there such a model and how might you describe
20 that.

21 A Yeah. So there are some features that are
22 similar and sometimes the differences are more
23 surface kinds of differences around linguistic
24 choices and things like that. I think the best
25 way to sort of think about this is to take you

1 through what a civil forfeiture law does in the
2 context of an actual case in its life cycle. So
3 obviously you start with some sort of unlawful
4 activity, and typically it's designed to bring
5 economic benefit to whoever is committing it.

6 So you'll typically be in an investigative
7 mode with the police, for example. They're
8 investigating a case. They will look at their
9 options, whether they can charge, whether --
10 they may talk to the Crown about whether they
11 can bring a criminal asset forfeiture case in
12 that particular instance. And as a civil
13 forfeiture practitioner, when I ran the unit I
14 always the took the position, if you can go
15 there, please do; there's more than enough work
16 going around; go there.

17 And if they can't go there, then they will
18 generally prepare a brief for the civil
19 forfeiture authority. And that brief generally
20 goes through some sort of a gate-keeping process
21 before it really gets into the unit, and there's
22 a lot of reasons for that. They want to make
23 sure that there's no confidential informant
24 information. You want to be very thoughtful
25 about information about young people who have

1 been convicted. You want to be sure that
2 there's no Part 6 or wiretap information. And
3 there are also -- in some cases you can do
4 what's called a tax app, but you can't pass a
5 tax application in certain kinds of drugs cases
6 from Rev Canada through the police through to
7 civil forfeiture. So you want to make sure that
8 you're in good shape there.

9 And then once it goes into the unit there's
10 a case review that's undergone and thought
11 about. You always want to really think about --
12 we'll talk, I think, later about some of the
13 safeguards, but you're always very, very aware
14 of where this case fits in your overall plan and
15 how it works.

16 One of the things that you absolutely have
17 to do if you're running the unit is do an asset
18 management review. What is it that you're
19 seizing; how are you going to do it. If it's a
20 horse, maybe you don't want it. Or if you do,
21 you're going to have to take intense care about
22 how you deal with it. And I think Mr. Gilligan
23 in Ireland did have a horse ranch, and it was a
24 little problematic, although they got through
25 it.

1 And then once you're ready to go,
2 generally -- not all provinces, but many
3 provinces have a choice of how they proceed.
4 They can proceed through administrative
5 forfeiture. So in BC that's where the value is
6 less than \$75,000 and the property is in the
7 hands already of a public authority. And if you
8 can't, then you will go and preserve the assets.
9 And we'll talk, I'm sure, as we go through about
10 how you do that, the test and so on. But the
11 idea is to freeze them before they can be
12 dissipated or moved or -- moved beyond your
13 jurisdiction.

14 And then you go into a forfeiture
15 proceeding. It's either by way of application
16 or action. Action would be more like a full
17 trial with witnesses. Application is more of a
18 paper-based procedure. And if you are
19 successful with forfeiture, you make sure that
20 there -- if there's any third-party rights that
21 you have to deal with it. Then you dispose of
22 the property if it's not just money that you
23 deposit in. You have to deal then with victims.
24 And we'll talk, I think, later about how the
25 special purpose account process works.

1 So at a high level that's sort of what most
2 jurisdictions right now in Canada do.

3 Q Thank you. Why don't we move, then, to talk a
4 little bit about some of the differences and the
5 unique features of what's in place in different
6 provinces. I thought we might start here at
7 home, at least for us, with British Columbia's
8 statute. In your view, what are the
9 significant, unique or distinct features of what
10 we do in this province?

11 A Sure. So British Columbia uses a director
12 model. Not all provinces do. Ontario doesn't.
13 So that puts in place a statutory designation
14 for a person and they're in charge of various
15 parts of the proceeding, everything from
16 instructing the lawyers through to dealing with
17 the assets.

18 As I just mentioned, the first choice, if
19 they have a case that's going to go forward, is
20 whether it goes through administrative
21 forfeiture or goes straight to what I would call
22 judicial forfeiture, through a court proceeding.

23 And in the judicial forfeiture, at the
24 initial phrases, the director will have two
25 choices. They can bring an interim preservation

1 order or they can bring a preliminary order of
2 preservation. The difference between the two is
3 that if you're going to do an interim
4 preservation order, you pretty much have to be
5 ready to launch your proceeding, and there is an
6 ability to do it where the time just wouldn't
7 allow you to put together your pleadings and
8 that sort of thing. There's a shorter kind of
9 process.

10 You're going to review the information that
11 you have, and I think we'll talk probably about
12 this a little as we go through. One of the
13 challenges that civil forfeiture practitioners
14 have in this country is that once something has
15 gone from the police into the unit, it's tricky
16 to procure more information. So if you have a
17 police investigator with the Vancouver Police
18 Department, you can't say to them, you know, if
19 you just followed this guy around a little bit
20 or did a wiretap or arrest this guy and see what
21 happens. You can't ask them to invoke the
22 criminal justice process to further a civil
23 justice end. And so you need to think a little
24 bit about what you're missing in terms of
25 information. And sometimes some units do use

1 investigators.

2 There are two kinds of statutory provisions
3 in the Civil Forfeiture Act in BC. One is that
4 the director can give a notice to financial
5 institutions to ask for more information and the
6 other is that they can go and seek a court order
7 to have production of information. And these
8 are relatively new things, but they're very much
9 needed.

10 And as the case goes through, in the BC law
11 anyway, the one thing that's unique -- not
12 unique but robust about the BC law is that there
13 are a number of presumptions in the statute. As
14 a practitioner, I was never quite sure about
15 presumptions because I always felt that a judge
16 would tell me to prove my case, not sort of
17 point to a presumption and say, it's not quite
18 there, but presume it away. And so as a
19 practitioner, I didn't use them very often. And
20 I'm not sure how effective the presumptions have
21 been.

22 But you go through the process. You go
23 through the discoveries. You go back and forth
24 with the position. In some cases there's a
25 bifurcation if there's Charter issues in a BC

1 case. And ultimately you head forwards
2 forfeiture and then disposal of the property.

3 Q You mentioned the new provisions that expand the
4 director's power to collect information,
5 including from financial institutions, and you
6 mentioned that in your view they were very much
7 needed. I wonder if you can speak a little
8 further about your view of sort of the need for
9 those types of provisions and maybe the
10 significance of those changes to the act.

11 A Sure. So, I mean, just to step back and go back
12 into sort of the investigative side. I mean,
13 one of the things that -- we have an FIU or
14 financial intelligence unit in this country,
15 FINTRAC. But it's kind of a funny unit because
16 it's stands in between the financial
17 institutions and the investigators and it's sort
18 of independent of both. And as it's evolved,
19 particularly the last five or ten years, they
20 rely on voluntary information requests. I think
21 that's what it's called. VIRs, anyway. And
22 what that is is, so if I'm an investigator, I'm
23 following someone, I can put a claim in to
24 FINTRAC saying, I'm following this person;
25 here's my information. Then they can go into

1 the bank account information or whatever they
2 have from STRs and CTRs and that sort of thing
3 that have been produced for the FIU by financial
4 institutions and come back to me with some
5 analysis.

6 But it's not always complete. And so we
7 might have some -- or the other -- and the other
8 problem, the reason you need something like this
9 is it may have been four weeks, six weeks, eight
10 weeks, 12 weeks. It really depends on the case.
11 But some of these are very complicated for a
12 criminal investigator. If they're using
13 warrants, the warrant might produce account
14 information about -- you know, there is a bank
15 account. Then they have to do another warrant
16 to actually find out what's in the bank account.
17 And then once they do, once it comes into the
18 civil forfeiture unit, your information isn't
19 timely. So it may well be that the bank account
20 four weeks ago had \$100,000 in. You're not
21 really sure what's in that account now when you
22 go out and freeze it.

23 So really, information gateways are really
24 critical to a well-functioning system, and a
25 well-functioning system across all the

1 modalities, criminal and civil. And so that's
2 one of the reasons that those are there. If you
3 simply went to the bank without that authority
4 and said, please can you produce this
5 information, you will get a smile and a shrug
6 and a no, we don't have any authority; under
7 privacy law we can't give you that information.
8 So you need to have some way to get it.

9 Q Thank you. After the discussion of British
10 Columbia in your report, you speak a little bit
11 about Alberta. And I wonder if you can just now
12 comment on sort of what's interesting or unusual
13 about Alberta's legislation compared to British
14 Columbia or the rest of Canada?

15 A Yeah, for sure. And I should say Alberta has
16 just changed their legislation. Those changes
17 are technical and I haven't had -- really had a
18 good chance yet to run them. Originally the
19 statute was written by -- the architect of the
20 statute, I remember talking to him. He wrote it
21 on -- was it the Red Line bus between Edmonton
22 and Calgary or Calgary and Edmonton. I can't
23 remember. And he was frustrated because he had
24 been doing a number of fraud cases, and he would
25 get a restitution order as part of the

1 conviction, but he just didn't seem to have any
2 way to have getting after the fraudster and
3 getting after their assets.

4 So that was the original conception, the
5 Victims' Right to Proceeds of Crime Act. But it
6 has since morphed, particularly in 2008 and then
7 2010, to have more of the traditional features
8 of a civil forfeiture. They're very similar not
9 in how they look, but how they operate to the
10 ones in BC.

11 One of the unusual provisions that they've
12 long had in Alberta is there's an ability for a
13 police officer to take an interim action in
14 respect of assets. So there's a number of rules
15 around this. The officer must be able to
16 articulate later that there was an exigent
17 circumstance that they were in and it must be
18 impractical for that officer to grab or to
19 obtain what in BC you call an IPO, what they
20 call a restraint under the Alberta system.

21 And so -- and then the officer also has to
22 objectively form reasonable grounds to believe
23 that whatever the property is is either a
24 proceed or an instrument within the meaning of
25 the act. And then any action that they take has

1 to be confirmed in writing. And essentially
2 they can -- the officer can do one of two things
3 or both. They can either direct someone to deal
4 with the property in a certain way. So if it
5 were -- property were in a self-storage centre,
6 change the locks and not allow the -- anyone to
7 get into the storage. Or they can ask for the
8 property to be delivered up either to a police
9 station or to the civil forfeiture authority.

10 They have to issue a receipt to whoever
11 they've seized it from. And that gives them 10
12 days to get this before a civil forfeiture
13 authority, and they can make a decision as to
14 whether to go to court and restrain it or revoke
15 the order and return the property. In the
16 original conception of that power -- up until
17 2010 it was 72 hours, but I think practically
18 that obviously didn't work very well for them.
19 So that's one of the unique futures of the
20 Alberta statute.

21 Q In speaking about the -- British Columbia's
22 administrative forfeiture system, you mentioned
23 that one of the requirements is that the asset
24 must be in the possession of a public body. I
25 wonder if a mechanism like this one you've

1 spoken about in Alberta would help to expand the
2 universe of assets that might be susceptible to
3 administrative forfeiture as it would provide a
4 way for them to get into the hands of a public
5 body?

6 A Yeah, I think it would certainly be something
7 worth exploring and asking. It would be
8 something I would probably want to consult with
9 law enforcement, and police in particular, to
10 say are there cases where you interdict -- maybe
11 someone is a money courier and you don't feel that
12 you have the grounds to seize incident to
13 arrest, to maybe an investigation under 354 of
14 the Criminal Code, which is possession of
15 proceeds of crime or a money laundering offence.
16 I'm not sure how often that happens. That's
17 what I wouldn't be sure about. But for sure I
18 think it would definitely be something worth
19 giving some consideration to.

20 Q Do you have a sense of how frequently that power
21 is it used in Alberta relative -- compared to,
22 say, seizures incident to arrest or other sort
23 of Criminal Code-type powers?

24 A Yeah, there's not -- there's very little
25 reported law on it, so I actually don't know. I

1 would think pretty infrequently. Most of the
2 cases that are going -- that are worth a bottle
3 to go to superior court on for a civil
4 forfeiture case. You know, the police are doing
5 a good investigation and a good job, and they
6 have grounds to get in there. They can't always
7 get to the criminal justice system, but there's
8 usually a pretty good reason for them to be --
9 to have that asset in their remit. And so I
10 wouldn't think it's used very often, but there
11 may be circumstances where it is useful.

12 Q Thank you. The next province you address in
13 your report is Saskatchewan. And maybe before
14 we get to the current state of the law, you
15 refer to sort of an initial seemingly somewhat
16 failed attempt to establish a civil forfeiture
17 regime. I wonder if you can comment a little
18 bit on -- about Saskatchewan's first attempt at
19 this and what went wrong with that.

20 A Well -- so Saskatchewan and Manitoba both had
21 civil forfeiture laws -- I'm trying to think of
22 the timing; probably 2005 or before then -- and
23 they were police-led models. And they had -- in
24 Saskatchewan there's something called SCAN,
25 which is Safer Communities and Neighbourhood

1 Act. It's designed to deal with things like
2 crack houses and nuisances, and it's sort of a
3 quasi-civil, quasi-regulatory tool that's given
4 to someone who is in the police community to
5 deal with that kind of a problem in the
6 community. And so I think they used that model
7 to go forward. But I don't think it was -- I
8 don't think any cases were launched under those
9 original iterations of the statute.

10 And I went out to Manitoba, to Winnipeg in
11 January. I actually stood at Portage and Main
12 because, you know, it's January and you have to
13 be able to say you've done that. I talked to
14 them about it. And it's not that you can't have
15 a police-led civil forfeiture regime. The Irish
16 one is similar. It's actually an independent
17 agency called the Criminal Assets Bureau, but
18 it's led by the senior member of the Garda. And
19 people that go into that agency retain their
20 powers. So police officers are still police
21 officers when they're in there. There's revenue
22 -- inland revenue commissioners and social --
23 and welfare commissioners. They all retain
24 those authorities when they go into that.

25 But if you look closely at the Irish model,

1 they created a statute to build the agency and
2 they resourced it. And that I think was
3 probably the biggest challenge in Manitoba and
4 Saskatchewan is if you can hand the police a
5 power, but if you don't actually give them the
6 resources and the lawyers and the things that
7 you need to use it, their not going to use it.
8 So they switched over and followed the Ontario
9 and BC models and that's currently what they
10 have right now.

11 Q One of the features you write about for the
12 Saskatchewan model is, like British Columbia,
13 they have a director of civil forfeiture. You
14 spoke a little bit about what the nature of that
15 office is. Can you comment on whether you see
16 that as sort of a significant feature of civil
17 forfeiture legislation in the provinces that
18 have it or whether it's -- and whether it makes
19 a practical difference in how these regimes
20 operate?

21 A Yeah. You have to have someone with a properly
22 delegated authority to make decisions. You have
23 to instruct your lawyers as to how you're going
24 to proceed with the case. You've got to make
25 practical decisions on everything from how to

1 procure a tow truck company through to, you
2 know, where you're going to store the seized
3 car, how you're going to take it to an auction.
4 All of those kinds of things. You've got to be
5 able to pass title with something that's
6 forfeited. You've got to deal with victims.
7 Whether you designate a director or not isn't
8 all that important in my own mind because you
9 have to designate someone.

10 So in Ontario there actually is a director
11 of asset management. That was my designation.
12 In addition to being the legal director I was
13 also the director of asset management. So it's
14 just a matter of making sure that you have that
15 functionality so that you can carry out all --
16 some of the tasks are administrative -- who
17 signs the contract for the tow truck company --
18 and some of them are quite significant. Are we
19 taking this case; what are the risks, the
20 Charter risks, and all that kind of stuff. So
21 it's across a panoply.

22 Q And turning now to the -- or continuing on with
23 the current Saskatchewan legislation. Are there
24 other features of that legislation that are
25 particularly interesting or unique?

1 interesting or unique or distinct about their
2 current [indiscernible].

3 A Yeah, so Manitoba sort of picked up -- I mean,
4 BC was the first to do administrative
5 forfeiture. Manitoba has gone there. So a lot
6 of the provisions in Manitoba are similar as
7 between, say, Ontario and BC. One that is a
8 little unique is the requirement that there's an
9 annual report filed, and this is something --
10 Ontario has passed legislation -- it won't come
11 into force until 2021 -- requiring an annual
12 report as well.

13 I think one of the criticisms sometimes of
14 civil forfeiture is that the story isn't
15 necessarily told. So you have people that will
16 tell anecdotes about this is horrible or is
17 awful, what have you, but we don't actually
18 always get the -- sort of the story out there
19 and we don't have maybe the transparency that
20 one might have. So that's one feature which I
21 think is important and I think it would be very
22 valuable to have.

23 Q Thank you. So we continue our eastward journey.
24 The next province we come to is your province of
25 Ontario. You've referenced the Ontario

1 legislation a couple of times, and I wonder if
2 you can give us a sense from your view what's --
3 as it currently exists, what's distinct or
4 unique about Ontario's civil forfeiture regime?

5 A Sure. So there's a couple of provisions I'll
6 talk to -- or speak to. The first one -- and
7 it's important to understand when we were doing
8 this 20 years ago -- in 2000 was when we were
9 really working on the drafting -- we didn't
10 really know what would work and what wouldn't
11 work. We did have some sense from other
12 jurisdictions. There were some things that gave
13 us confidence. For example, in the Irish
14 constitution there's a right to property, and
15 that had survived a challenge in a case called
16 Gilligan. There had been a challenge in
17 Britain. There had been challenges under the
18 ECHR in Europe as well. So we had some sense of
19 where things would go.

20 One of the things that we didn't know how it
21 would work would be access to assets for legal
22 expenses. So you work on sort of hypotheticals,
23 you say okay, if I freeze everything that this
24 person has, everything, then I put them in a
25 conundrum where they can't afford a lawyer and

1 legal aid might deny them a certificate based on
2 what their assets are even though I've frozen
3 them.

4 So we did create a provision -- it's been
5 used a couple of times -- that allows a litigant
6 to access assets for legal expenses. Under the
7 Criminal Code and CDSA there's also provision
8 for personal and living expenses. We didn't use
9 that -- didn't allow that at all.

10 And normally the rule in other
11 jurisdictions, BC, for example, is the costs
12 follow the event. That's how the Civil
13 Forfeiture Act in BC works. You just with let
14 it be sorted out kind of at the end. So there's
15 some rules around the Ontario. One, we apply
16 the legal aid tariff. You can get into -- up to
17 15 percent of the value of the assets. You can
18 only use that for a lawyer to defend the civil
19 forfeiture case. And we used parts of the
20 judicare model in terms of it's a means-based
21 model, so you have to go in and show that you do
22 not have the means or the wherewithal to pay for
23 the legal expenses to defend on the provision.

24 So it hasn't been used very often, but it
25 has been used a couple of times. So that's one

1 of the unique provisions that's in Ontario. And
2 I don't think any -- no other jurisdiction has
3 that.

4 Q On that related -- that subject of paying for
5 legal representation in these proceedings, are
6 you aware of any province having seriously
7 considered sort of ensuring that respondents
8 have access to a legal aid program as they might
9 in criminal proceedings?

10 A Yeah. That's a really good question. I know --
11 I talked to all of the provinces at the design
12 stage about this, and I wasn't confident that
13 they should copy us in there. It might be an
14 interesting legal challenge for someone. That's
15 why we had the provision, and we built it into
16 Ontario.

17 Generally speaking, no, I'm not aware of
18 situations where the civil forfeiture proceeding
19 is so successful that the other side is
20 completely indigent. That doesn't happen very
21 often. Not in my knowledge. And so certainly
22 in my 10 years I don't think I ever had a case
23 where I was going to sort of call legal aid and
24 see if they could get a -- any of that kind of a
25 thing. No.

1 Q And in writing about the Ontario regime you also
2 talk about a distinct right of action available
3 to the Attorney General regarding conspiracies
4 that cause harm to the public. I wonder if the
5 you can describe the purpose of that provision
6 and your thoughts on its significance to the
7 Ontario system.

8 A Sure. So this was actually in Ontario where we
9 actually had started. We had studied -- or I
10 had studied a statute that the US Congress
11 passed in 1970 called RICO, it's the Racketeer
12 Influenced and Corrupt Organizations statute.
13 And RICO was used to go after organized crime.
14 The original Ontario statute was originally
15 called Remedies For Organized Crime and Other
16 Unlawful Activities and that's where we were
17 sort of thinking along the lines of.

18 The challenge with RICO, though, in the
19 United States is what it really does is it puts
20 civil tools in the hands of the criminal
21 prosecutor in a criminal prosecution. So they
22 can seek injunctive relief and they can seek
23 disgorgement, and they can -- injunctive relief
24 can go quite far. It's quite structural.
25 Things like the Fulton Fish Market in New York

1 was largely cleaned up as a result of RICO,
2 Labour racketeering problems with some of the
3 unions. We don't seem to have those problems
4 thankfully in Canada. But RICO was instrumental
5 in those.

6 But what we did do was we kept a residue of
7 RICO which allowed the Attorney General to sue a
8 conspiracy. And then there's -- sort of the end
9 game of that was to either get a preventative
10 order of the court -- could be injunction, could
11 be something along those lines -- or damages for
12 the injury to the public. And the way it's
13 framed is where you have two or more people who
14 conspire to engage in unlawful activity, at
15 least one of whom knew that injury to the public
16 would result. You can then bring a proceeding.

17 And injury to the public is fairly broadly
18 framed. It's enjoyment of property, questions
19 of health, safety, comfort or convenience or
20 costs by government. It hasn't been used very
21 often. It was used in one notable case around
22 2009, 2010, 2011 involving a building contractor
23 who was -- a predatory building contractor who
24 tried to find little old ladies with diminished
25 mental capacity and then take them for every

1 penny that he could. And so we used that as a
2 sort of a far-reaching mechanism along with
3 forfeiture in that case given the damages, and
4 we did get money back to the families that had
5 been victimized by that gentleman.

6 Q Thank you. One last feature of the Ontario
7 legislation I'll ask you about is you describe
8 in your report a recent amendment that creates
9 what you refer to, judicially authorized
10 disclosure orders. We've talked already about a
11 couple of provisions in other jurisdictions that
12 allow for -- you know, expand the powers of the
13 civil forfeiture unit to seek out information.
14 I wonder if you can explain how this provision
15 works and you thoughts on its significance.

16 A Sure. So all provinces with a civil forfeiture
17 law, the one thing I didn't anticipate when we
18 got into the drafting was the engagement on
19 privacy issues and it's very, very important.
20 So all statutes have in them, and it's usually
21 in technical and kind of hard to read sections,
22 at the back of the statute a statutory authority
23 for the director to collect, use and disclose
24 information that they obtain. Typically it will
25 be from police and as I say, the process that

1 we've talked about later -- earlier. The second
2 thing that we did in Ontario, and it was
3 involving a case out of the United States, was
4 we created an ability to create an agreement
5 with another jurisdiction -- and BC has this as
6 well -- that allowed us -- and the case that we
7 dealt with was a massive fraud by Allen
8 Stanford. And Stanford had defrauded victims
9 all over the world. He had then parked some of
10 his money -- had gone through a bank in Toronto
11 before it was going on to Antigua where he had
12 his estate. Some of it went off to Europe.

13 And so we then struck an agreement with the
14 Securities Exchange Commission to collect the
15 information on the Stanford case, then went in
16 and we froze the money and we got all of that
17 money -- it was a pretty substantial sum in the
18 end, \$23 million, something like that -- back to
19 the victims.

20 And then the third thing, the most recent
21 thing that has changed for the Civil Remedies
22 Act in 2020 is that at the time of what you
23 would call an IPO -- we call it preservation
24 order -- at the early stages or prior to those
25 you can seek a court order ex parte for up to

1 legislation that you think are of particular
2 significance.

3 A Yeah, there's a couple. I mean, some are more
4 administrative. So the authority -- the statute
5 gives the authorities in Quebec the ability to
6 deal with assets, whether they're in the
7 criminal or the civil system, which is kind of
8 an interesting thing. We have a kind of a
9 different approach in the common law provinces
10 on that.

11 But there are a couple of interesting
12 things. One thing, the statute gives the court
13 the ability to declare property rights
14 unenforceable where they are of a simulated or
15 fictitious nature. So that would typically be a
16 nominee ownership relationship where it's the
17 spouse or the child of the main target actually
18 holds title. And in civil law this provision
19 allows the Quebec court to unpack that.

20 There's also a presumption for proceeds in
21 Quebec that if the legitimate income is
22 significantly disproportionate to the -- either
23 the property or the lifestyle or both of the
24 individual respondent, that a presumption can
25 arise that says their property is a proceed.

1 And there are also presumptions that arise
2 for people who frequently engage in unlawful
3 activity, people who have been convicted on a
4 crim org offence under the Criminal Code and for
5 companies that are largely controlled by those
6 kinds of individuals.

7 Q Thank you. Maybe to conclude our brief tour of
8 Canada, there are three other jurisdictions that
9 you refer to in the report, Nova Scotia and New
10 Brunswick and Nunavut. Each of those I believe
11 you suggest are functionally similar to British
12 Columbia's legislation. So instead of going
13 through them one by one I'll just ask you to
14 comment if there are any distinct features of
15 the legislation in those provinces and that
16 territory. Is there anything that you would
17 suggest we be alive to?

18 A Yeah. In New Brunswick and Nova Scotia they
19 haven't been used very often. There was a
20 smattering of cases about -- I don't know -- a
21 few years ago. I can't remember exactly when
22 they happened. They weren't successful at trial
23 in Halifax on a couple of cases. And that
24 seemed to have taken the wind out of their sails
25 a little bit.

1 Nunavut, the provisions as you read them are
2 very similar to the ones in British Columbia. I
3 know that there are different kinds of
4 challenges because you have remote Inuit
5 communities, you could have a dry community
6 that's then affected by bootleggers in a really
7 horrible way, and they are very practical
8 considerations. If you wanted to, say, preserve
9 the snowmobile of someone because they're a
10 bootlegger, where do you put it and how do you
11 deal with that piece of property. There are
12 things that they really have to think through
13 operationally.

14 And then the one -- I know -- I worked with
15 them a little around -- they were doing
16 intensive consultations, and they want to be
17 very sensitive to the communities that they're
18 serving up there, and they did a lot of talking
19 with elders and others in communities to get a
20 real good sense of what was needed and what
21 wasn't.

22 Q You've just mentioned the challenge in Nunavut
23 or -- yes, in Nunavut of potentially dealing
24 with a snowmobile that's been seized and you
25 need to find somewhere to put it. And you

1 earlier referred to the difficulty the Irish
2 authorities had in dealing with Mr. Gilligan's
3 horses.

4 I wonder if we can just speak briefly, then,
5 since it's come up, about the asset management
6 aspect of civil forfeiture. I wonder if you can
7 maybe just speak generally to the challenge that
8 that can pose and maybe some of the ways that
9 different provinces have addressed that issue.

10 A Yeah, so we were really alive to the challenge.
11 There had been -- there's something called the
12 Government Accountability Office, which is a
13 congressional watchdog. And they had -- and the
14 auditors in the United States as well had issued
15 a whole series of scathing reports about how the
16 American system in the 70s and more in the 80s
17 and the 90s had managed assets. You had cars
18 with a tree growing out of them, that sort of
19 thing, because they had done a very poor job.

20 And so one of the pieces of advice that we
21 got everywhere we went was you really, really
22 need to be mindful of asset management. And
23 I'll just give you an example. We dealt with a
24 case in Ontario. It was just a massive
25 prosecution against an outlaw motorcycle gang,

1 and it had been a criminal prosecution. It had
2 gone on for many, many years, and it was
3 collapsing. There were only a couple of
4 defendants left. But they had restrained a
5 number of clubhouses in a number of places
6 across Ontario and these things were falling
7 down; they were moldy; they were rotted. And so
8 the security and all those kinds of costs would
9 have been very significant.

10 So we managed to get -- if you go through in
11 the Civil Forfeiture Act, you'll go through --
12 there's a whole series of kinds of orders that
13 the court can make to preserve the property.
14 And in this instance, we convinced the court, at
15 least for the outlaw motorcycle gang clubhouses,
16 that the best way to preserve the value would be
17 to tear them down, sell the vacant lots and pay
18 the money into court, which the court agreed
19 with us on. And so we tore down buildings in
20 Windsor and Toronto, Sault Ste. Marie and so on
21 and so forth. And then we went through the
22 litigation, and it went where it went, which did
23 result in forfeiture, but ...

24 So you always had to be thoughtful. You
25 know, if you have a \$1,000 car, are you going to

1 spent \$200 a month impounding it and putting it
2 in a yard. What are you doing? If you have
3 perishable property -- there was a famous case
4 in Arizona involving melons. If you don't
5 actually deal with the property quickly, you
6 don't have property; you have something else.
7 So it's just something that has to be --
8 preseizure planning is what the Americans call
9 it. You have to be very thoughtful about that
10 in any given case.

11 Q Thank you. Okay, then. So having concluded our
12 little tour of Canada, I thought I might zero in
13 on a few sort of bigger picture questions around
14 how this legislation operates and some of the
15 different issues that arise with respect to this
16 type of legislation. And I want to begin with
17 what I gather is likely the most frequent
18 criticism of this type of legislation which is
19 its impact on property rights and civil
20 liberties.

21 Beginning in this province. You describe
22 one of the safeguards in the British Columbia
23 legislation as the availability of relief
24 against forfeiture where it's clearly not in the
25 interests of justice. I wonder if we can begin

1 this conversation by asking is that sort of
2 feature common to most provinces and -- or if
3 it's -- there are, you know, significance
4 differences in how different provinces address
5 this issue of civil liberties and property
6 rights.

7 A Yeah. So this is -- one of the things that
8 other jurisdictions had told us is that as
9 you're moving through the legislative and the
10 policy process, there will be people that come
11 up with crazy hypotheticals and they will say,
12 you know, you're going to take a million dollar
13 house because of some small technical regulatory
14 contravention and then you're just -- and that
15 was the controversy. And we were -- so we were
16 very aware of that and we were also just aware
17 from a design perspective. I mean, I've worked
18 for the Attorney General for 30 years, and even
19 though I'm not speaking in that capacity here,
20 I'm very, very respectful of rule of law and
21 very respectful frankly of the courts and the
22 role that the courts play.

23 So what we wanted to do was to vest in the
24 courts an inherent jurisdiction so that even if
25 we make all of the basic elements of a case out,

1 yes, the property is -- provenances in crime or
2 unlawful activity, and yes, it's a proceed. We
3 wanted to make sure the court could still say --
4 and there's also -- there are specific defences
5 that are there for people who are legitimate and
6 responsible owners and they can come in and
7 say no -- yes, maybe the property is the
8 proceeds but not my interest in the property.
9 So we wanted to make sure -- even if those boxes
10 weren't ticked, if it was going to result in
11 what the courts -- the jurisprudence as its
12 developed has said is a manifestly harsh and
13 inequitable result. That's clearly not in the
14 interests of justice, and the court can refuse
15 to issue an order of forfeiture or an order of
16 preservation. You put it through the whole
17 system.

18 And this is one of the areas that has been
19 litigated a lot in BC and Ontario in particular.
20 All provinces have something like these in their
21 jurisdictions and statutes. The onus to make
22 that claim, clearly not in the interests of
23 justice, is on the claimant themselves. The
24 courts have recognized that this is a
25 discretionary remedy. It's not to be issued as

1 a matter of course. And it needs some evidence,
2 which means that it's not particularly amenable
3 to something on summary judgment, for example.

4 And the factors that the courts have looked
5 at over a range of different cases, they want to
6 look at the culpability of the claimant or the
7 litigant. How culpable are they in the unlawful
8 activity. They want to look at the seriousness
9 and the impact of the unlawful activity on the
10 community. They will look at things like a
11 history of other offences from the litigant.
12 They will look at the value of the property, and
13 is forfeiture disproportionate to the kind of
14 unlawful activity that's being engaged.

15 And the courts have recognized that there is
16 a public interest in the director, for example,
17 in British Columbia, bringing a proceeding under
18 the Civil Forfeiture Act. They've given
19 recognition to that and that's one of the
20 factors that they consider when they're
21 considering that particular doctrine.

22 Q Thank you. I wonder if you can speak to -- from
23 your experience or from the study you've done of
24 this legislation across Canada, does this type
25 of standard play a role? Is it just at the sort

1 of judicial stage of the process, or what kind
2 of a role does it play at the time that cases
3 are selected or evaluated for civil forfeiture
4 action?

5 A Yeah, in my experience you look at things very,
6 very carefully if you are in a civil forfeiture
7 authority like the director. And you look at
8 them vary carefully for two reasons -- lots of
9 reasons, but the two main ones is you have
10 limited resources. You always do. That's just
11 a product of the system that we're in. So you
12 always ask yourself, is this the right thing to
13 go forward with. One of the reasons I think
14 that administrative forfeiture came online was,
15 I think, there was a recognition in BC -- and BC
16 was the first to do it -- that, you know,
17 bringing a full court proceeding is very
18 expensive. Even if it's not opposed, it's still
19 very, very expensive. It costs 10-, \$11,000,
20 15,000, whatever it is, even on an unopposed
21 application. So you always sort of think about
22 that.

23 And then we're all very mindful of the fact
24 that we're going to be before sometimes a very,
25 and fairly, sceptical, judge about what we're

1 doing. And so, you know, if there is something
2 that's really clearly not in the interest of
3 justice, we wouldn't -- we do not deal with it.
4 And I know there were cases where we had
5 evidence, and when we dug into it will evidence
6 a little bit more we us passed on the case
7 because it ran risks that just weren't fair to
8 the other side and I didn't want those risks
9 being brought onto the Attorney General.

10 So we are always really, really mindful of
11 those kinds of decisions as we decide what we go
12 and bring forward.

13 Q Aside from that interests of justice type of a
14 test, are there other mechanisms that have been
15 implemented in difference provinces to -- you
16 know, in consideration of these issues of
17 property rights and civil liberties or is
18 that --

19 A Yeah. I mean, you know, there's -- one of the
20 things that does come up frequently and came up
21 recently in British Columbia is the interplay
22 between the criminal justice and the civil
23 justice system. It's a slightly different
24 issue, but, you know, you often will have a -- a
25 case will often start in the criminal justice

1 system with a police investigation. It will be
2 in the hands of the prosecutor and for any
3 number of reasons the prosecution might fall
4 apart. You might have an inadvertent disclosure
5 of a confidential informant or whatever and --
6 or no reasonable prospect of conviction in the
7 hands of the Crown.

8 When property is in the criminal justice
9 system, it's generally governed provincially by
10 section 490 of the Criminal Code. So there's a
11 return done before a justice, the property is
12 then managed through that process, and someone
13 can seek a return back of the property as well.
14 And where there's been a lot of confusion in the
15 courts -- and it's starting to resolve now I
16 think a little bit -- is what happens when in
17 that interface between the criminal justice
18 system and civil justice system for a civil
19 forfeiture case, and there's a recent decision
20 called Qin in which the BC Court of Appeal
21 overturned a trial court ruling which was going
22 to return several millions of dollars in assets
23 to a respondent. And the court said that the
24 processes -- the Criminal Code process is -- its
25 own process and it's independent of the civil

1 forfeiture process. The civil forfeiture
2 process makes determinations on title, who
3 really owns it, is it forfeited or not, whereas
4 the criminal justice system really only deals
5 with possessory interests, and so that it
6 doesn't get at the title issue. So that's one
7 of the areas that I think we're starting to see
8 a little bit of clarity in the law around.

9 Q And just to conclude on this civil liberties and
10 property rights issue, you spoke a little bit
11 about the thought process that went into the
12 creation of this kind of an interests of justice
13 standard at the outset of Canada's civil
14 forfeiture experience. I'm wondering now after
15 20 years, looking back from your perspective as
16 somebody who's worked in the area and studied
17 the area, do you believe that we've struck the
18 right balance between an effective civil
19 forfeiture regime and ensuring that it's used in
20 sort of a just and a fair way?

21 A I do. I think that's the one thing that -- and
22 I don't want to say we got it right. I mean, we
23 put the architecture in. Really it was through
24 the independent judiciary where they've
25 established the jurisprudence. There's a couple

1 of very important court of appeal cases out of
2 Ontario and there's some very important
3 decisions out of BC as well. And I think really
4 does create a balance. I mean, the thing about
5 civil forfeiture is it's one thing within a
6 continuum of different modalities to deal with
7 problems. It's not a panacea. It doesn't apply
8 to everything. It doesn't work for everything.
9 But where it is the right tool, it really,
10 really, is the right tool. And having clearly
11 an interests of justice test in there I think
12 really has struck a good balance.

13 Q Thank you. The next topic I'd like to turn to
14 would be the financial side of the operation of
15 this type of legislation and the units that are
16 responsible for administering it.

17 You spoke a little bit earlier about one of
18 the features of the British Columbia legislation
19 that the proceeds realized through civil
20 forfeiture actions are deposited into a
21 segregated account that are used for specific
22 purposes, including the cost of administering
23 the statute, victim compensation and grants.
24 And I wonder if you can first just speak to
25 whether this is sort of the common arrangement

1 across Canada or if BC -- if there are
2 significant differences in how that financial
3 side of things is managed.

4 A Sure. So this was probably the most difficult
5 part of the policy process because governments
6 generally have a consolidated revenue fund, and
7 they want -- everything that goes into that
8 fund, they don't want it earmarked for anything
9 else. That's sort of a presumptive rule.

10 If you look at US tax laws, you'll see lots
11 of things are taxes, but they can only be used
12 for roads or for this or for that. And we've
13 tended very much to avoid that process in
14 provinces across the country. It's not -- this
15 isn't unique to Ontario. But part of the design
16 of civil forfeiture, really, is to get money to
17 victims. And so if something goes into the
18 consolidated revenue fund, it's -- then you have
19 to worry about the appropriation of that money,
20 to get that money to the victims, because there
21 is really going to be a time lag between the
22 time you preserve, the time of forfeiture and
23 the time that you sort out the claims. It can
24 be pretty complicated depending on what you're
25 doing.

1 And so we decided that we would use a
2 special purpose accounts sort of process. All
3 it is really is it's a segregated account within
4 the consolidated revenue fund and the
5 legislature has given an authority in BC's case
6 to the director, and they can cost recover.
7 They have -- they certainly get money out to
8 victims and then there is a grants process as
9 well. And it runs differently than the American
10 system. Quite differently, actually. And
11 that's also by design.

12 Q And can you speak to whether there's a general
13 expectation across Canada that civil forfeiture
14 programs will effectively fund themselves and
15 recover their own costs?

16 A Yeah. I mean, it's -- you know, I always
17 took -- as an architect, I was always concerned,
18 you know, if I have a case selection between a
19 victim's case and a simple, easy drugs case, the
20 policy impact of the victim's case is probably
21 much more important. But if I don't have a cost
22 recovery mechanism, I would worry that I would
23 go for the low-lying fruit, the easy stuff. So
24 we always took the view that it was quite
25 appropriate for us to cost recover on cases, and

1 in victim's cases typically we don't and in
2 other cases typically we would. The numbers
3 aren't huge and they're not overwhelming, but I
4 do think it's an important way of making sure
5 that you can focus in on the things you really
6 need to focus in on if you're running a program.

7 Q And at the outset of your evidence when we spoke
8 a little bit about the purposes of this type of
9 legislation, one of the purposes you referred
10 to, if I recall correctly, was deterrence and I
11 suppose by extension crime prevention.

12 I wonder if you can speak to whether there's
13 a risk where there's a cost recovery expectation
14 that cases that might have a major impact on --
15 through deterrence or an impact on crime
16 prevention might be sort of not pursued because
17 they don't have much risk -- or stand much
18 prospect of cost recovery.

19 A Yeah, I mean, there's a balance, you know, and
20 there's a balance in terms of what actually
21 happens practically in all of the civil
22 forfeiture units. So there are -- you know, if
23 someone is in the narcotics trade, they're
24 selling fentanyl or something on the street,
25 there probably aren't going to be too many

1 victims' claims. If someone is in the business
2 of committing fraud, there almost certainly will
3 be. And what we tended to find was, you know,
4 organically there was enough of a balance in the
5 case loads between those things that that never
6 became an issue.

7 And we were always very mindful. I mean,
8 you know, you have to walk the walk. We said
9 this was for victims' compensation. In fact,
10 Ontario's been quite successful in that regard,
11 but you have to actually do it to get there.

12 Q Thank you. If we can move ahead, then, to
13 another topic, specifically around the sources
14 of information and referrals received by civil
15 forfeiture units. And you spoke a little bit
16 before about how the model -- the typical model
17 of civil forfeiture units receiving information
18 from police and the challenge that comes with
19 not being able to go back to police to seek more
20 information. I wonder if you can just speak
21 to -- that was part of your description of the
22 sort of common Canadian model. So is it fair to
23 say that most civil forfeiture units or all
24 civil forfeiture units in Canada are largely
25 reliant on referrals from law enforcement to

1 identify potential targets for forfeiture?

2 A Yeah. I mean, in Ontario it's not just police.
3 There can be referrals from the Ontario
4 Securities Commission. There can be referrals
5 from a ministry like the Ministry of
6 Environment, for example, in regulatory
7 prosecution kind of context. If someone's doing
8 some sort of a waste-dumping scam or whatever in
9 order to make money, there can be a referral
10 from that kind of an organization.

11 So yeah, and as I say, this is a tool that
12 exists in a whole bunch of different modalities
13 for law enforcement to use, but most of the
14 cases -- I think most of the cases would come
15 from a police service. In Ontario the RCMP, the
16 OPP or municipal police service.

17 Q And are you aware of any civil forfeiture unit
18 in Canada that has the capacity to independently
19 identify potential targets for forfeiture,
20 essentially, for lack of a better term, refer
21 targets to themselves?

22 A Yeah -- no. I think there's a couple of
23 different places that this could arise. For
24 example, you know, could have -- if you realized
25 that a kleptocrat had taken money from treasury

1 in Eastern Europe and hidden it away in a bank
2 account, you might learn that through something
3 like Transparency International, or you know,
4 the Panama Papers or, you know, the FinCEN
5 disclosures or something like that. I could see
6 you sort of self-instructing in that kind of a
7 place.

8 I think -- the bigger question and the
9 bigger issue, I think -- and I know the
10 commission's heard about this certainly in the
11 summer, things like JMLIT in the UK, is -- are
12 the information gateways. And I think that's
13 one rich area that really needs to be thought
14 through. What information can get to the civil
15 forfeiture unit; who has the authority to give
16 it; how does our FIU work. You know, the FIU,
17 FINTRAC, in this country is a lot more reactive
18 than some other financial intelligence units.
19 Whether that's good or bad is a different
20 question, but it's certainly something we're
21 thinking about a little bit.

22 Q To the extent that civil forfeiture units are
23 dependent on referrals from law enforcement and
24 in some other cases other types of entities, is
25 it fair to say, then, that the targets of civil

1 forfeiture in a given province are likely to
2 reflect the priorities of law enforcement to a
3 large degree?

4 A Yeah. Yes. And then within that construct, you
5 know, if the law enforcement agency in Ontario
6 is the anti-racket squad of the Ontario
7 Provincial Police, then the focus of their
8 referrals would be around fraud. And if it's
9 the drug enforcement unit, the focus would be
10 around narcotics. So things kind of come and go
11 in cycles. I know BC did a lot and still does a
12 lot of outreach.

13 One of the things that happens in the law
14 enforcement community is that people rotate
15 through units, so you often don't have
16 continuity where there's one investigator who
17 has simply done proceeds for 20 years, those
18 kinds of difficult, technical investigations.
19 They rotate every two, three, four years
20 through. And it's a good thing for the police
21 service, it keeps their officers fresh, but it
22 constantly requires a civil forfeiture unit to
23 do renewal of training and making sure people
24 know what's there, what the tools are, how to
25 use them properly and that sort of thing.

1 Q We spoke a little bit about the absence of
2 internal capacity to identify targets. Are you
3 aware -- I think we'll hear a little bit later
4 this week about approaches taken in other
5 jurisdictions where that capacity has been
6 developed. Are you aware of any province having
7 given serious consideration to, you know,
8 providing a civil forfeiture system with some
9 kind of significant investigative capacity to
10 help to generate those types of referrals?

11 A When we were working 20 years ago, we did look
12 very closely at sort of the US task force model
13 because they try and bring a whole bunch of
14 different people to the table. I spent some
15 time with the organized crime task force in New
16 York state out of White Plains, and they had,
17 you know, prosecutors, they had civil forfeiture
18 lawyers, they had criminal investigators and
19 they were all kind of part of a team.

20 I think if you look across the American
21 federal system, the assistant US attorneys,
22 they're sanguine about whether they go civil or
23 criminal on a case. It's whatever suits them
24 and whatever suits the facts of the case. And
25 it's the same lawyer, same prosecutor and they

1 really don't understand the kind of divisions
2 that we have here.

3 I do know civil forfeiture authorities here
4 have sometimes retained, you know, a retired
5 police investigator to make some followup
6 inquiries. There are certainly things that will
7 come out in a discovery, if that's where the
8 proceeding tends to go, and so there's lots of
9 questions that gets asked and lots of back and
10 forth.

11 And if -- you know, if someone's contesting
12 a proceeding and they say no, no, this is money
13 from a legitimate source, that's great, then
14 let's prove it and let's go through that. So
15 there's -- that kind of a testing of evidence is
16 just sort of a natural part of a contested
17 proceeding. So that happens as well.

18 Q And you mentioned the difficulties your American
19 colleagues have in understanding why we have the
20 divisions that we do here. Can you speak a
21 little bit to why we have chosen to set up
22 things in such a different way from the
23 Americans and what maybe the impediments to
24 setting up that kind of a system might be.

25 A Yeah, I mean, you know, there are certainly are

1 some things that are excellent products of a
2 long standing culture. So our Crown prosecutors
3 are rigidly and rightly independent of police
4 and police decision making. The police, yes,
5 you can lay the charge, but, you know, it's
6 going to really vest with that prosecutor to
7 make that decision about what they do with the
8 charge because if there's no reasonable
9 prospect, they're going to pull the charge
10 regardless of how angry that makes the police.

11 And so we do have -- and police are, you
12 know, no fear, no favour. They are quite
13 properly independent and independently formed.

14 One of the things that we're always worried
15 about in any kind of a task force model was
16 that, you know, it's very problematic if you
17 want to use a criminal justice process to get to
18 a civil justice end. I think that -- I'm glad
19 for the Americans that they're not too worried
20 ability that. I certainly -- I did worry about
21 that. And if you think back to 20 years ago it
22 was even greater where we didn't know whether
23 civil forfeiture would be upheld by the courts
24 or not. Not with any certainty. We were
25 confident, but we didn't know. And so we didn't

1 want to add another complexity into that mix.

2 Q Thank you. I'm jumping ahead, then, to talk a
3 little bit about sort of the federalism aspect
4 of civil forfeiture. Your report and your
5 evidence today is focused on provincial
6 legislation, and I take it that's because
7 there's no civil asset forfeiture legislation of
8 the sort that we're discussing today at the
9 federal level in Canada; is that correct?

10 A No, there actually is. There's -- there was a
11 very important case called Martineau. It was a
12 civil forfeiture case. It was called -- I think
13 it was called an ascertained forfeiture, and
14 it's about 20 years old now. And that was a
15 customs case where someone had sort of illegally
16 moved -- I think it was used cars up and back
17 and across the border. So there are some
18 places, you know, where you have a diminished
19 expectation of privacy at the border where there
20 are sort of forfeiture laws. You know, we all
21 have to file a declaration when we're coming off
22 a plane to say do we have more than \$10,000 or
23 not in our possession. And if you don't -- you
24 know, if you don't declare that, there is more
25 or less a civil forfeiture process. It can be

1 challenged in the federal court, but there is a
2 civil forfeiture process there. So it's not
3 exclusively provincial, but those are sort of
4 very niche applications of it.

5 I think if you wanted to talk about sort of
6 a very broad civil forfeiture statute, really
7 you're engaging property and civil rights, so
8 you're really engaging provincial authority
9 [indiscernible].

10 Q Earlier the Commissioner has heard some evidence
11 about the -- I'll say the general disregard
12 criminal organizations might have for provincial
13 boundaries and borders. In a context where
14 crime can move and spread easily across
15 provincial boundaries, I wonder if you can
16 comment on whether provincial civil forfeiture
17 regimes that apply only within a single province
18 sort of are limited in their effectiveness to
19 accomplish the -- some of the objectives we
20 spoke to earlier.

21 A Yeah. We always worried about that. And I
22 think what you'll find, the BC statute, the
23 Ontario statute, there's a provision -- again
24 it's a technical provision in the back -- that
25 allows for an information-sharing agreement so

1 that -- when things can cross borders.

2 Just step back a little bit. We think
3 internationally, so not thinking sort of -- not
4 so much inter-provincially but internationally.
5 It's a very big problem because, you know, it
6 takes a millisecond to wire transfer money from
7 here to New York to Paris to Bangkok and then
8 back to here. And there's no -- it costs you
9 money. Each time you're bouncing through --
10 transiting through a different hub, it's not
11 going cost you a little bit of money. But the
12 people that are doing it know full well that
13 while it can be followed, it's very, very
14 difficult. And we have a mutual legal
15 assistance treaty process, but that's only for
16 criminal matters. And so we can -- you know, we
17 can go to the police in Bangkok and try and seek
18 information.

19 There are other networks. Egmont, for
20 example, is a network of FIUs, financial
21 intelligence units. So FINTRAC could reach out
22 to the FIU -- their FIU equivalent in Bangkok to
23 try and get information assuming that there's a
24 filing, and each kind of FIU is a little bit
25 different.

1 But it is a big problem, and it's a big
2 problem particularly where you have things like
3 corruption and you have the money that's moved
4 offshore. And some of the jurisdictions that
5 have dealt with it very well -- and I think
6 probably American federal government is probably
7 one of the leaders in this area. I think in the
8 last couple years they've done about a billion
9 and a half dollars in forfeitures and tried to
10 get that money back to countries. The Swiss are
11 very active in this space as well. But you need
12 to figure out how you can network so that you
13 can deal with each other in terms of exchanging
14 information, in terms of verifying things. Even
15 simply verifying business records.

16 There's also a group called CARIN,
17 C-A-R-I-N, which is the Camden Asset Recovery
18 Information [sic] Network. And that's -- the
19 Irish actually were very instrumental in that
20 being created. And that's an informal network
21 where someone in Dublin can reach out to someone
22 in Toronto and say, I think my target has a bank
23 account with the Bank of Montreal or whatever in
24 Toronto, and can we talk about how we deal with
25 that. And there is an authority then in Ontario

1 or BC to strike an agreement with the -- with
2 our counterparts and to share information and to
3 proceed. Again, there's a question of
4 investigative capacity and that sort of thing.

5 Q And coming back to the interprovincial dynamic.
6 In your view what's sort of the state of
7 cooperation between difference provinces in this
8 area and is there a need for something more?

9 A There's an incredible amount of information
10 sharing. There's sort of a national, provincial
11 group. I mean, I haven't obviously sat with
12 them for 10 years, but we talk -- they talk all
13 the time. They share information about upcoming
14 case, they have questions. You know, some
15 jurisdictions like BC are quite mature, and they
16 may have someone who has got an expertise in how
17 you the deal with a particular kind of property
18 and the challenges around it. You know, if you
19 had a house that's been used as meth lab, it's
20 very complicated to deal with that from an asset
21 management kind of perspective. It's toxic.
22 There's all kinds of problems.

23 So information sharing does happen all the
24 time. It's not legislatively mandated but as a
25 practical policy matter, it happens. There's

1 information shared all the time.

2 Q Thank you. We've spent a fair bit of time now
3 talking about the Canadian legislation and the
4 Canadian context. In your report you also deal
5 with -- at least briefly with a number of
6 international jurisdictions and you've mentioned
7 a few of those now already. I anticipate we'll
8 hear evidence later this week and later in the
9 commission's proceedings in detail about asset
10 forfeiture in different international
11 jurisdictions, but I thought maybe we could
12 spend a few minutes on those and get your
13 thoughts on sort of what aspects of different
14 systems in different countries are of interest
15 and maybe of value to this province.

16 You've -- I think the first jurisdiction
17 you deal with in your report, or at least the
18 one closest to us geographically, is our
19 neighbours to the south. I wonder if maybe
20 beyond what you've already had a chance to speak
21 to, are there significant features of the
22 American model that you think are worth
23 highlighting for the Commissioner?

24 A Sure. I mean, the American model is -- it's
25 dispersed. It's dispersed in two ways. There

1 is federal, state and local provisions that deal
2 with civil forfeiture. So there are certain --
3 you know, violations of certain New York City
4 ordinances can lead to forfeiture. Violations
5 of state law can lead to forfeiture. And then
6 obviously if it's something that picks up the
7 federal jurisdiction they can go after it as
8 well.

9 And then the federal Department of Justice
10 has a case adoption kind of process where if you
11 start a case at the state level, you can hand it
12 over to the federal resources. They'll have the
13 specialized resources to bring the forfeiture
14 and away you go.

15 The problem with American law in my
16 opinion is that it -- we have the advantage in
17 Canada of being able to do everything all at
18 once. Their law evolved. You know, go back
19 into the 1970s and then the 80s and the 90s and
20 2000 and even now, and so there are silos all
21 over the place in American law. Each statute is
22 different as between treasury and justice and
23 all of that kind of stuff.

24 That said, there's a lot to be learned from
25 our friends in the United States. They have

1 immense amounts of experience. If there's any
2 kind of case, they've probably done it.
3 Everything from art theft to cash smuggling to
4 what have you. And certainly, as I say,
5 corruption's in other area is another area that
6 they're starting to really move on and that's a
7 really positive thing.

8 So yeah, that's sort of a quick precis of
9 the United States.

10 Q Okay. The next jurisdiction you deal with I
11 think is the United Kingdom. If you can tell us
12 a little bit about their system and their
13 experience from your perspective.

14 A Yeah. So talking about in kind of two ways. So
15 right now -- so when we were coming online, I
16 think in 1998, they had passed POCA, the
17 Proceeds of Crime Act, which was a great big,
18 huge thing. And it has evolved significantly
19 since then, and it's evolved in two ways. In --
20 in 1998 to about 2002 I think they created an
21 agency, the Assets Recovery Agency. And that
22 was really unsuccessful. It just -- it never
23 quite worked the way that they wanted it to.
24 They had all of the resources, property
25 management, they had all those things that were

1 in the right way. Anecdotally, maybe the
2 connections between the agency and law
3 enforcement weren't as good as they could have
4 been. I don't know really why it didn't
5 succeed.

6 That then evolved into SOCA, which is the
7 Serious Organized Crime Agency. And now since
8 2013 it's been with the National Crime Agency in
9 Britain.

10 There are two features to the British law
11 that are kind of interesting. One is that they
12 can do value-based confiscating. And what that
13 means is the focus is less on connection of the
14 asset. So in BC you have to trace. If you want
15 to go and forfeit property as a proceed, you
16 have to trace the provenance of the asset such
17 that the court is convinced that it was
18 purchased through unlawful activity or it was a
19 benefit of unlawful activity.

20 In Britain there are some cases where they
21 focus more on the unlawful activity, the value
22 that that creates, and then they go against any
23 assets regardless of their provenance to deal
24 with the value of the confiscation. And there's
25 similar provisions in Australia as well. Some

1 of them can operate quite harshly.

2 The other thing that they've done in Britain
3 is they have -- and I think we've had people
4 come to the commission and speak about this a
5 little bit are unexplained wealth orders. And
6 those are particularly useful, I think, in
7 corruption cases. I think one of their very
8 first cases involved, you know, the wife of a
9 lower-paid central banker in central Asia, you
10 know, had no legitimate source of income and she
11 was spending huge the amounts of money in
12 Harrods and shopping and she had mansions in
13 Mayfair and so on and so forth. So she had no
14 explanation for the massive amount of wealth
15 that she was flaunting in the city of London.
16 And so unexplained wealth orders are another
17 feature that are kind of interesting in the
18 British law.

19 Q Some of the work that preceded the creation of
20 this commission suggested that unexplained
21 wealth orders of the sort we see in the UK may
22 be an effective solution, a strategy for
23 combatting money laundering in this province.
24 Have you -- do you have a perspective as to
25 whether they -- their sort of suitability for

1 Canada or how effective they might be in
2 addressing the problem of money laundering in
3 this country?

4 A Yeah, it's hard to know. You know, I --
5 certainly they -- I think if I were doing case
6 selection and I had unexplained wealth orders
7 and forfeiture tools, I would probably prefer
8 the forfeiture tool if I can use it because what
9 I'm doing there is entering into the court very
10 direct evidence. Where money laundering is
11 complicated, though, is that there are lots
12 of modalities where they shift value and they
13 use unwitting people, mules, that sort of thing.
14 I think one of the speakers before the
15 commission in the summer was talking about
16 foreign students in Britain. And they would get
17 cash from someone who they were told was -- you
18 know, say it was a foreign student from China.
19 They would get cash from someone and say listen,
20 you're just helping a guy; he's working under
21 the table as a dishwasher, and he wants to remit
22 money back to his family. And there were
23 hundreds of these arrangements and the only way
24 to deal with those was through civil forfeiture.
25 They froze all the accounts based on their

1 activity. The students didn't really know what
2 was going on. Maybe they were blind to it or
3 maybe they weren't. An unexplained wealth order
4 wouldn't necessarily work in that kind of
5 context.

6 Where it really would work, though, is where
7 you have a nominee. So if you're a bad guy, I
8 mean, one of the things you want to make sure
9 you do is take care of your family, your
10 children, your wife, your girlfriend, your
11 girlfriends, whatever it is. And so an
12 unexplained wealth order really works in that
13 kind of a context because you have an
14 82-year-old pensioner with no income, and
15 suddenly she's sitting in a million dollar
16 mansion. Maybe she can't really explain the
17 provenance, but maybe her organized crime son
18 can. So that's -- there are some places where
19 it would have utility. I think it wouldn't be
20 my first choice, but there are certainly areas
21 where it could be explored.

22 Q Thank you. You also discuss the Australian
23 experience in your report. What can you tell us
24 about what might be of interest to us from the
25 Australian experience?

1 A Yeah, so the Australians have been at this
2 probably longer than anyone with a common law
3 system. And so we've spent a fair bit of time
4 looking at what they did. We had chats with the
5 New South Wales Crime Commission, which was an
6 agency they brought. And they have state laws
7 and there's also a federal commonwealth law in
8 Australia.

9 Some of them can be quite harsh in
10 operation. Western Australia seemed to be one
11 of the harshest. If you were convicted of
12 certain kinds of serious drug dealing, for
13 example, a presumption would arise that all of
14 your property was forfeitable. All of it,
15 regardless of the source. I seem to recall a
16 case where, you know, the son had inherited from
17 his parents the family home, and that became the
18 subject of the forfeiture proceeding.

19 I think they're very effective at what they
20 do. They certainly have done some very
21 interesting work around money laundering.
22 Something called cuckoo smurfing. And there's a
23 case -- a notable case out of Australia. It
24 involved an Indonesian stockbroker. I believe
25 he was Indonesian. And his two daughters were

1 going to school in Australia. He didn't want to
2 pay regular banking fees to remit money to
3 Australia to pay for tuition and books and so
4 on, so he went to a friend who was a registered
5 money dealer. The friend then would take the
6 money from the stockbroker and he would tell
7 him, just wait a week or two and then check your
8 account balance. And if he checked the final
9 account balance it would show whatever, the
10 \$10,000, had transferred. But if he actually
11 looked at the statement, what he would have seen
12 was multiple deposits: \$300, \$600, \$400.

13 And at the time in Australia, they had these
14 things -- I think they're called smart ATMs --
15 and you could go in and put cash in an ATM and
16 deposit it into anyone's account. And so that's
17 what was happening is the bad guys were smurfing
18 money into the Australian account, and then they
19 were settling the transaction with the money
20 broker in Indonesia. The stockbroker didn't
21 know what was happening, but his money was
22 forfeited. And the court struggled with it a
23 lot because they recognized the knowledge
24 problem but they also recognized that, you know,
25 there clearly was money laundering involved in

1 that case.

2 Q You've spoken a couple of times about the Irish
3 model and the Irish experience. Can you speak
4 sort of generally about what it is about -- that
5 makes that system distinct or unique and what
6 might be significant for our purposes?

7 A Yeah, so the Irish government in 1996 reacted to
8 the murder of an investigative journalist,
9 Veronica Guerin. And she had been following
10 John Gilligan, who was a notorious and very
11 violent mobster; he had threatened her before.
12 And she actually was a terrible driver,
13 apparently, so she was -- they knew where she
14 was because she had to go to traffic court to
15 defend against a ticket, and she was murdered on
16 the highway on the way home.

17 And so they did it very, very quickly. And
18 what they did was they created a separate
19 agency. It has its own on governance. It's
20 called the Criminal Asset Bureau. The leader of
21 the agency is appointed from the Garda, from the
22 police, and then various departments will second
23 people into the agency with their power. So
24 there are tax commissioners, and there are
25 social welfare commissioners that come in. One

1 of the experiences they had -- or at least
2 early; I don't know if they're having it in
3 island -- was that not only would I be, you
4 know, a bad guy and making drug money but I'd
5 also be claiming welfare as another source of
6 income because I wasn't working legitimately
7 anyway.

8 So a very, very interesting approach. It's
9 integrated. I've been told sort of anecdotally
10 sometimes cases will settle as long as it's a
11 tax debt because they don't -- someone -- you
12 know, the other side doesn't mind saying, I
13 didn't pay my fair share of taxes, whereas they
14 do mind the taint that might come from a
15 settlement where it's an acknowledged civil
16 asset forfeiture case. And the Irish are very
17 active in networks in Europe in terms of
18 connecting and so on and there were some really
19 interesting cases there.

20 Q And the final international jurisdiction you
21 deal with in your report is South Africa. Can
22 you comment on a little bit about what civil
23 forfeiture looks like in that part of the world.

24 A Yeah. So, you know, the Proceeds of Crime Act
25 have two -- has two chapters. It has a criminal

1 forfeiture chapter and civil forfeiture chapter.
2 And, you know, it dealt with various people. I
3 still communicate with people in South Africa,
4 certain kinds of questions. They've had a bit
5 of a bumpy ride on what their instrumentality
6 provision is. They've had court challenges
7 around a couple of cases. But they've had other
8 cases that have gone right up to the Supreme
9 Court of South Africa and have been very
10 successful with them.

11 Last week Willie Hofmeyr, who founded the
12 unit, he was -- prior to that he was a lawyer
13 for the ANC in South Africa. He spoke at the
14 opening of an asset forfeiture handbook out of
15 Geneva for STAR. And he indicated in the call
16 last week that there's probably some things that
17 need updating in the law, and I think that's
18 probably fair. I don't think it's changed
19 significantly since 1998, but it is a very good
20 law. It was -- when it was written, it was more
21 American in its architecture than, say, any of
22 the provincial laws that you see here. Why they
23 make that choice I don't fully understand and
24 know, but it certainly has a little bit of an
25 American orientation, and American jurisprudence

1 is relevant sometimes to the courts in South
2 Africa.

3 Q That takes us through the international
4 jurisdictions you refer to in your report. Are
5 there any other sort of significant features of
6 asset forfeiture legislation or systems in other
7 parts of the world that are worth mentioning
8 sort of beyond those few?

9 A Yeah -- no, I can't think of anything off the
10 top of head, but I do know that there's a lot of
11 thinking going on around how you share
12 information across borders. And I've written
13 and thought about this a lot myself as well,
14 information gateways. We have, you know, a
15 treaty process, an MLAT, a Mutual Legal
16 Assistance Treaty process, that is really,
17 really great. We have UN Convention on
18 Corruption, which is very enabling. But there
19 isn't really a great infrastructure right now
20 for sharing, if you wanted to follow someone who
21 has an international criminal organization, but
22 there are some really good best practices.

23 In the United States, for example, they can
24 go in and enforce a foreign civil asset
25 forfeiture order. But as far as I know, I think

1 they're one of the few countries that can do
2 that. If we had -- if we were dealing with the
3 Americans in BC and they wanted us to deal --
4 and they have in fact deal with a few cases --
5 we couldn't enforce. There's no reciprocal
6 enforcement in BC of an American order. But the
7 director could start a case, can sign an
8 information agreement. It can go after the
9 assets in BC, but he would be the director; he
10 certainly wouldn't be a lawyer for the Americans
11 or whatever. He'd have to bring his own
12 proceeding and make all the -- or she would have
13 to make all the right decisions throughout the
14 course of the case. And then there's an ability
15 to share those assets back to the United States,
16 especially if there are victims.

17 Q Thank you. We've spent some considerable time
18 now discussing the past and present of civil
19 forfeiture, both in Canada and abroad. I'd like
20 to turn our focus a little bit to what will be
21 coming in the future. I'd suggest to you that
22 one of the trends that emerges from your report
23 is sort of the expansion of civil asset
24 forfeiture across Canada and internationally
25 over the last three decades or so. In Canada we

1 see the initial enactment and the spread of
2 legislation across the country and then
3 subsequently through the expansion of the system
4 through administrative forfeiture and now maybe
5 some growing powers to collect information. And
6 then internationally, you know, it can spread
7 across different jurisdictions. Maybe more
8 recently the development of mechanism like
9 unexplained wealth orders.

10 I just wondered if you would -- would you
11 agree what we're seeing is sort of this trend
12 towards the growth of the geographic scope of
13 asset forfeiture and the extent and the sort of
14 reach of the types of assets, the types of
15 circumstances that it can apply to?

16 A Yeah. And I think there's a lot of multilateral
17 bodies, the World Bank, the UNODC, FATF -- the
18 FATF, that all are sort of encouraging this kind
19 of development and this progress because it can
20 be an excellent targeted tool within a very
21 narrow range. You're just talking -- you're
22 talking about property and you're talking about
23 bank accounts and that sort of thing. But
24 there -- so it's not just that jurisdictions are
25 dealing with this across Europe, across Asia,

1 but there are international bodies that are
2 promulgating its use. And last week the stolen
3 asset recovery initiative of the World Bank
4 issued a new assets recovery handbook, and that
5 certainly, you know, encourages the use of NCB
6 or non-conviction-based or civil asset
7 forfeiture.

8 Q And are you aware or can you think of any
9 examples of areas where we're seeing
10 jurisdictions sort of go against this trend and
11 restrict -- retract or restrict what they're
12 doing in this area?

13 A Yeah. There certainly have been some vigorous
14 debates in the United States at the state level
15 and also at the federal level about what the
16 appropriate balance is for the use of civil
17 asset forfeiture, how the assets are dealt with,
18 and all of that kind of stuff, and some states
19 have amended their laws. I don't know that
20 they've gotten rid of civil forfeiture, but they
21 certainly have changed some of the things that
22 are in the law. And some of those changes
23 aren't necessarily a bad thing. You know,
24 they -- we have always built sort of a
25 legitimate owner defence in all of the civil

1 forfeiture laws -- it's protection order under
2 the BC legislation -- for somebody that might be
3 caught up in a case when they're really not
4 culpable and they really shouldn't have their
5 property forfeited.

6 It hasn't always necessarily been the case
7 in the United States. There's a famous Supreme
8 Court case called Bennis v. Michigan. And Tina
9 Bennis owned a vehicle. Her husband was an auto
10 worker in Detroit. He used the vehicle to pick
11 up a sex trade worker on the street, had sex
12 with her in the car, so obviously Tina didn't
13 have anything to do with that. And there was a
14 state ordinance that said that your -- the car
15 was forfeitable. And she said well, I'm the --
16 I presume ex-wife -- of Mr. Bennis, and she
17 lost. They said there's no statutory protection
18 for the owner; there's no statutory protection
19 for the owner.

20 So that's about 2005 or 2006. So I'm sure
21 now -- I haven't had a chance to look, but I'm
22 sure now in Michigan law it's different. And
23 it's cases like that that sometimes lead to
24 results. That would never happen in Canada.

25 Q Maybe turn our attention back to this general

1 trend towards the expansion of civil forfeiture.
2 Do you have a view as to where you expect that
3 trend to go moving forward, and are there
4 particular innovations that you might see coming
5 forward in the years to come or particular
6 trends that you've -- we've seen elsewhere or
7 mechanisms we've seen elsewhere that might
8 expand sort of beyond where they've been
9 developed?

10 A Yeah, I think you need to distinguish, I think,
11 between, you know, what the law says, what's on
12 the statute book and how it's used. I think one
13 of the things that we need to think about in
14 this country a little bit is the entire sort of
15 train of investigations, prosecutions, civil
16 forfeiture practitioners. It is a highly
17 specialized area. It's not necessarily
18 complicated. If you say securities law is
19 specialized or tax law is specialized, so is
20 forfeiture law in that same kind of way.
21 There's very niche things about it. Certainly
22 at the investigative level it's very
23 specialized. And if you have a very seasoned
24 proceeds investigator, they would be able to
25 give expert evidence on bundling and packaging

1 of money, for example, cash, that really is --
2 tells a lot of a story. You think you just have
3 a duffel bag with a whole bunch of \$20 bills in
4 there, but they can talk a lot about how it's
5 packaged and because, you know, if you're in
6 that business you want to be able to exchange --
7 you don't trust anyone but you want to be able
8 to exchange very quickly without having to stand
9 at the roadside and verify what's really in the
10 bag.

11 So those kinds of things, I think that's
12 where we need to improve. I think it's on the
13 resources side. I think we need to have more
14 resources into specialized policing, more
15 resources into specialized prosecutors, and then
16 from that the civil forfeiture system itself
17 will be better. So I think that's probably more
18 important than any -- I don't think there's
19 anything that we're missing fundamentally here
20 in our statute. There are some things that we
21 could do. We talked about unexplained wealth
22 orders. There are some things we can do. But
23 really for the system to work properly and get
24 at things like money laundering, it's really
25 getting that infrastructure around how we're

1 coping with that and dealing with it and
2 mitigating the risks that it poses. That's the
3 more important thing in my mind.

4 Q And maybe along the same lines, then, you've
5 spoken a little bit about the challenge that
6 comes with -- or the internationalization, if I
7 can use that term, of crime and the speed with
8 which proceeds of crime can move across borders.

9 I'm wondering if you see other emerging
10 challenges for civil forfeiture that are going
11 to need to be address in the years to come,
12 maybe particularly around emerging technologies.

13 A Yeah, so I think there's probably two big areas
14 around technology that -- and it's not a civil
15 forfeiture problem; it's more of a money
16 laundering problem, to be honest with you. So
17 one is fintech, f-i-n-t-e-c-h. Fintech is
18 really just sort of a notional name. Some parts
19 of it are quite good. There might sort of an AI
20 program that would help a financial institution
21 to understand its risk profile from an
22 anti-money laundering perspective.

23 But there's a lot of parts of fintech which
24 are challenging brick-and-mortar banks in the
25 same way that Uber challenged the taxi industry.

1 And So I think that's an emerging kind of
2 challenge that we're going to see. Virtual
3 currencies, exchange going across borders very
4 quickly and with very little friction and very
5 little fees, that sort of thing is going to be a
6 really difficult challenge for us to get our
7 heads around.

8 The other big looming challenge I think that
9 is out there, and I don't know where it's going
10 to go, is what I call big tech. So you have,
11 you know, Facebook and you have Google, Alibaba,
12 you have these -- PayPal. These big, big, big
13 companies and right now if you're using Apple
14 Pay, for example, really they're keeping within
15 the bounds of the existing financial system. So
16 my Apple Pay, I pay for cloud. I'm using my
17 Visa card to pay for that every month or
18 whatever it is. So they're using the existing
19 financial system. But there are a couple of
20 places, Alipay in Asia and M-Pesa in Kenya,
21 where the big tech are actually settling the
22 transactions on their own platform. And if you
23 think about a Google or a Facebook, one of those
24 big companies, you think about the reach that
25 they have, the depth of data that they have,

1 it's a little frightening. And, you know, who
2 knows. If you think about mortgages, you know,
3 they would understand a lot more from my search
4 history about my risk for a mortgage than the
5 Bank of Nova Scotia ever would and that sort of
6 thing.

7 So that's another one that I think we really
8 would need to be mindful of in terms of
9 technology and the future.

10 Q The last subject I'd like to address around
11 civil forfeiture is the issue of effectiveness.
12 And we've spoken about the goals and objectives
13 of civil forfeiture and a little bit about sort
14 of what works and what doesn't in different
15 jurisdictions. I'm interested in your views,
16 maybe taking a step back and trying to
17 understand, you know, what does an effective --
18 what -- excuse me. What does effectiveness mean
19 in the civil forfeiture context, and what would
20 we see if -- how would we know if a civil
21 forfeiture unit or regime is successful?

22 A Yeah. I mean, step back -- half step back from
23 that question. If you look at estimates of how
24 much money laundering there is in Canada and you
25 look at the range, it's insane. It's just --

1 it's saying we don't know. And we really don't
2 know from a data point of view. And I think,
3 you know, there's an element -- civil forfeiture
4 isn't that big a thing in Canada. You know,
5 relative to everything else, I'm not sure how
6 big it is really, but we don't -- again, we
7 don't have great data.

8 I think we're seeing Manitoba, Ontario is
9 going to come up with an annual reporting thing.
10 I had a very quick look this morning to see what
11 the numbers were in BC, and they only run to
12 about 2017.

13 So I think one of the things that, you know,
14 we should think about first of all is some
15 transparency in reporting out to know. I think
16 the second thing is that we have -- I think we
17 have to receive numbers with some degree of
18 scepticism. If you look at the US numbers,
19 they're huge but they vary year to year. They
20 usually vary about a billion dollars sometimes
21 between 1 and \$2 billion. And that variation is
22 often around big, big cases like an Enron or big
23 bank fraud or HSBC or something like that. You
24 know, they can have a case which is a forfeiture
25 of half a billion dollars or whatever and that

1 skews the numbers and it doesn't really tell the
2 story around effectiveness. But I do think some
3 annual reporting would start to tell that kind
4 of a story and it would give a little bit more
5 transparency into what's happening.

6 In 2017 Professor Gallant at the University
7 of Manitoba, who had been -- who had written
8 just before -- I should back up. She had --
9 before Chatterjee she had written an article
10 that was fairly critical, I think, of civil
11 forfeiture. And then she commissioned a
12 detailed study in Manitoba. And I would never
13 want to -- I like Professor Gallant. I admire
14 her greatly. I wouldn't want to put words in
15 her mouth, but I think she was surprised. They
16 studied about a hundred cases that had happened
17 in Manitoba, and she says in her article, you
18 know, we had read these sort of newspaper
19 stories, alarmist newspaper stories about misuse
20 of civil forfeiture, but when you actually
21 unpacked it and looked at it, it was used fairly
22 consistently and fairly effectively in the
23 Province of Manitoba.

24 And, you know, that's not to say she's a
25 proponent of the thing, but that kind of a

1 study, we don't -- we haven't really done and we
2 don't really do it around money laundering
3 either. We don't really know. It's an activity
4 that's not meant to be known. That's obviously
5 a problem. But I think there's lots of
6 possibility for academics and civil society,
7 people like Transparency International and other
8 groups to -- and the media to really look at
9 what we're doing and ask that question: how
10 effective are we being?

11 Q You've mentioned the importance of regular
12 reporting a couple of times. Thinking about
13 sort of the type of metrics that might be
14 reported, an obvious one would be, you know, the
15 total value of assets forfeited. From your
16 perspective how valuable is that as a metric in
17 assessing whether civil forfeiture is doing its
18 job?

19 A Well, it's a strange business or enterprise to
20 be in because you get what you get sometimes in
21 terms of what is in the moment for law
22 enforcement and when civil forfeiture is needed.
23 And the thing I would be a little worried about
24 around numbers is if you have one year where
25 there's one extraordinary case -- and one that

1 we did in Ontario was Stanford and it was over
2 \$20 million. If in the next year I don't
3 have -- am I unsuccessful because I'm 20 million
4 less in the next year because I haven't had that
5 extraordinary case. I'm not sure that that says
6 anything about how effective the program is. It
7 certainly would say a lot about how effective it
8 was the year I did that case, but I'm not sure
9 on a year over year basis that it is effective
10 on the other side if I don't -- if there's --
11 you know, if it takes two more years for another
12 slow moving and extraordinary case to come into
13 the unit, in that middle year have I been
14 unsuccessful. I don't think so.

15 I think one of the things that you could
16 absolutely do is you could survey your
17 stakeholders, your law enforcement, Crowns,
18 whatever, and say, is this -- has this been
19 effective for you in the course of your
20 investigations and in the course of your work.
21 Because there may be well cases that never
22 become civil forfeiture cases but the
23 possibility of them so doing might actually
24 advance other objectives. We don't know, for
25 example, whether a money launderer has to take

1 extra steps to mitigate the risk of losing the
2 property to civil forfeiture. That actually in
3 and of itself has a salutatory effect, a
4 prophylactic effect, because that money
5 launderer isn't laundering more money; they're
6 worried about how to stay away from, you know,
7 the BC director and civil forfeiture proceeding.

8 Q So the -- well, the total assets forfeited might
9 be a useful measure for some measure -- or
10 excuse me, views of the objectives of civil
11 forfeiture. For things like deterrence and
12 crime prevention it would provide very little
13 insight into those purposes.

14 A Yeah, that's correct.

15 Q Okay. Moving ahead from this question of what
16 effectiveness looks like, and we've spoken a
17 little bit about sort of what's worked and what
18 hasn't worked in Canada. I wonder if maybe,
19 sort of summing things up, can you talk a little
20 bit about from your perspective what are the
21 lessons learned from the past 20 years of
22 Canada's experience with civil asset forfeiture,
23 in particular sort of what works and what
24 doesn't.

25 A Yeah. So it's a good question. There are some

1 areas that I don't think civil forfeiture has
2 yet touched. Trade-based money laundering would
3 be an example. And I'm not sure that -- I'm not
4 sure that's on the near horizon for civil
5 forfeiture. It may be on the CRA -- the Canada
6 Revenue Agency side there might be something
7 that happens there. Very, very difficult, very
8 complicated activity. You need very specialized
9 resources to understand what's really going on
10 because it's hiding a value shift in very plain
11 sight on a transaction involving emeralds from
12 Colombia or whatever, whatever it is that's
13 going on in that activity.

14 So there's some kinds of activity that civil
15 forfeiture hasn't yet reached but that it could
16 reach. On the whole I think we've actually been
17 very successful in this country. I think we've
18 found the right balance between safeguards and
19 respecting rule of law but also being effective
20 in having an impact in our communities, which
21 the whole point of why we come to work every
22 day. So I think -- on a broader sort of scope I
23 think we've been very successful.

24 Q And maybe turning our gaze then internationally.
25 From your perspective what are the lessons to be

1 learned for jurisdictions like British Columbia
2 within Canada from the international experience?

3 A Yeah. I mean, it's -- you have to move with
4 speed. You know, it takes a millisecond to wire
5 transfer money over a border, and could it
6 really -- you know, irretrievably beyond your
7 reach.

8 And you have to move with knowledge and
9 expertise so that you really understand what's
10 happening. And that -- again, to me that's
11 something that is across the system. It
12 includes specialized investigators, it includes
13 specialized prosecutors and it includes civil
14 forfeiture folks as well. I mean, there's some
15 things that, you know, I've been contemplating
16 what might we do differently in civil
17 forfeiture. I know some jurisdictions -- I
18 believe it's Brazil, they use powers that we
19 would only maybe recognize under the Bankruptcy
20 and Insolvency Act. If you look closely at the
21 British Columbia statute, you'll see that at the
22 interim preservation order stage the court can
23 actually put a receiver or receiver manager in
24 as part of the preservation of the property.
25 And the thought behind that, just so you know

1 from a design perspective, was if you have money
2 laundered into an ongoing business, and the best
3 way to deal with that as a piece of property is
4 to forfeit it as an ongoing business, you could
5 have a receiver manager do that. If you had
6 money laundered into a partially completed real
7 estate development, you might want someone to go
8 in as a receiver manager, finish the real
9 estate -- the planning process because that will
10 then enhance the value of the asset that you
11 forfeit at the end of the day.

12 What we don't have other than perhaps a
13 little bit in Alberta where they have an ability
14 to really try and -- and that's on an
15 enforcement of criminal restitution orders.
16 They have a real ability to sit down with
17 someone and try and figure out where their money
18 really is, where their assets really are. I
19 don't know whether something like that would be
20 a useful change to our laws here, but it might
21 be. It might be something worth exploring

22 Q Maybe to try to put some of those lessons
23 together. 20 years ago you had the opportunity
24 to develop a civil forfeiture regime in Ontario.
25 If -- you know, if you were to tasked with doing

1 that again in a Canadian province and maybe if
2 you had a specific focus on the issue of money
3 laundering, what might -- that civil forfeiture
4 legislation and perhaps the units tasked with
5 administrating it, what might those look like if
6 you were doing that again today?

7 A Yeah, you know, it's -- when you're at the
8 design stage of something, it's very, very
9 difficult to know how it's going to go. And so,
10 for example, at the preservation order stage in
11 Ontario an order can be issued by the court if
12 there's reasonable grounds to believe that it's
13 a proceed or an instrument. And that was a
14 test, and BC picked it up, and it seemed to work
15 everywhere. And then in the courts in British
16 Columbia they started to really import some
17 criminal law concepts in interpreting how that
18 worked, and so they changed the tests. Is there
19 a reasonable question to be -- you know, that
20 kind of thing. They had to change the test.
21 They didn't have to change it anywhere else.

22 And that's only just to say that it's hard
23 to know when you're sort of starting something
24 where it's really going to end up. And I think
25 if you look at the bones of what we produced

1 originally in Ontario, I think it's pretty good.
2 I think it's stood now for 20 years. It's gone
3 to the Supreme Court and got a unanimous
4 endorsement of it. There are some areas, I
5 think, that are likely to be explored by the
6 courts in the future. Instruments probably --
7 that's going to probably be the next challenge
8 and it will probably come out of the Angels
9 Acres case in British Columbia.

10 So there's certainly areas that will change.
11 I don't think, though, that I would have changed
12 anything that I did 20 years ago when I worked
13 on the statute. I don't think that there's
14 anything I would have changed. I think that the
15 only thing that would have made a difference
16 from -- over the 20 years when it comes to money
17 laundering is to have the right resources across
18 the system, the right prevention and detection
19 resources, the right relationship with financial
20 institutions, the right relationship with the
21 FIU, with FINTRAC and with law enforcement so
22 that the right information was coming in.

23 I think that that's the thing that is -- if
24 civil forfeiture hasn't been as effective as it
25 might be around money laundering, I think the

1 is now resumed. Mr. Commissioner.

2 THE COMMISSIONER: Yes. Thank you, Madam Registrar.

3 Yes, Mr. McCleery.

4 MR. McCLEERY: Thank you, Mr. Commissioner. I can

5 confirm I have no further questions for

6 Mr. Simser. So I believe we can move to

7 participants' questions beginning with

8 Ms. Friesen for the Province.

9 THE COMMISSIONER: Thank you. Yes, Ms. Friesen.

10 MS. FRIESEN: The Province no longer has any

11 questions for this witness.

12 THE COMMISSIONER: I'm sorry, Ms. Friesen, I'm not

13 able to hear you.

14 MS. FRIESEN: I apologize, Mr. Commissioner. Can you

15 hear me now?

16 THE COMMISSIONER: Yes, I can. Thank you.

17 MS. FRIESEN: I can advise that the Province no

18 longer has any questions for Mr. Simser at this

19 time.

20 THE COMMISSIONER: Thank you, Ms. Friesen.

21 Ms. Dickson on behalf of the Criminal

22 Defence Advocacy Society.

23 MS. DICKSON: Thank you, Mr. Commissioner.

24 **EXAMINATION BY MS. DICKSON:**

25 Q Mr. Simser, I represent the Canadian Bar

1 Association and the Criminal Defence Advocacy
2 Society, but my questions today will be asked on
3 behalf of the Criminal Defence Advocacy Society.

4 And, Mr. Simser, I want to begin with some
5 of the BC data you reviewed. You mentioned that
6 there isn't a vast amount of publicly available
7 data with respect to the forfeiture regime in
8 BC. Is that true?

9 A Well, I mean, readily available I think would be
10 the right answer to the question. So, you know,
11 Professor Gallant in Manitoba had that concern
12 and what she did -- everything that the civil
13 forfeiture unit does is in the court basically.
14 So what she did was went into the Winnipeg
15 courthouse and pulled a hundred case files and
16 did research on it. So I think that we -- I
17 think that governments could improve, and they
18 are. Ontario has passed a provision for annual
19 reporting that will come in effect in 2021, and
20 Manitoba has one. So I think that it could
21 improve.

22 Q So of the data you reviewed, it's your
23 understanding that the majority of cases that
24 are pursued by the Civil Forfeiture Office in BC
25 are through the administrative scheme?

1 A To be honest with you, I haven't done a very
2 deep dive. And the data that -- and I've only
3 had a very quick look this morning, and the data
4 only runs to about 2017, so it's hard to
5 actually know. And I think -- that's one thing.
6 I think the other thing just to be sort of
7 mindful of is administrative forfeiture is --
8 exists within a fairly narrow construct. So
9 cases have to be under \$75,000 and they have --
10 the property has to be already with a public
11 authority. So it may have been seized by police
12 incident to arrest, it's subject to the controls
13 of section 49 of the Criminal Code through a
14 return.

15 So, you know, the numbers could be deceptive
16 because if you say there's a hundred cases that
17 are administrative forfeiture and one that's
18 judicial, it might not really reflect the values
19 and the work that's at play.

20 Q Just sticking, then, with the administrative
21 scheme, is it your understanding, Mr. Simser,
22 that the majority of cases in BC, it's the case
23 that defendants do not respond to the majority
24 of cases that are filed on behalf of the Civil
25 Forfeiture Office?

1 A Well, like I said, I don't know what the actual
2 numbers are in terms of administrative. But I
3 do know in my own experience there are a fair
4 number of cases that aren't defended, and they
5 may be cases where you have a nominee, you have
6 a courier. They don't -- they never really had
7 anything other than possession of the property
8 at the time, they're not really the owner and
9 they have no particular interest in coming
10 forward to defend the case. So there were --
11 there were undefended cases for certain.

12 Q So in those cases that are undefended, the
13 property that's claimed ultimately, then,
14 forfeited through the civil forfeiture, the
15 administrative scheme; that's correct?

16 A Yeah. That's correct. And there's lots of
17 procedural steps that the director has to
18 follow. He has to make sure he gives notice and
19 that sort of thing. But yes, ultimately, if
20 it's uncontested, the time period will toll and
21 the property will be forfeited and the money
22 will go into the SPA. And if someone
23 subsequently learns that there had been an
24 administrative forfeiture, there is an ability
25 for them to challenge it later.

1 Q So in those cases there's no judicial oversight
2 at all; is that right?

3 A Yeah, in an uncontested administrative
4 forfeiture case, that's right. There's
5 always -- there's always the ability to make it
6 a judicial case, but no, if it's -- it will be
7 forfeited without a judge.

8 Q So to put it another way, in cases where
9 defendants do not reply to the claim and there's
10 no judicial oversight, it's of course then not
11 the case that the claim is proven on its merits
12 on a balance of probabilities. Is that fair?

13 A No, I don't think it is, actually. I think
14 that, you know -- and I have to -- I have to
15 qualify my remarks by saying I have not run an
16 administrative forfeiture process. It's been
17 introduced in Ontario, but I've never operated
18 one, so -- and, again, my views, in any event,
19 are personal.

20 But the director as a public official has a
21 statutory duty to look at the evidence and form
22 a belief about the credibility of that evidence.
23 And at the outset you don't know as the director
24 whether you're going to be challenged or not.
25 And certainly, were it me, I would assume in

1 every case that it will be challenged. And if
2 it's challenged, is it going to be fine or not,
3 is the question that I would ask at the outset.
4 So someone does look and weigh the evidence
5 probably at both the referral stage but
6 certainly at the stage of the director.

7 Q So someone looks at the evidence and they form a
8 belief, but it's -- just as a general
9 proposition, it's fair to say absent judicial
10 oversight, they're not actually proving the
11 claim on the balance of probabilities standard?

12 A Well, there's no -- if no one's coming forward,
13 they have what they have in terms of evidence.
14 The administrative forfeiture process that we
15 have here was largely adopted from the American
16 federal system. So it's a little bit different
17 in its detail. But -- so there's a lot of
18 experience around how this actually works and a
19 lot of jurisprudence in the United States around
20 it as well.

21 Q So in sticking with that scheme, so the \$75,000
22 and under, the administrative scheme in BC,
23 you'd agree with me that to almost anyone
24 \$75,000 is a lot of money?

25 A Well, that's a good question. Yes, at a certain

1 level. But, you know, if you've got people with
2 hockey bags going into casinos, maybe not. I
3 mean, it is all relative to what the issue is
4 and why you've engaged the civil forfeiture
5 process in the first place.

6 Q And fighting the claim in court could of course
7 amount to high costs. Expensive to litigate.

8 A It is expensive to litigate and costs go with
9 the result. So if, you know -- first of all, if
10 your client -- you know, if you're a defence
11 lawyer and your client has an absolute case,
12 frankly a lot of those would settle with the
13 director revoking the order. If there really
14 is -- the money has a legitimate provenance,
15 there was something that wasn't known from an
16 evidentiary perspective. And I don't think any
17 director would recklessly go into court with
18 something that wasn't provable or if they were
19 faced with facts, they would revoke the order.

20 Q But to seriously fight it, you would agree, you
21 know, to hire a lawyer and to take this -- a
22 claim to trial, to respond and then have it
23 adjudicated, the legal fees could easily surpass
24 the amount at issue?

25 A Well, I've always been a public sector lawyer,

1 so I don't know how legal fees work for your
2 bar. But yes, I mean, presumably it would be
3 expensive.

4 Q Okay. And so there's a zone where the amount of
5 property taken, for instance, is worth a lot of
6 money to a person where it wouldn't make
7 economic sense to them to respond and litigate
8 it on its merits?

9 A Well, I don't know that I necessarily agree with
10 that. I think, you know, your clients would
11 know whether it's worth fighting for because
12 they really know what the provenance is of the
13 property. And if it's in crime -- there may be
14 other reasons why they don't fight it and there
15 may be reasons why they do. And there's a good
16 chance -- you know, if a parcel of money's been
17 interdicted, there's a good chance that's not
18 the whole enterprise, that's one piece of the
19 enterprise in a moment in time. And so it might
20 not be worth fighting for other reasons,
21 depending on what the facts are. I think
22 everything is very contextual and very
23 fact-specific as to where one would go.

24 Q You're aware that in BC legal aid is not
25 available to defend civil forfeiture claims?

1 A I don't know.

2 Q Would your perspective change -- you know, in
3 understanding or taking that proposition at face
4 value, in jurisdictions where no legal aid is
5 available to defend a claim, would you agree
6 that the economics for someone who's not in a
7 position to pay for legal representation might
8 draw a decision not to respond to a claim?

9 A Yeah, I really -- I don't have any insight into
10 that decision-making matrix for someone on the
11 other side of the case. I do have an insight
12 into, as a public authority, you know, what we
13 do. And we're very, very thoughtful; we're very
14 careful; we're very, very respectful of rule of
15 law and the independence of the judiciary. And
16 so you know, things are not just done sort of
17 we'll throw this at the wall and see if it
18 works. There's a lot of thought that goes into
19 case selection.

20 Q Yes. But even in good faith examples, claims
21 are successfully defended?

22 A It can happen, yeah. Sure. Anything can
23 happen.

24 Q So then staying on sort of the economics of
25 civil forfeiture, I'd like to move now beyond

1 the administrative scheme to the higher amounts
2 of property, so that of \$75,000 or more. And I
3 believe you've referred to it as a judicial
4 system or the courts-based system. And
5 obviously now this amount of property, we're
6 talking about amounts that for most members of
7 society are substantial.

8 A Yep.

9 Q And in these cases, again, for those that
10 actually progress to trial, it's fair to say
11 that the legal costs could easily surpass the
12 value of the property?

13 A Yeah. But, I mean, again, the decision -- the
14 risk matrix or the decision matrix isn't really
15 about costs in my mind. And in fairness, I've
16 never been a member -- it's been a long time
17 since I've been a member of the private bar,
18 over 30 years. But it's really around what the
19 factual substrate is underneath the case that
20 would drive -- if I were a criminal defence
21 lawyer, which I'm not, would drive the risk in
22 terms of that. And I don't know what defence
23 lawyers charge, so I really couldn't speak to
24 those economic dimensions.

25 Q But it can also be a factor that drives

1 settlement, for instance; is that fair?

2 A That's true, yep.

3 Q And would you agree one of the reasons that --
4 well, I guess first, to begin, would you agree
5 that there's a high rate of settlement in civil
6 forfeiture claims?

7 A Yeah, I think there is. You know, oftentimes a
8 criminal defence lawyer will have, you know,
9 various aspects with one client, this being one
10 of them. And so yeah, there are often
11 settlements. And some of those have been tricky
12 because, just to be mindful, it's not up to the
13 director to settle a case. The director can
14 settle the case with the defence lawyer, but
15 they still have to go before the court if
16 there's going to be a forfeiture and they still
17 have to satisfy the court that there's -- the
18 property is a proceed of an instrument or both.
19 So -- and that's been tricky at times in
20 Ontario. In fact, there's been some legislative
21 amendments specifically to deal with that kind
22 of a circumstance. But you still have to
23 prove -- even though it's uncontested you still
24 have to satisfy a judge about your case.

25 Q In the judicial system. That's not true of --

1 A Yeah, that's correct. In the judicial system,
2 yeah. It's no different, I guess, from a plea
3 bargain. I mean, a defence lawyer and Crown
4 attorney can come to agreement around, you know,
5 resolution of a criminal matter, but the court
6 still has the residual jurisdiction to make a
7 decision on sentencing.

8 Q So switching out, Mr. Simser to just
9 perspectives -- maintaining the perspective on
10 economics, but moving now to the self-funding
11 nature of the BC Civil Forfeiture Office. I
12 take it your evidence was that it is self-funded
13 and it derives all of its revenues through
14 property that's forfeited?

15 A You know what? I genuinely don't know how the
16 BC system would work, but I'm not sure that's
17 necessarily correct because, you know, you have
18 employees of -- you know, it's the Solicitor
19 General in BC; it's the Attorney General in
20 Ontario -- you still have a budgetary allocation
21 process and so on and so forth that you have to
22 go through. You have full-time equivalent
23 employees. There's a lot of other things that
24 are involved. So I genuinely don't know what
25 the actual cost recovery numbers are in BC, but

1 I wouldn't assume that that's actually how it
2 works. It may well work quite differently.

3 Q But you're not aware of a revenue stream flowing
4 from the provincial government?

5 A I'm not sure I understand that question.

6 Q The revenue generally flows from the property
7 seized, and it's not -- it's self-funded in the
8 sense that the government of British Columbia is
9 not funding the office itself. Is that your
10 general --

11 A Well, no, I'm not sure that's necessarily
12 correct because, you know, the -- so I work for
13 the Attorney General. You know, my salary --
14 you know, 10 years ago when I was running the
15 unit, that wasn't cost recovered. I mean, I was
16 just -- that was part of the budget of the
17 Ministry of the Attorney General. And there was
18 cost recovery for sure, but there was no way
19 that it was all. And the cycles are different.
20 You know, the problem with forfeiture, you know,
21 it's not necessarily a steady stream of things.
22 So, you know, you don't necessarily budget that
23 way and allocate that way. Although having said
24 that, I do not know how the BC government funds
25 the civil forfeiture program. I don't know any

1 of the details.

2 Q But you know that it's self-funded. That was
3 your evidence earlier?

4 A It can be. It can be. There's -- certainly the
5 legislation enables the Civil Forfeiture Office
6 to recover costs, and it's really a couple of
7 different kinds of costs; right? There's the
8 costs, you know, of salaries, wages, benefits,
9 but there's also costs -- you know, if you have
10 to -- let's say you interdict a vehicle because,
11 you know, it's got a secret compartment that
12 carries -- and it's armour plated. You need to
13 store that, you need to keep it safe, you need
14 to keep -- in case you're not successful, in the
15 case you need to be able to return it in its
16 condition. So there are definitely things like
17 property management costs, tow costs, all those
18 sorts of things that would be associated with
19 that property, and that's something I would
20 think they would cost recover against.

21 Q And earlier in your evidence when you were
22 discussing the self-funded nature generally, you
23 mentioned that there's a risk that cases might
24 not be pursued because of a low prospect of cost
25 recovery?

1 A Well, that was something in the design phase
2 20 years ago. I wanted to be in a position
3 where we were happy to take difficult cases with
4 victims that -- where there was no cost recovery
5 because that had an important impact for the
6 program and that was entirely consistent with
7 the stated legislative purposes of the program.
8 So I wanted to make sure -- and as it happens, I
9 think the actual experience beyond that, once we
10 actually got the thing up and running was there
11 was a very good balance and that actually wasn't
12 a concern at the end of the day. We did lots of
13 really good victims cases, and we did lots of
14 cases where there weren't any victims claims
15 launched.

16 Q Would you agree that the opposite in a
17 self-funded model could be true whereby there's
18 incentive or a need to pursue cases to keep the
19 lights on, if you will?

20 A Is that a concern? I mean, it could be, I
21 suppose. It could be. But, you know,
22 practically in Canada I don't think that's been
23 a concern. What I don't know, for example, is I
24 don't know why we haven't seen much in New
25 Brunswick and Nova Scotia, for example. I don't

1 know why we haven't seen much by way of a
2 forfeiture, we haven't seen much jurisprudence.
3 Whether that's a resourcing issue or something
4 else, I genuinely don't know. They're smaller
5 provinces. They're disbursed. We've seen that
6 even in the pandemic. They're safer because of
7 the conditions they exist in. But I don't know
8 whether that's a resource issue or not.

9 Certainly we never -- certainly in the time
10 that I ran the program that was never really a
11 consideration -- self-funding was never a
12 consideration at all really. We made decisions
13 based on, you know, what the Legislative
14 Assembly asked us to make decisions on which is
15 the impact of the cases, its importance. And we
16 were also always very mindful that we were going
17 before a very independent and sceptical,
18 properly sceptical judiciary in all of our case
19 decisions.

20 Q Okay. I'd like to move on from those questions,
21 Mr. Simser, and touch on some of the evidence
22 you gave with respect to your view that, you
23 know, civil forfeiture schemes, again generally,
24 have struck the right balance, that they're
25 proportionate and fair. And one of the reasons

1 you concluded that way, as I take your evidence,
2 is that, for instance, in BC's act there's a
3 relief pursuant to section 6, you know, when
4 something's clearly not in the interest of
5 justice. So there's a built-in safeguard, if
6 you will. But that safeguard isn't available in
7 the administrative scheme to your knowledge, is
8 it?

9 A Well, no, but as I say, if the you are -- and I
10 never brought an administrative case, so just
11 with that clarification. But if you're the
12 director, you would never bring a case if you --
13 you have to form a view that your administrative
14 forfeiture case involves a proceed or an
15 instrument, and you would never bring a case, I
16 don't think, where you'd expose your program to
17 the risk of a finding of clearly not in the
18 interest of justice. I don't think you would
19 ever do it.

20 So you're right, the director is going to
21 make that decision, but like a public official,
22 they know they're subject to curial review,
23 judicial review, and there's also an appeal
24 route that -- where the matter can become
25 judicial, and you always think about that when

1 you're making those decisions.

2 Q I have just a couple remaining questions for
3 you. The first -- hopefully a couple --
4 revolved around the differences between civil
5 forfeiture and the criminal justice system. And
6 you've of course raised that civil forfeiture is
7 in rem versus in personam in the criminal
8 justice system.

9 But just to clarify -- and I don't think
10 this is uncontroversial [sic] -- there's no
11 right to silence in the civil forfeiture system;
12 is that right?

13 A No -- well, you can choose on behalf of your
14 client not to contest or not say anything, but
15 that's right. I mean, if you want to say that
16 the provenance of a particular asset is
17 legitimate, you can't sort of make that argument
18 without having tendered evidence. So the way
19 that it works is you start down the road where
20 the onus is completely on the director to
21 satisfy the court that this is, for example, a
22 proceed of unlawful activity. And if the
23 director -- there is a right to silence in the
24 sense that you as a defence lawyer feel that the
25 director can't make that case, fine, then you

1 can seek to oust the case at that level. But if
2 the director does get that evidence across, you
3 will have to enter your own evidence to come up
4 with your narrative as to what's really going on
5 from an evidentiary perspective.

6 Q Right. And in adjudicating it, there would be,
7 then, a requirement to produce lists of
8 documents in document discovery, for instance?

9 A That's correct.

10 Q And the director is entitled to examine you
11 orally?

12 A That's correct.

13 Q So -- and another difference of course is the
14 difference between the standard of proof
15 required, one being the balance of probabilities
16 in the civil forfeiture regime versus beyond a
17 reasonable doubt in the criminal stream.

18 A Well -- so you have to be a little thoughtful
19 about that because certainly if -- for a
20 conviction you are in that world of beyond a
21 reasonable doubt. Sorry, I've got a phone
22 ringing behind me. But when you are -- even in
23 the criminal, when you're in the sentencing
24 provisions for forfeiture, I think you're going
25 to find you're back into the civil standard for

1 a court to make a forfeiture decision following
2 a conviction.

3 Q Sure. But for the court to make a forfeiture
4 decision, first it must find beyond a reasonable
5 doubt that they're convicted of the thing
6 they're alleged to be -- to have done?

7 A Right. Unless the prosecutor goes in rem under
8 the Criminal Code. That's correct.

9 Q Okay. Just ending, then, with some questions
10 around the public debate around civil
11 forfeiture. You mentioned in your paper that
12 there has been and continues to be rigorous
13 debate in the US about the perceived fairness of
14 civil forfeiture?

15 A That's correct, yeah.

16 Q And would you say or is it fair to say that
17 there are criticisms or concerns about the
18 perceived fairness in Canada?

19 A Certainly some commentators have raised concerns
20 and sometimes it is from a property rights
21 perspective and sometimes it's more a criminal
22 defence perspective. And those were vigorously
23 contested in Chatterjee before the Supreme Court
24 of Canada, and it was a unanimous decision of
25 the court that -- to resolve that debate. But

1 there's still -- certain people have their
2 views, and I'm very respectful of the different
3 views that people have.

4 Q And of course that debate extends to BC in
5 particular as well?

6 A Yeah. For sure. The thing about the American
7 debate, though, is there's two things, just to
8 be thoughtful about, I guess. One is that the
9 magnitudes are significantly different. We
10 might talk about a few million dollars here in
11 Canada in a program. They're talking billions
12 of dollars there. And their structures are
13 really different because they have different
14 modalities across state, local and federal and
15 different rules and asset-sharing rules and
16 things like that that we do not have. It
17 doesn't work the same way here. So the
18 magnitudes are significantly different, and the
19 actual operation of things is different as well.

20 MS. DICKSON: Thank you, Mr. Simser, and thank you,
21 Mr. Commissioner. Those are my questions.

22 THE COMMISSIONER: Thank you, Ms. Dickson.

23 Now, Ms. Magonet for the British Columbia
24 Civil Liberties Association, who has been
25 allocated half an hour.

1 MS. MAGONET: Thank you, Mr. Commissioner.

2 **EXAMINATION BY MS. MAGONET:**

3 Q Mr. Simser, can you hear me okay?

4 A Yes, I can. Thank you.

5 Q Brilliant. Thank you so much. So my first
6 series of questions will concern the BC civil
7 forfeiture regime specifically. You would agree
8 that under BC's regime because there's a lower
9 standard of proof that applies with respect to
10 civil forfeiture as compared to criminal
11 conviction and the presumptions that operate in
12 favour of the Civil Forfeiture Office, it's
13 easier for the state to obtain its claim to
14 property through civil forfeiture as compared to
15 criminal forfeiture?

16 A Well, I think you have to unpack that just a
17 little bit. You know, we deal in society all
18 the time with property disputes. We deal with
19 matrimonial disputes, child care,
20 decision-making capacity on a civil standard all
21 the time. The difference is that in the
22 criminal process what we're really talking about
23 is a liberty at jeopardy kind of issue -- if you
24 convict someone, they could face
25 incarceration -- and that puts you to the higher

1 standard of proof.

2 But as I said just a moment ago, if you're
3 talking about a conviction-based forfeiture,
4 after conviction, what the court considers --
5 and I'm not a prosecutor, but what the court
6 considers in terms of forfeiture attendant and
7 sentencing attendant to that conviction is also
8 done at a more -- more likely than not a civil
9 standard of proof.

10 Q Okay. Thank you. But in order to get to that
11 stage you must first secure a conviction which
12 is not a balance of probability standard.

13 A That's correct. In the criminal justice system,
14 that's right. But the thing at jeopardy in a
15 civil forfeiture case is property, and just
16 property.

17 Q Certainly. But it would be easier, then, to
18 obtain the property using the civil forfeiture
19 system as compared to the criminal justice
20 system?

21 A Yeah, I mean, I just worry that you're
22 conflating apples and oranges. I mean, I always
23 took the view as a practitioner that if law
24 enforcement could go down the conviction-based
25 route, including on the forfeiture side, that

1 that was the better place to go from a values
2 perspective, but there's lots of cases where
3 that isn't appropriate. Someone might have fled
4 the jurisdiction. A defendant may have died.
5 We may not know who really committed the
6 unlawful activity but we know that the property
7 is tainted by unlawful activity. And in those
8 kinds of cases civil forfeiture on a civil
9 standard of proof, in my opinion, is the right
10 approach.

11 Q Thank you. In terms of the activities -- or
12 rather the assets targeted by BC's legislation,
13 you would agree that BC's regime targets the
14 proceeds and instruments of unlawful activity?

15 A That's correct.

16 Q And unlawful activity isn't limited to criminal
17 offences?

18 A No, that's correct as well. It picks up
19 provincial offences within a range. It picks up
20 criminal offences federally and it also has sort
21 of a -- it's a dual criminality provision. So
22 if someone in Seattle commits a fraud, puts the
23 money in a bag and drives into Vancouver with
24 it, the fact that the criminality or the
25 unlawful activity occurred in Washington state

1 doesn't matter. It's still unlawful because
2 it's dual, because it would have been unlawful
3 had that same activity been committed in
4 Vancouver, then it is forfeitable in the civil
5 process.

6 Q Thank you. So you would agree that the
7 application of this legislation isn't limited to
8 forfeiting proceeds of organized crime?

9 A That's correct.

10 Q And it's also not limited to forfeiting the
11 proceeds of profitable crime?

12 A I'm not quite sure what to make of that
13 question. If the crime is unprofitable, what is
14 there to forfeit, I guess. It's not -- there
15 has been to be a nexus between the property and
16 the unlawful activity. Whether it in fact is
17 profitable isn't really so important as much as
18 the nexus. So you could have a somewhat failed
19 fraud scheme where, you know -- I don't know --
20 maybe more money went into the committing of the
21 fraud than was made from the fraud. But the
22 fact of the matter is that if there's a bank
23 account with the money from a little old lady
24 who was the victim of the fraud, the fact that
25 it was unprofitable is irrelevant. I think the

1 real question is is that money tainted by the
2 fraud, and if it is, then yes, it's forfeitable.

3 Q And you would agree that the instruments
4 provisions, they aren't targeting the profit of
5 crime but rather something that was used in the
6 commission of the offence?

7 A Well, generally. But, you know, you can think
8 of -- it could. In fact you could, for example,
9 have something set up as a front, you know, to,
10 for example, facilitate money laundering. You
11 could have a sort of store front or a business
12 part of which is legitimate but the real
13 purposes of the enterprise are to facility money
14 laundering. So that could be an instrument and
15 then the money laundering part of it would be
16 the proceeds of it. And things -- property can
17 have both aspects. So if I go and sell drugs on
18 the street, the money that I get from the drug
19 sale is a proceed. But if I'm using that money
20 to buy further wholesale supplies that's an
21 instrument because it's enabling the next
22 transactional round with the property. So it
23 can be both an instrument and a proceed,
24 depending on where it is in time.

25 Q But there certainly could be some cases where

1 the instrument is not a proceed or is not a
2 profit of the unlawfully activity?

3 A No, absolutely. Absolutely. That's correct.

4 Q Thank you. You would agree that BC civil
5 forfeiture law allows the states to secure
6 property for even minor offences?

7 A In theory it does. But that's why it was really
8 important to us to have the clearly not in the
9 interest of justice discretion that residually
10 resides with the court. And so if you had, you
11 know, a million dollar house and \$100 of the
12 house was a proceed of crime and you say well,
13 it's all, that's a harsh and inequitable result.
14 And, you know, even if you technically make the
15 case, the court has that residual discretion to
16 throw you out on your ear, and they should. And
17 so -- and then that becomes an important factor
18 as sort of a governance mechanism because the
19 director of the program is always very alive to
20 that being there and very alive to answering the
21 question, is this something that potentially
22 would engage that section. And if it is, then
23 that affects case selection.

24 Q Thank you. And are you aware that BC civil
25 forfeiture legislation has been used in cases

1 concerning infractions under natural resource
2 laws?

3 A I'm not aware of those cases, but it makes sense
4 that that could happen. I can see, you know,
5 environmental law violations for profit. That
6 would make sense to me as well.

7 Q Thank you. Would you agree that BC's
8 legislation does not have strong protections to
9 ensure the impact of civil forfeiture is
10 proportionate to the underlying offence?

11 A No, I wouldn't agree with that at all. No. I
12 think, you know, there are protections embedded
13 within the statute and there's a duty that's put
14 on the director to make case selection in a
15 careful way. So to me those two things, if
16 nothing else, are really important measures that
17 are there. The residual discretion is given to
18 the court. This all was designed with rule of
19 law in mind and an independent judiciary in
20 mind. It doesn't mean we always agree with the
21 decisions; we always respect them. They're fair
22 and the process is fair. So no, I wouldn't
23 agree with that comment at all.

24 Q But you would agree that the law requires judges
25 to grant a forfeiture order for the proceeds or

1 instruments of unlawful activities unless it's
2 clearly not in the interests of justice, which
3 you've previously stated is a high standard.

4 A Right. So if the court -- you know, so the onus
5 is on the director to establish a case on the
6 evidence. And if the director fails, then that
7 case will not proceed and it will not be
8 successful. If the court -- if the director
9 does establish that, then the onus falls on a
10 respondent to say no, no, I'm deserving of a
11 protection order, and there's a specific series
12 of provisions in the statute they can avail
13 themselves to make that claim. Even if they're
14 unsuccessful there, then they can ask the court
15 to invoke the [indiscernible] in the interests
16 of justice section. And it has been done and
17 it's been litigated a fair bit over the last
18 decade.

19 Q Thank you. You would agree that in BC's
20 legislation there's no provision ensuring access
21 to property secured by a preservation order for
22 the purposes of legal expenses?

23 A That's correct. Ontario is the only
24 jurisdiction with that provision in Canada.

25 Q And you would also agree that the Supreme Court

1 of Canada has never assessed whether any civil
2 forfeiture regime in Canada is compliant with
3 the Charter?

4 A Well, you know, Chatterjee really didn't engage
5 the Charter at the Supreme Court level but it
6 certainly did at trial in court of appeal and it
7 was thought about. And the way that
8 Mr. Chatterjee's lawyer decided to bring the
9 case into the highest level didn't engage the
10 Charter in the same way and it didn't engage the
11 instruments section in the same way. But they
12 were engaged at the other levels of court and
13 they certainly have been engaged at trial in
14 court of appeal decisions in Ontario, BC and
15 other places.

16 Q Thank you. I would now like to ask you a few
17 questions about Professor Gallant's study
18 regarding the Manitoba civil forfeiture regime.

19 A Sure.

20 Q So you would agree that what that study was
21 looking at was how Manitoba's civil forfeiture
22 legislation was being applied --

23 A That's correct.

24 Q -- in the province?

25 A Yeah. M'mm-hmm.

1 "The study concluded that, while
2 'evocative media accounts make great
3 stories' empirical research places those
4 stories in context."

5 I couldn't find that quote in the study, but is
6 that -- I just wanted to clarify, is that just
7 your general impression of the conclusions she
8 reached?

9 A Yeah, so it's important to understand. So
10 Professor Gallant had written, I believe it was
11 in Criminal Law Quarterly, just before
12 Chatterjee went to the Supreme Court and said
13 that, you know, civil forfeiture from a crime
14 control perspective -- I hate to put words in
15 her mouth. I think that was kind of her
16 theoretical perspective. It was an unsound
17 approach. And I think -- my reading of her
18 paper is that I think she was slightly surprised
19 by the outcome of the study, that -- I don't
20 know exactly what she was expecting. Certainly
21 there are a lot of American sort of so-called
22 horror stories and anecdotes, and I don't know
23 if that's what she was expected to find in
24 Manitoba, but she didn't find them. So that was
25 my -- that was my interpretation of her finding.

1 Q But you would agree -- are you aware that in
2 papers that have been written by Professor
3 Gallant since, she's continued to raise concerns
4 that civil forfeiture legislation could stray
5 beyond its purposes of targeting profitable
6 crime?

7 A Yeah -- no, and, you know, it's a good question
8 to ask. There's a lot that we don't know, and I
9 think there's a lot that could be subject to
10 critical examination. We do not know, for
11 example, how much money laundering there's in
12 this country. We have no idea. We have guesses
13 that are based on GDP and GNP and things like
14 that, but they're wild guesses. And I think --
15 you know, I think it's absolutely fair to say
16 that there needs to be more academic research
17 done in this area. I think that's fair. I
18 think the only other thing I would say, though,
19 is, you know, the magnitudes in Canada are
20 small. I think to really look at is this
21 effective or not, you probably want to
22 be interjurisdictional. You'd want to look at
23 the United States, the UK, Australia and other
24 places to really get an understanding of where
25 things go.

1 Q Thank you. So earlier in your paper you discuss
2 the policy justifications of civil forfeiture,
3 and I think, if I remember correctly, the
4 justifications that you present are taking the
5 profit out of crime, deterring unlawful activity
6 and compensating victims; is that correct?

7 A That's correct. And those were -- so each
8 statute was designed a little bit differently.
9 Ontario's statute was designed with a purpose
10 and section. My recollection is BC's doesn't
11 have one. I could be wrong about that. Some of
12 the other provinces don't have one. But that
13 language about the -- that's really what was
14 argued by Mr. Chatterjee's counsel and our
15 counsel in the Supreme Court of Canada.

16 Q Thank you. Are you aware of any research or
17 evidence in Canada establishing that civil
18 forfeiture is effective at deterring unlawful
19 activity?

20 A No. You know, there's my own research, there's
21 Professor Gallant's, there's a few articles that
22 are here and there, but there isn't as much as
23 there needs to be. There's a bigger body of
24 thinking and critical thinking in the United
25 States because they've got a more mature system,

1 it's bigger. But no, there's not as much
2 research as there should be. There's --
3 Dr. German's book as well as my book are really
4 the two main textbooks that are active and
5 reliable in this space.

6 Q And are you aware of any research establishing
7 that it's specifically effective in combatting
8 money laundering in Canada?

9 A No, I'm not aware of research done that makes
10 that connection. I think -- if you think about
11 money laundering more broadly and
12 internationally, I think there is -- certainly
13 there's been a lot of thinking that has been
14 done. As I say, there was a handbook on asset
15 recovery issued last week by the stolen asset
16 recovery initiative out of the World Bank.
17 There's FATF, which has done mutual evaluations,
18 including of Canada, but of a number of
19 countries.

20 So there's been a lot of [indiscernible]
21 about this as one of the ways of dealing with
22 money laundering. It certainly isn't the only
23 one, and prevention and detection are probably
24 way more important than civil forfeiture, but
25 where you have effectively detected money

1 laundrying, civil forfeiture and frankly
2 criminal forfeiture and criminal prosecutions
3 are very important tools if you really want to
4 address money laundrying.

5 Q Thank you. You would agree that none of
6 Canada's provincial civil forfeiture regimes
7 have been subjected to an Auditors General
8 review?

9 A Well, that's a good question. I don't know of
10 one. I know there's certainly been internal
11 audits, but I'm not aware -- that's a good
12 question, over the last 20 years has there been
13 an Auditor General report. I don't think there
14 has, but I'm not a hundred percent certain.

15 Q Thank you. And you would agree that while civil
16 forfeiture regimes provide a mechanism for
17 compensating victims, in BC it's actually only a
18 small percentage of the proceeds that are
19 forfeited that go towards victim compensation.
20 Is that something you're aware of?

21 A Yeah, I don't know what the BC numbers are. I
22 do know a little bit about the Ontario numbers
23 but from some time ago, and it varies from year
24 to year. There would be one year probably
25 around 2010 or 2011 where a significant portion

1 of the forfeited assets went back to victims
2 because we had one massive case, and that is --
3 that is what tends to happen. You know, where
4 you have victims' cases, they're generally of a
5 particular kind, generally fraud cases.
6 Sometimes securities cases. I know there have
7 been some of those in BC as well. And the other
8 thing is there's usually a time gap between, you
9 know, the conclusion of a case can take some
10 time through the court system and then there's a
11 time gap, you know, determinations are made on
12 victim eligibility. And it's done differently
13 in each jurisdiction. Ontario has an Order in
14 Council-appointed adjudicator, and in BC I think
15 that falls -- task falls to the director.

16 Q Thank you. I now have some questions about who
17 is most impacted by civil forfeiture
18 legislation. Are you aware of any studies in
19 Canada examining the impact of this legislation
20 on racialized and low-income communities?

21 A No, I'm not.

22 Q But are you aware in the United States there's
23 significant research establishing that these
24 laws disproportionately impact low income and
25 racialized communities?

1 A Yeah. I mean, you know, there is vigorous
2 debate in the United States about the use of
3 civil forfeiture and there certainly are people
4 that have that view. There are people who
5 strongly hold a different view. What I would
6 say are two things. The magnitudes are very,
7 very different, and the systems are very, very
8 different. So in the United States in the
9 federal system there's an equitable sharing
10 program. And so if there's a forfeiture and
11 state and local authorities have assisted the
12 federal US attorney in getting to the
13 forfeiture, they are entitled to a share of the
14 forfeited assets. And that's been the subject
15 of considerable controversy, that entitlement.
16 The actual federal agencies are not entitled to
17 the funds in that way. So there are some people
18 who very strongly believe that that's a
19 problematic way that it's set up. We're not set
20 up that way at all in Canada. There's also an
21 official use policy in the United States. So if
22 there's an asset that is forfeited, say a
23 high-end car, a Lamborghini, the US authorities
24 can hand it over to a police service for
25 official use in undercover operation that needs

1 a high-end car. We don't do that at all in
2 Canada either.

3 Q Thank you. Just on the point of equitable
4 sharing, would you agree that in BC under the
5 civil forfeiture regulation governments that
6 participate in a forfeiture proceeding, so
7 another provincial government or the Canadian
8 government, can receive payment out of the civil
9 forfeiture account?

10 A Yeah. There can be an agreement where something
11 is cross-jurisdictional. So you could have --
12 you can come to an agreement on that which --
13 the statute enables it. I'm not aware of one
14 ever having been entered into. That doesn't
15 mean it hasn't. I'm just not aware of one.

16 Q But under section 9 of the Civil Forfeiture Act,
17 is an agreement required or does the of the CFO
18 simply have discretion to compensate another
19 government that's participated in the forfeiture
20 proceedings?

21 A So you have to look beyond the section because
22 realistically, if you're talking about an
23 intergovernmental case involving the federal
24 government or, say, the Province of Alberta,
25 before you ever get close to talking about what

1 happens with the money, you have to have an
2 information share that complies with provincial
3 privacy law and maybe federal privacy law. And
4 so you have to go to the sections at the back
5 that would allow the director to establish an
6 MOU before the case ever comes in to deal with
7 the information, and they can deal with the
8 sharing and the cost allocations at that time or
9 they can deal with it later.

10 Q Thank you.

11 MS. MAGONET: Madam Registrar, would you be able to
12 pull up the article by Louis Rulli that I
13 circulated with my notice of cross-examination.
14 Thank you.

15 Q Are you familiar with this article, Mr. Simser?

16 A I've had a quick go through it. There's lots of
17 research like this in the United States, and I
18 have gone through it. I would be thoughtful
19 about how you extrapolate this kind of research
20 into how we deal with things here in Canada
21 because I think the systems are quite different.
22 But yes, I'm roughly aware of this kind of
23 research for sure.

24 Q Certainly. And understanding there are
25 differences between the US and Canada, you would

1 agree this author concluded that civil
2 forfeiture in the US has disproportionate
3 impacts on low income and racialized
4 communities?

5 A Yeah, I mean, that's this author's conclusion.
6 Yes, that's true.

7 Q And would you agree that there's a need for
8 similar research in Canada so we can at least
9 assess whether this is a problem?

10 A I really do think, yes. I think that we could
11 do a lot more than we do now in terms of
12 research. I would agree with that.

13 Q Thank you.

14 MS. MAGONET: Mr. Commissioner, if this could --
15 could this be marked the next exhibit?

16 THE COMMISSIONER: Sorry, I forget to unmute myself.
17 Madam Registrar, if you would.

18 THE REGISTRAR: Yes. The next number is 379.

19 THE COMMISSIONER: Very well. This will be
20 exhibit 379. Thank you.

21 **EXHIBIT 379: "Seizing Family Homes from the**
22 **Innocent" by Louis Rulli**

23 MS. MAGONET: Thank you.

24 Q Mr. Simser, I now have some questions about the
25 funding models for civil asset forfeiture

1 bodies. Would you agree the CAB in Ireland is
2 not self-funding?

3 A Yeah, I don't really know a lot about the
4 funding, but my understanding, yeah, it's an
5 independent agency that is -- has a budget
6 appropriated by the legislature and what they
7 the produce: tax savings, welfare savings and
8 civil forfeiture. Because they don't do
9 criminal forfeiture through the CAB, they do
10 just go into the consolidated revenue fund. The
11 caution, though, that I would give to you is,
12 you know, it's just a different kind of
13 budgetary process. So there still has to be an
14 allocation for the budget of the Criminal Assets
15 Bureau. I believe it's through the Attorney
16 General, but I'm not a hundred percent on that.

17 Q Thank you. And are you aware that in BC the
18 Civil Forfeiture Office actually has budget
19 targets that are set for it to meet?

20 A I've never seen those, so no, I'm not aware of
21 what they do.

22 Q Okay. Thank you. I just have one last
23 question, and it's about the Yukon and its
24 decision not to adopt civil asset forfeiture
25 legislation. And I understand that's not where

1 you work and practise, but were you aware that
2 its decision not to adopt this legislation
3 followed a number of protests and petitions
4 raising civil liberties concerns with civil
5 asset forfeiture legislation?

6 A Yeah -- no, that's absolutely correct. What I
7 don't know or understand is that community or
8 its politics or, you know, why that was
9 compelling in the way that it was, but
10 absolutely. That was the debate, if you will,
11 and that's why their bill was withdrawn.

12 MS. MAGONET: Thank you. Those are my questions.
13 Thank you, Mr. Simser.

14 Thank you, Mr. Commissioner.

15 THE COMMISSIONER: Yes. Thank you.

16 And now I think we have Mr. Rauch-Davis for
17 Transparency International Coalition, who has
18 been allocated 15 minutes.

19 MR. RAUCH-DAVIS: Thank you, Mr. Commissioner.

20 **EXAMINATION BY MR. RAUCH-DAVIS:**

21 Q Mr. Simser, can you hear me okay?

22 A Yes, I can. Thank you.

23 Q Okay. Great. I'm just going to pick up on my
24 friend's -- one of my friend's topics on
25 cross-examination. That's the impact of civil

1 forfeiture on money laundering in general. So I
2 take it you agree with me that asset forfeiture
3 has the potential to deter money laundering on a
4 greater level than just penal fines?

5 A Yeah. No, it certainly does. I mean, if you --
6 you know, a fine is potentially a cost of doing
7 business to a launderer -- a professional
8 launderer, and if they're moving significant
9 amounts of money, the only thing that really
10 deters them, and even beyond deterrence forces
11 them perhaps to take different measures to guard
12 against the risk of asset forfeiture, is civil
13 forfeiture.

14 Q And an example of that would be in trade-based
15 money laundering, if you seize the asset, it's
16 likely that the exporter or importer is not
17 going to continue in a trade-based money
18 laundering regime within that jurisdiction.
19 Wouldn't you agree?

20 A Yeah. No, that's absolutely possible.

21 Q And I take it from your evidence you're not able
22 to really go into much detail on BC's cost
23 recovery regime. But I wonder if you would
24 agree that there's at least the potential for a
25 financial windfall to a state or province or law

1 enforcement from the civil forfeiture regimes?

2 A You know, I think if -- I'm not on the numbers.
3 I haven't looked at the BC numbers and I don't
4 know. But my suspicion, though, is that there's
5 not going to be a big windfall. That whatever
6 is going out in small police grants -- and I've
7 seen just press releases from BC on some of the
8 grants -- small potatoes when you put them
9 beside the overall operating budget of a police
10 service and the fixed costs and salaries and
11 vehicles and all those kinds of things. So I'm
12 not sure that there's a measurable impact, and I
13 certainly don't think there's a possibility of
14 any kind of a massive windfall for anyone.

15 Q Perhaps "windfall" wasn't the right wording in
16 my question. But maybe I'll go back to some of
17 your evidence this morning on the segregated
18 account you alluded to.

19 A Yes.

20 Q And that's part of the cost recovery program, I
21 take it; right? That's what you --

22 A Yeah, it's called a special purpose account. It
23 is segregated within the consolidated revenue
24 fund. And one of the reasons for that when we
25 did this 20 years ago was that, you know, if you

1 had money in that account for victims, it didn't
2 move in the same kind of time frame that normal
3 governmental budgetary processes work in. So
4 that was the primary reason for creating a
5 special purpose account. And other
6 jurisdictions had done it as well, and we sort
7 of looked at what was good and bad about theirs.

8 Q Did I understand your evidence correct when -- I
9 understood it to also be that in addition to the
10 victim compensation there is the cost recovery
11 aspect of the segregated account.

12 A Yes.

13 Q And that it's up to the province of the
14 legislator to determine -- or the director, I
15 suppose, to determine what could be count a cost
16 recovery; right?

17 A Yeah. So in BC it would be the director that
18 makes the decision. And obviously, you know,
19 the director is subject to audit and review and
20 all of that kind of stuff, and even then I
21 suspect within the financial delegations -- I
22 don't know with BC -- but all of that's got to
23 be accounted for very carefully within the
24 public service.

25 Q And so in that sense it's fair to say that the

1 director or the province then becomes a secured
2 creditor on the asset in question?

3 A Well, no. I mean, you know, the asset in
4 question isn't -- no. So a secured creditor is
5 someone who has a proprietary interest in a
6 piece of property in exchange, say, for a loan.
7 That's not what's happening at all. What's
8 happening here is that you're entering into a
9 process either administratively or through the
10 courts to forfeit property or extinguishing the
11 title of the property that -- because you're
12 saying its provenance is in unlawful activity.
13 And only does then does that then move into the
14 next stages, which are asset disposal. So if
15 the property is a car, maybe you take it to
16 auction, and then ultimately at the end of the
17 day you put that money into an account. But
18 until that is all resolved, there's no interest
19 that the director has.

20 Q Thank you. I have your evidence on that.

21 The next topic I'd like to go to is the use
22 of corporations and shell companies. I take it
23 you'll agree with me that that's prevalent in
24 money laundering regimes?

25 A Yes, absolutely.

1 Q They're a good vessel to hide proceeds of crime,
2 as there is an added layer of anonymity to the
3 true owner of a corporation?

4 A Yeah.

5 Q So from a civil forfeiture perspective the
6 distortion or lack of beneficial ownership
7 information, that can create difficulties in
8 enforcing a civil forfeiture regime, can't it?

9 A Yeah. Well, so I think that that question or
10 that issue, we should think of it maybe perhaps
11 a little more broadly. So, you know, when a
12 case comes to a civil forfeiture unit as a rule,
13 it's been investigated. And that's where a
14 shell corporation is a little bit more
15 challenging because, you know, you can't get to
16 the beneficial ownership.

17 Now, we know that there's changes coming
18 within Canada. The US Congress passed something
19 last week. There's changes on stream now. And
20 I think the commission's already heard from the
21 UK. So it is an area that is changing, but
22 it's -- for sure it's one more layer that makes
23 it difficult because your job in civil
24 forfeiture or your job as an investigator is to
25 follow the money. And so if you add layers, it

1 makes it harder. If you add shell corporations,
2 it makes -- it's not impossible; it's just
3 harder. And then if you add borders, that
4 creates another layer yet again.

5 Q And in your evidence this morning you mentioned
6 the UK's evolution of their civil forfeiture
7 regime. Are you aware that they have a
8 corporate beneficial ownership registry?

9 A Yes.

10 Q And wouldn't you say that that has assisted in
11 the success of their civil forfeiture regime?

12 A Well, I thought the testimony that this
13 commission heard in the summer was quite
14 interesting, so I think the presumptive answer
15 is yes, but. And the but is, if I recall, that
16 there was -- you know, that the company's
17 register was available to at least the media and
18 someone did a search and found a dummy
19 corporation with names of the government's
20 cabinet ministers in there. Obviously phoney
21 names. And so one of the challenges with this
22 is it's fine to have more transparency, but it's
23 a real question as to how you really make that
24 work.

25 Now, from a civil forfeiture perspective if

1 I could show that, you know, there's a company,
2 it has -- you know, if I could follow the assets
3 into the company, I'm a little less worried
4 about its ownership structure. And if I can
5 prove that its ownership structure is entirely
6 fictitious, then I can knock it out.

7 And in Quebec actually there's a specific
8 provision that allows them to disentitle the
9 ability of that corporation to claim for the
10 assets if they have a fictitious structure
11 underneath them.

12 So yes, I think it's definitely helps. I'm
13 glad to see that's -- we're finally seeing some
14 movement on it. But it's complicated; right?
15 We're talking around the world. We're talking
16 about jurisdictions in the Caribbean and in Asia
17 and Europe, and so it's -- there's progress
18 being made but there's more to do.

19 Q Right. There's progress. But I think I have
20 your evidence that cooperation, international
21 cooperation is needed in addition to a
22 beneficial ownership registry, or am I
23 mishearing you?

24 A Yeah, well, I mean, it depends on the activity,
25 obviously. But, you know, if you wanted to

1 think about something that Transparency
2 International is interested in, kleptocracy,
3 corruption, absolutely. Because, you know, if
4 we're talking about someone in the developing
5 world, they don't want to keep -- they want
6 their assets in London or Vancouver or New York.
7 That's because it's a safe place. The banks are
8 safe, they're solid and they're removed, and
9 then they can go -- you have to have
10 cross-border cooperation to get at those assets
11 and then you also have to have very careful
12 cooperation, if you're successful, to return the
13 assets so that they're not stolen a second time
14 by a different kleptocrat.

15 That's a very, very complicated problem.
16 It's being worked on. I did some work in
17 Ethiopia on that. It's a very complicated
18 problem, but it is being worked on.

19 Q Yeah, and I take it that this complicated
20 programming, one of the steps towards solving
21 it, one of the first steps should be the
22 establishment of a beneficial ownership
23 registry. Would you agree with that?

24 A Yes. Yeah, absolutely.

25 Q And so the last topic of question I'd like to go

1 through is the enforcement of civil forfeiture.
2 And so in your evidence this morning you
3 mentioned that it's ultimately pretty
4 discretionary on what actions get taken and what
5 actions are pursued in terms of civil
6 forfeiture. You mentioned things like limited
7 resources, and you're mindful that you might
8 have a sceptical judge and things like that.

9 A Yeah. What I meant to say was that, say, the
10 director of the BC program is going to be very
11 thoughtful and try and be very prudent in case
12 selection and what they're pursuing and they
13 need to plan for it and they need to think about
14 it a lot. I think that was the point I was
15 hoping to make was just there's a lot of thought
16 that will go into things long before they see
17 the inside of a courtroom.

18 Q And part of the thought is, as you said,
19 budgetary restrictions. Part of the thought is,
20 I guess, chances of success or chances of
21 judicial scrutiny. And then also just priority.
22 There might be a priority of crimes that is --
23 there's crimes at the top of the list and lesser
24 crimes at the bottom of the list; is that right?

25 A Yeah, I think that's fair. I think that, you

1 know, on any -- you know, there's not an endless
2 public service, and you do have to make
3 thoughtful and prudent decisions. You know, you
4 could do a whole bunch of complicated
5 forfeitures for \$3,000 cases, and it might cost
6 you a lot to actually do those, and you've
7 really got to do -- ask yourself, you know,
8 what's the benefit. And sometimes the benefit
9 is -- has nothing to do with the dollar value.
10 Sometimes you have activity, you know, maybe --
11 I don't know -- child pornography or something.
12 You have something that in and of itself has got
13 a huge impact even though the value of the case
14 isn't that big. And other times, you know, it's
15 a different kind of decision-making matrix, but
16 there's always thought that goes into how you
17 make those decisions if you're in that position
18 of the director.

19 Q And in my question I said "crime," but I think
20 really it should be -- in BC, at least, it's
21 unlawful activity, which you would agree has a
22 very broad definition within the act, within the
23 CFA?

24 A Yes. It does.

25 Q It applies to all offences under a federal or

1 provincial level?

2 A Yeah. Not all -- I think there's an ability
3 under the reg -- I'm not sure it's been used --
4 to exclude categories of offences. If you look,
5 for example, in the Criminal Code and the
6 forfeiture provisions, they operate similarly.
7 But yes, it's broadly construed, and it also
8 captures -- I said this earlier in my
9 evidence -- it also captures dual criminality.
10 So if there's unlawful activity in Washington
11 state but the asset's in BC, as long as it would
12 still be unlawful activity in BC, that asset is
13 forfeitable notwithstanding that the unlawful
14 activity might have occurred in another
15 jurisdiction.

16 Q And didn't the criminal and civil forfeiture
17 regimes worldwide, but the modern criminal and
18 civil forfeiture regimes, didn't they really
19 come into being after the 1988 Vienna Convention
20 on International Drug Trafficking?

21 A That was absolutely one of the drivers. There's
22 no question. That was the Comprehensive Crime
23 Enforcement Act in Congress. I think that's
24 '86. The Vienna Convention is very, very
25 important. The UN Convention on Corruption,

1 very, very important. The work of the Financial
2 Action Task Force and the G7 also very important
3 around money laundering. So there were lots and
4 lots of things, but you're absolutely right,
5 Vienna Convention was an important factor for
6 sure.

7 Q And you mentioned this morning in your evidence
8 that -- I think you obliquely referenced that
9 drug offences are kind of considered the
10 low-hanging fruit, or you maybe made a passing
11 reference to them being low-hanging fruit. Do
12 you remember that?

13 A Yeah. No, what I was -- so just to be clear
14 what I meant. There are certainly going to be
15 certain kinds, categories of cases typically --
16 not so much around drug offences as much as
17 money couriers. I think earlier in my evidence
18 I had said that, you know, the Columbians 20,
19 30 years ago pioneered a risk mitigation
20 strategy by parsing out their drug couriers from
21 their money couriers. The two never met. And
22 that was just a basic risk mitigation to guard
23 against the effects of law enforcement.

24 They have largely been displaced in no
25 small measure by the Mexican cartels. But

1 low-lying fruit would be, you know -- and we've
2 had -- every civil forfeiture authority has
3 probably had this kind of a case. There's a
4 young man, you know, no visible means of support
5 and he's got \$300,000 in a gym bag in his car
6 and he's driving somewhere; he doesn't know
7 where he's driving. That kind of a case to
8 me is low-hanging fruit. And it's low hanging
9 because it's likely that the civil forfeiture
10 authority and the criminal investigations may
11 never really get to the bottom of what's
12 underneath that case and what's really going on.
13 And that's something that, you know, as we get
14 better in more sophisticated would be
15 preferable.

16 But that's more or less what I meant by
17 low-lying fruit. Not so much drugs as much as
18 much as, you know, bulk cash smuggling and that
19 kind of activity.

20 Q And you mentioned that trade-based money
21 laundering is an area that civil forfeiture
22 hasn't touched yet to your knowledge.

23 A I don't think it's fair to say we haven't
24 touched it. What I do know, it's very, very
25 hard to get it and it's very complicated. It

1 has been effectively dealt with in the United
2 States. The black market peso exchange, for
3 example. There have been a number of very
4 important civil forfeiture decisions there. And
5 I know Dr. German has talked about a variation
6 on trade-based money laundering where, you know,
7 a bad guy will go and use dirty cash to pay the
8 debts of a legitimate business and then take a
9 cheque from that legitimate business, a
10 legitimate cheque, and that's the value transfer
11 in that.

12 So there's lots of things I think we need to
13 get better at. But trade-based money laundering
14 itself, very sophisticated and very difficult
15 because it's subtle; it's hiding in plain sight.
16 There's billions and billions and trillions of
17 dollars in trade going across borders every day,
18 and so you hide a little bit of that in plain
19 sight by under- or over-invoicing and
20 transferring value. That's really, really hard
21 to get at and you need sophisticated -- it's not
22 about civil forfeiture, to be honest. It's more
23 about customs and Revenue Canada and
24 investigative folks who have the sophistication
25 to understand what they're actually seeing. And

1 financial institutions too because they're
2 writing letters of credit against some of that
3 trade, and they should know -- they have an
4 obligation to know what their customers are
5 doing and what their business lines are, so they
6 should be part of that solution as well.

7 Q And, I mean, there's been no civil forfeiture --
8 to your knowledge has there been any civil
9 forfeiture in Canada on cases of large-scale
10 price fixing or corruption or anything of that
11 nature?

12 A Price fixing, no. That would probably -- if it
13 really is price fixing, that's something that --
14 the competition bureau would probably be the
15 first place to look. Grand scale corruption,
16 no, I'm not aware of any cases in Canada.
17 There's a lot of cases internationally. There's
18 a ton of important cases in the United States
19 and in the UK. And some in Australia as well.
20 But I don't think we're -- we've seen very many
21 cases around corruption generally in Canada.
22 We've seen a few but not as many as we probably
23 should.

24 Q But in principle civil forfeiture would apply
25 equally, the principles of civil forfeiture

1 would apply equally to those types of offences.

2 A Well, I would say more than that. I think, you
3 know, if you look at things like the Stolen
4 Asset Recovery Initiative out of the World Bank,
5 they would say NCB or non-conviction-based
6 forfeiture is absolutely critical to deal with a
7 kleptocrat because, you know, if you look at
8 someone like General Abacha out of Nigeria, I
9 mean, millions and millions and millions of
10 dollars spread all over the world, family
11 members are all nominees, nominee companies.
12 And so to get at that kind of a thing -- or
13 Marcos looting the Philippines -- you need a
14 non-conviction-based forfeiture tool in your
15 tool belt to effectively address the problem.

16 Q So doesn't that just mean that law enforcement
17 or the directors are just making an active
18 choice not to pursue those types of -- to pursue
19 civil forfeiture on those types of offences?

20 A I'm not sure I fully understand that question.
21 So if you've got, you know, a nominee, a distant
22 relative, and it hasn't been picked up by -- our
23 detection system is supposed to pick up
24 politically exposed persons. It doesn't always,
25 but it's supposed to. But if you've got someone

1 who is nominee and you've got virtually no
2 information about them, how are you ever going
3 to convict them. You know, you can show that
4 they have assets. You might even be able to the
5 trace the assets. Although if they're good, you
6 probably won't. You know, and I think I spoke
7 earlier about the first unexplained wealth order
8 in Britain. I mean, it was the wife of a central
9 banker from south central Asia. And so, you
10 know, there's no way -- I think convicting her
11 is very, very challenging, but it's clear that
12 she doesn't have the wherewithal for the wealth
13 that she's freely spending in Harrods and on
14 golf courses and all those kinds of things.

15 MR. RAUCH-DAVIS: All right. Thank you. I think my
16 time is up. Thank you.

17 THE COMMISSIONER: Thank you, Mr. Rauch-Davis.

18 Anything arising from that, Ms. Magonet?

19 MS. MAGONET: No, Mr. Commissioner. Thank you.

20 THE COMMISSIONER: Thank you. Ms. Dickson?

21 MS. DICKSON: No, Mr. Commissioner. Thank you.

22 THE COMMISSIONER: Thank you. And Mr. McCleery?

23 MR. McCLEERY: Nothing arising, Mr. Commissioner.

24 Thank you.

25 THE COMMISSIONER: Thank you. Thank you, Mr. Simser.

1 We're very appreciative of the time you've taken
2 in sharing your experience and expertise with
3 us. I think it will certainly provide us with
4 the -- grist for our mill, as it were, and
5 something that we can use to consider in making
6 findings and appropriate recommendations. So
7 you're excused from further testimony.

8 **(WITNESS EXCUSED)**

9 THE COMMISSIONER: And I think now, Mr. McCleery, we
10 adjourn until tomorrow at 9:30. Is that right?

11 MR. McCLEERY: Yes, Mr. Commissioner.

12 THE COMMISSIONER: All right. Thank you.

13 THE REGISTRAR: The hearing is adjourned until
14 December 15th, 2020, at 9:30 a.m. Thank you.

15 **(PROCEEDINGS ADJOURNED AT 1:01 P.M. TO DECEMBER 15,**
16 **2020)**

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