

DON'T PLAY IN THE DIRT

In their quest to choke off money laundering, governments are raising the standard for vigilance on the part of professionals

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BACKGROUND

You are a mortgage broker assisting a client who purchases and sells real estate frequently, funds large private mortgages, drives a fancy car, goes on vacation often and lives the high life. You wonder how she funds the lifestyle. She doesn't have a job, as far as you know. Your client indicates she has investments that have paid off rather well. You notice she often pays for expensive things in cash.

What obligation do you have to ensure your client is not using you to launder money? By being involved in the process, are you a money launderer?

MONEY LAUNDERING IN CONTEXT

Money laundering is the process of transforming "dirty money" into, in perception, "clean money." It creates a legitimate explanation for proceeds obtained from illegitimate activity, hiding the true origin and owner of the proceeds.

The battle against money laundering is related to the Criminal Code prohibition against possessing stolen property. The government has over time expanded legislation against activities related to stolen activity, both as to increasing the scope of prohibited activities and decreasing thresholds and safeguards in enforcing the laws.

This expansion puts workers in the real estate and financial sectors, including mortgage brokers, at greater risk of inadvertently violating the law and of having property forfeited to the Crown.

How far is too far for the government to go in fighting money laundering? Do the limitations on rights and freedoms of law-



abiding citizens outweigh the worthwhile goal? Are available remedies against wrongdoers disproportionate to the wrong? Is taking the medicine worse than bearing the illness?

Intelligent people will disagree as to the appropriateness of various measures, however there is little room for disagreement that the expansion is in fact occurring.

THE EXPANSION

Possession of Stolen Property

Possession of stolen property has always been an offence in Canada. The targeted property was the property obtained from the commission of the offence, for example the goods that were stolen in a burglary.

Proceeds of Crime

The Criminal Code expands the type of property it is wrong to possess to include proceeds of crime. Proceeds of crime are property the person knew was obtained or derived directly or indirectly from the commission of an indictable offence. (Criminal Code, section 354.1) For our purposes, it is enough to understand that indictable offences are generally the more serious offences.

Forfeiture

Forfeiture laws allow the government to dispossess wrongdoers of their ill-gotten possessions. They entitle the government to confiscate property, without paying compensation.

The Criminal Code allows forfeiture when:

- on a balance of probabilities (that is, more likely than not) the property is related to the offence for which there has been a conviction, or
- beyond a reasonable doubt the property is a proceed of crime, without regard as to whether there has been a conviction for the crime. (Criminal Code, section 462.37)

Other federal statutes allow forfeiture in similar circumstances (Controlled Drugs and Substances Act for example).

The provinces have expanded forfeiture considerably. All provinces, except Prince Edward Island and Newfoundland and Labrador, have enacted civil forfeiture statutes; none of the territories has done so.

The provincial laws make it easier for the government to obtain forfeiture by:

- applying to property obtained not only by crime but by unlawful activity (the provinces use various terms to describe such activity);
- requiring proof only on a balance of probabilities;
- not requiring a conviction, trial, or even charge related to the conduct from which the proceeds are claimed to have been obtained (New Brunswick law allows forfeiture to occur even if the person has been acquitted);
- streamlining the process and thereby avoiding many of the protections provided in the criminal process; and
- not being concerned with whether the value of the property to be forfeited is

proportionate to the wrong committed (for example, in B.C. a Lamborghini was forfeited for having been involved in the unlawful activity of street racing). However, some provinces' laws do contain a provision allowing a court to not order forfeiture when it would not be just to do so.

The relative ease with which civil forfeiture can be obtained produces an incentive for the government to pursue it rather than pursuing a criminal conviction for the substantive charge. This can sometimes deprive a person of property without ever having their day in court concerning the primary accusation.

B.C. is considering expanding its civil forfeiture program further by allowing forfeiture:

- once the Crown links the asset to unlawful activity, unless the defendant proves the property is not an instrument or proceed of unlawful activity; and
- allowing the Crown to hold the asset before the Crown starts court proceedings (this in effect deprives the defendant of the use of the asset without a forfeiture proceeding, let alone not having been heard on the primary charge).

MONEY LAUNDERING

Forfeiture is easier if people are prohibited from hiding proceeds of crime. Proceeds of crime that are converted into another form can be difficult to trace, locate and have forfeited.

The various methods of money laundering involve the following three stages:

- placing ("dirty money" is introduced into the financial system)
- layering
 - Proceeds of crime are converted into another form (such as real estate purchases, mortgage investments, stocks, and bonds).
 - Sequences of financial transactions, some complex, are created (to disguise the audit trail and the source and ownership of funds).
- integration
 - The laundered proceeds are in the economy (to be perceived as "clean" money).

The Criminal Code, in effect, makes it an offence to deal with proceeds of crime in any way (Criminal Code, section 462.31). This prohibits being involved in any of the conduct concerning any of the stages of money

laundering. While not precise, suffice it to say that almost all (if not all) conduct engaged in by mortgage broker in dealing with proceeds of crime would contravene the section.

The mortgage broker will have violated the section if the conduct was engaged in:

- with the intention to conceal or convert the proceeds and
- knowing, believing, or being reckless as to the property being proceeds of crime.

Recklessness standard and implications for industry participants

The recent addition of recklessness being enough to satisfy the mental component lowers the standard for being charged with money laundering. Professionals who facilitate real estate and mortgage transactions might be charged with money laundering if they proceed with a transaction in the face of red flags. They may be said to have been reckless in the face of the red flags. The defence to such an allegation might be showing that the person did not ignore but rather conducted appropriate assessments in dealing with the red flags. Superiors might now have to be more attentive of alerts of money laundering raised by subordinates, or risk being found to have been reckless.

DETECTION

Governments have enacted various laws to make detection of money laundering easier.

FINTRAC: The Proceeds of Crime (Money Laundering) and Terrorist Financing Act requires various entities conducive to conversion or concealment of funds (such as banks, credit unions, life insurance companies, securities dealers, money services businesses and foreign exchange dealers, accountants, real estate brokers, casinos, dealers in precious metals and stones, notaries, and real estate developers) to report suspicious transactions and those above certain amounts to FINTRAC. A suspicious transaction is one that is related to the commission or attempted commission of a money laundering offence or a terrorist activity financing offence. Even those who are not required to report suspicious transactions to FINTRAC are permitted to do so.

FINTRAC analyzes the information made available to it and as part of their reporting out provides money laundering/terrorist financing red flags/indicators for various industries.

Corporate Shares Transparency Register

B.C. requires corporations to maintain a corporate shares transparency register indicating the true owners of their shares. This avoids true owners from hiding behind trustees and/or corporations who hold shares in other corporations. Other provinces are considering following suit.

Landowner Transparency Registry

B.C. is on its way to having in place the Landowner Transparency Act (LOTA). When in place, LOTA will require corporations, partnerships and trusts that hold land in British Columbia to disclose the "true" ownership of that land. This information will be accessible by the public.

Unexplained Wealth Orders?

The March 31, 2019 report to the B.C. government entitled "Combatting Money Laundering in B.C. Real Estate" recommended the government should consider introducing unexplained wealth orders. A person served with such an order would have the onus to show that the source of their wealth is legitimate, or risk forfeiture of their property. Presumably the targets of such orders would be persons whose assets and lifestyles are far greater than their known, legitimate income would support.

We will have to wait to see whether B.C. follows through, and whether other provinces follow suit. It will also be interesting to see whether successful enforcement of such orders leads to further allegations, such as tax evasion.

TAKEAWAY

A mortgage broker would do well to be diligent in knowing/verifying the source of money they are handling. The law does not require that a thorough investigation be conducted; it does require diligence. **MB**

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