

## Working Paper 41

# Targeting unexplained wealth in British Columbia

An analysis of Recommendation 101 of the Final Report of the  
Commission of Inquiry into Money Laundering in British Columbia

Andrew Dornbierer and Jeffrey Simser | October 2022



## Foreword

Money laundering has been a significant problem in Canada for years. Often improperly perceived as a victimless crime, it has never been treated seriously enough by policy makers, legislators, budget setters, regulators and law enforcement. It has become clear that money laundering both springs from and fuels direct and negative impacts on our communities: illegal guns, drugs and resulting violence, fraud, corruption and declining trust and respect for our institutions.

It has become a bumper sticker issue, that is, one well set in the public's consciousness. Pickup truck bumpers at road construction sites read: "Dirty hands. Clean money". Clearly something has to be done.

Money laundering reached crisis levels in British Columbia, leading to the Cullen Commission: 199 witnesses, over a thousand exhibits, 133 days of hearings and a 1,831-page report with 101 recommendations.

The final recommendation is the implementation of unexplained wealth orders as a tool to assist in forfeiture of assets to fight money laundering. Unexplained wealth legislation, also known as illicit enrichment legislation, is legally complex, has been implemented and considered in other jurisdictions and in some circles is controversial. It will require policy makers to understand what it is, its usefulness, the related legal issues and experiences in other jurisdictions to assess its potential impact on money laundering in British Columbia – and Canada more broadly – and how best to implement it.

We cannot afford to waste the thoughtful and detailed analysis and recommendations arising from the Cullen Commission. The authors Andrew Dornbierer and Jeffrey Simser set out a comprehensive and thoughtful road map to understanding unexplained wealth orders and the key issues for policy makers and others to consider. I encourage policy makers and implementers to read their articulate, thoughtful and practical paper and to act on it.

Any legislated enactment of and implementation of unexplained wealth orders will doubtless be challenged in our courts and we will need to hear from the Supreme Court of Canada on it. All the more reason that any steps taken to implement such legislation are well informed. The authors have provided invaluable assistance to this process.



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# Table of contents

About the authors	1
About this Working Paper	2
Executive summary	3
1 Introduction	5
2 What is ‘unexplained wealth’ and how can it be legislatively targeted?	7
2.1 Unexplained wealth laws	7
2.2 UK-style UWOs	8
2.3 Other laws targeting unexplained wealth	8
3 Why did the Commission recommend a UK-style UWO?	9
4 How UK-style UWOs work	11
4.1 Manitoba’s UK-style UWO	12
5 Has the UK-style UWO been successful?	14
5.1 The United Kingdom mechanism	14
5.2 Legal costs	14
5.3 The Manitoba mechanism	17
6 Would a UK-style UWO be constitutionally acceptable in British Columbia?	18
7 Is a UK-style UWO likely to be successful in British Columbia?	20
8 An alternative avenue: unexplained wealth laws that both reverse the burden of proof and permit confiscation	23
8.1 The Western Australian Unexplained Wealth Declaration	24
8.2 Ireland’s <i>Proceeds of Crime Act</i> mechanism	26
8.3 Would a Western Australian or Irish mechanism be constitutionally possible in British Columbia?	28
9 Would either a UK-style UWO or a traditional unexplained wealth mechanism violate established legal rights in Canada?	30
9.1 The presumption of innocence and the unfair reversal of the burden of proof	30
9.2 The privilege against self-incrimination	36
9.3 The right to be secure against unreasonable search and seizure	38
10 Safeguards that could be adopted to prevent the infringement of legal rights	40
11 Conclusion	43

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## About this Working Paper

This document has been prepared by experts working with the Basel Institute on Governance, an independent not-for-profit organisation dedicated to countering corruption and other financial crimes, and the Vancouver Anti-Corruption Institute, an organisation devoted to anti-corruption efforts and legislative change. The collaboration was facilitated by the International Academy of Financial Crime Litigators, an independent, non-partisan global centre that shapes and advances financial crime litigation practices for the future.

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For questions or to report any inaccuracies or missing information, please contact the authors or email [info@baselgovernance.org](mailto:info@baselgovernance.org).

## Executive summary

The final recommendation of the *Commission of Inquiry into Money Laundering in British Columbia* ('the Commission') urged the government to legislate an unexplained wealth order ('UWO') as part of a wider approach to counter the prevalence of money laundering and proceeds of crime in the province. This document analyses the feasibility of this recommendation.

If a UWO was introduced under British Columbian law, it would likely be contained in the Civil Forfeiture Act<sup>1</sup> and would complement the existing powers of the Director of the Civil Forfeiture Office ('the Director'). While there are a number of differing UWO models that could be used by legislators as a foundation for such a mechanism, the Commission recommended the introduction of a UWO based on the existing model of the United Kingdom ('UK'). This type of UWO is an information gathering device, the fruits of which can be used to launch a civil forfeiture proceeding. It can be used to unpack the holdings of a fraudster, an organized crime figure or an offshore corrupt official hiding their lucre behind a chain of trusts and shell companies.

If a UK-style UWO was introduced under British Columbia's Civil Forfeiture Act, the Director would be empowered to seek a court order requiring a respondent to provide information and documentation respecting their interest in a specified piece of property, their source of funds to purchase the property, the particulars of any trust arrangement and any other relevant information specified by the court. If the respondent did not comply, a rebuttable legal presumption that the property is a proceed of unlawful activity would arise that could be used by the Director in a subsequent civil forfeiture proceeding to confiscate the asset.

The likely success of a UK-style UWO in British Columbia is difficult to predict. A number of factors have already hindered the success of this mechanism in the UK, and there are additional constitutional and legal rights implications that must be considered if a mechanism of this kind was introduced. There are also a number of actions however, that could be taken to increase the chance that a British Columbian mechanism would be effective – such as ensuring that the Civil Forfeiture Office is properly resourced and equipped to implement the law, and by adapting the law to address the deficiencies made clear by the UK experience.

Beyond a UK-style UWO, there are also a number of alternative UWO models that could be considered by legislators, such those that exist in Ireland and Western Australia. While it is unlikely that these models could be completely incorporated into British Columbia due to constitutional restraints, there are characteristics of these models that should nonetheless be considered. One such characteristic is a reversed burden of proof mechanism that would directly require the claimed owner of a specific property to prove its lawful origin. The inclusion of such

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1 Civil Forfeiture Act 2005 (British Columbia).

a characteristic must, of course, be done in a way that respects established legal rights and falls within constitutional requirements regarding the division of federal and provincial powers. Additionally, safeguards can also be incorporated into the law itself, to prevent a mechanism such as this being misused.

# 1 Introduction

On 15 June 2022, the Commission released its *Final Report* ('the report') to the public. Sparked by a wave of significant public concern about money laundering in the province, the report drew from an abundance of evidence including 199 witness testimonies and 1,063 exhibits filed during 133 days of hearing.

The key finding of the report is clear: 'money laundering is a significant problem requiring strong and decisive action'.<sup>2</sup>

The author of the report, the Honourable Austin F Cullen ('the Commissioner'), provides 101 recommendations to tackle this issue. In his 101<sup>st</sup> recommendation, he states as follows:

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

The recommendation refers to an existing initiative by the British Columbian Ministry of Finance to develop a UWO regime based largely on the mechanism contained in the UK's *Proceeds of Crime Act 2002*.<sup>3</sup> This UK mechanism is predominantly an information-gathering tool, similar to a disclosure order, under which the court can obligate a person to provide information relating to the ownership and source of specific property (providing that certain conditions have been met). Based on the information provided, the relevant law enforcement agency can then opt to pursue a separate civil confiscation order for the relevant property by establishing that it was, more likely than not, obtained through criminal conduct. In British Columbia, a UWO of this kind would likely complement the existing statutory information gathering powers of the Director (e.g. s.22.02 of the *Civil Forfeiture Act*).

The fact that this was the 101<sup>st</sup> of 101 recommendations should not detract from the significance given to it by the Commission. As stated by the Commissioner in the executive summary of the report: 'Unexplained wealth orders will be a valuable additional tool in the fight against money laundering.'<sup>4</sup>

This document will explore the feasibility of implementing the report's 101<sup>st</sup> recommendation. Specifically it will:

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2 The Final Report of the Commission of Inquiry into Money Laundering in British Columbia, p.2.

3 Ministry of Finance (British Columbia), Briefing Document – Unexplained Wealth Orders, 22 November 2019 (Exhibit 62 of the Commission of Inquiry into Money Laundering in British Columbia).

4 The Final Report of the Commission of Inquiry into Money Laundering in British Columbia, p.9.



- Briefly explain the concept of unexplained wealth and how it can be targeted through legislative instruments;
- Outline the reasons for which the Commissioner proposed a UWO for British Columbia;
- Explain how a UK-style UWO works and assess the probability that a mechanism of this kind would successfully recover unexplained wealth in British Columbia;
- Address the constitutional issues that may arise if a UK-style UWO was introduced, as outlined by former Supreme Court Justice, the Honourable Thomas A. Cromwell C.C., in his annexed opinion to the report;
- Explain other legislative options that target unexplained wealth (including those in Western Australia and Ireland) and assess their constitutional compatibility and potential effectiveness as compared to a UK-style UWO;
- Explore the legal rights issues that may arise if either a UK-style UWO or a traditional UWO was introduced; and
- Outline the legislative safeguards that could be put in place to reduce the risk that any such mechanisms would negatively impact on established legal rights.

## 2 What is ‘unexplained wealth’ and how can it be legislatively targeted?

There are over 100 different laws targeting unexplained wealth globally and, as might be expected, there is a significant lack of consistency regarding the definition of ‘unexplained wealth’. The scopes of definitions around the world apply the concept to varying forms of tangible and intangible items of wealth, as well as different categories of people. From the widest perspective however, ‘unexplained wealth’ refers to the acquisition, receipt or use of something of pecuniary value by a person that has not been justified by reference to lawful income.<sup>5</sup>

### 2.1 Unexplained wealth laws

With so many jurisdictions targeting unexplained wealth, there is also some variation in the definition of an ‘unexplained wealth law’. Traditionally, unexplained wealth laws are legislative mechanisms under which a court can sanction a person through a stand-alone criminal or civil procedure for enjoying wealth that is not justified by reference to lawful income. When the unexplained wealth law is a criminal mechanism, a person who cannot justify certain wealth can be sanctioned with criminal punishments (such as imprisonment, fines and criminal confiscation). When the law is a civil mechanism, the court can only issue civil sanctions such as confiscation orders or payment orders to the value of the proven unexplained wealth. Neither criminal nor civil versions of unexplained wealth laws require the existence of a conviction, or any proof that an underlying or separate criminal activity has taken place, before the law can be applied.<sup>6</sup> Consequently, these mechanisms differ from *in rem*, non-conviction based forfeiture (‘NCBF’) mechanisms such as the one already contained in British Columbia’s *Civil Forfeiture Act*, where the Director must first satisfy the court that there is a connection between the property in question and an unlawful activity before a forfeiture order can be issued.

Notably, the federal government has consistently refused to implement a criminal unexplained wealth law based on legal and constitutional concerns.<sup>7</sup>

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5 The Basel Institute on Governance has produced a recent and comprehensive study of unexplained and illicit wealth provisions which includes an online annex with an extensive interjurisdictional scan, see: Dornbierer, A., 2021. *Illicit Enrichment: A Guide to Laws Targeting Unexplained Wealth*. Basel: Basel Institute on Governance. Available at: [illicitenrichment.baselgovernance.org](https://illicitenrichment.baselgovernance.org).

6 Some laws however do require the state to demonstrate a ‘reasonable suspicion’ or ‘reasonable belief’ that a criminal activity has occurred – though this does not include proof of the act itself (see: Dornbierer, A., 2021. *Illicit Enrichment: A Guide to Laws Targeting Unexplained Wealth*. Basel: Basel Institute on Governance, p.27. Available at: [illicitenrichment.baselgovernance.org](https://illicitenrichment.baselgovernance.org)).

7 Article IX of the Inter-American Convention Against Corruption urges jurisdictions to pass a conviction-based unexplained wealth law, but both Canada and the United States have refused citing constitutional concerns.

## 2.2 UK-style UWOs

There are other civil mechanisms that can be used by state agencies to identify and target potential unexplained wealth, but which do not include a power to issue civil sanctions relating to the property in question. These laws, such as the United Kingdom's 'unexplained wealth order' or Manitoba's 'preliminary disclosure order', only permit the court to issue a judicial order requesting a person to provide details of the origin of certain assets.

These mechanisms differ from the traditional unexplained wealth mechanisms above, as they cannot be used to actually confiscate unexplained wealth – even if a person's response to the order does not adequately justify the sources of the assets in question. Instead, a separate civil order must be sought, often referred to as a 'civil recovery order' or a NCBF order which requires the court to be satisfied, on the balance of probabilities, that the assets are either derived from, or connected to, criminality of some sort.

Notably, if a person in the U.K. does not 'comply' or 'purport to comply' to the original order to provide information, a rebuttable presumption will be created that the relevant assets are criminally tainted which may be used in the subsequent civil recovery proceeding. For the purpose of this document, these mechanisms will be referred to as 'UK-style UWOs'.

## 2.3 Other laws targeting unexplained wealth

Other jurisdictions have laws that can also be used to target unexplained wealth in certain circumstances, even if they do not specifically refer to the concept of 'unexplained wealth'. For instance 'extended confiscation' mechanisms exist in many countries that allow a court to make a presumption that all the assets held by a convicted person in a defined period up until their conviction are the proceeds of crime – regardless of whether or not they can be connected to a criminal activity.<sup>8</sup> These assets will subsequently be confiscated unless a person can explain how they acquired them. Such laws are categorized differently from unexplained wealth laws however, on the basis that they require proof of criminality before they can be applied.

Furthermore, many tax laws in countries around the world, including Canada, can be used to obligate a person to disclose the lawful sources of their wealth – or face legal consequences.<sup>9</sup>

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8 For an example, see the Proceeds of Crime Act 2002 (United Kingdom), ss.6, 10, and 75.

9 The Canada Revenue Agency can conduct a net-worth assessment under the Income Tax Act, see for example *Halls v The Queen* 2022 TCC 14. The similarities in operation between US tax law and illicit enrichment legislation is also noted in R. Messick, 'Will the United States Please Admit It has an Illicit Enrichment Law', The Global Anti Corruption Blog, 24 April 2019, <https://globalanticorruptionblog.com/2019/04/24/will-the-u-s-please-admit-it-has-an-illicit-enrichment-law/>, accessed 26 September 2022.

### 3 Why did the Commission recommend a UK-style UWO?

The report specifically recommends the introduction of a UK-style UWO, and provides a number of justifications for this recommendation.<sup>10</sup>

Firstly, the Commission suggests that a UK-style UWO will assist state agencies in efforts to identify, and make decisions to pursue, criminally-connected assets:

*There are often circumstances in which law enforcement agencies have reasonable grounds to suspect that a particular asset was obtained or derived from the commission of a criminal offence, but simply do not have the evidence required to prove that fact to the civil standard of proof. Through the introduction of an unexplained wealth order regime, the state can require a property owner to produce information concerning the provenance of a suspicious asset (which may assist the authority in deciding whether to pursue civil forfeiture).<sup>11</sup>*

Secondly the report suggests that a UK-style UWO will assist the British Columbian Civil Forfeiture Office in efforts to target the assets of criminals further up the criminal hierarchy, particularly when the assets of these people are held by nominee owners:

*[UWOs] may be particularly useful in targeting the assets of individuals further up the criminal hierarchy, who are often involved in highly lucrative but less visible forms of criminal activity. If used properly, unexplained wealth orders also allow authorities to address problems such as nominee ownership, where those involved in criminal activity put unlawfully obtained assets into the hands of a family member or associate who is not involved in criminal activity with a view to insulating the asset from a forfeiture order.<sup>12</sup>*

Finally, the Commission argues that a UK-style UWO will deter criminals from keeping proceeds of crime within British Columbia:

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10 The Final Report of the Commission of Inquiry into Money Laundering in British Columbia, p.1616, 'After reviewing the international evidence with respect to unexplained wealth orders, and the challenges experienced by the Province in targeting money laundering and proceeds of crime, I am persuaded that such orders are a useful and effective tool in the fight against money laundering, and that the Province should proceed with its plan to introduce an unexplained wealth order regime similar to that in place in the UK'.

11 The Final Report of the Commission of Inquiry into Money Laundering in British Columbia, p.1616.

12 Ibid., p.1616.

*Another benefit of unexplained wealth orders is that they may discourage foreign corrupt officials and others involved in criminal activity from moving their illicit wealth to British Columbia through the purchase of real estate and other valuable assets... Faced with the prospect of having to prove the provenance of a particular asset to avoid a forfeiture order, these offenders may choose to place their wealth in another jurisdiction.<sup>13</sup>*

Beyond a UK-style UWO, the Commission also considered other legislative models to target unexplained wealth, including those that exist in Ireland and Australia. The Commission determined, however, that there would be significant implementation challenges posed by these models in comparison with a UK-style UWO. In any case, the feasibility of these models is also examined later in this document.

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13 Ibid., p.1617.

## 4 How UK-style UWOs work

As explained by the Commission, a UK-style UWO is:

*...primarily an investigative tool that allow[s] an enforcement authority... to apply for an order requiring a person to provide information concerning the nature and extent of that person's ownership interest in a particular property, and how they obtained that property'.<sup>14</sup>*

The UK's UWO mechanism is contained in the *Proceeds of Crime Act*,<sup>15</sup> however there are similar versions of this law in other jurisdictions including Zimbabwe,<sup>16</sup> Barbados,<sup>17</sup> and Manitoba.<sup>18</sup> New Zealand, a jurisdiction similar in many ways to British Columbia, has also introduced legislation which if passed would change their civil forfeiture law to add presumptions and provisions similar to that of the UK-style UWO mechanism.<sup>19</sup>

The UK introduced their mechanism in 2017. While the mechanism was labelled an 'unexplained wealth order' it differed significantly from UWOs in other jurisdictions. Rather than providing a direct mechanism for the confiscation of unexplained wealth, the order functions more like a preliminary disclosure order in that it can be used to compel a person to provide information under certain conditions. This information may then assist authorities to make a decision on whether or not to pursue a separate civil recovery process.

Under the UK mechanism, a court may issue a UWO relating to an identified and specified property (of a value greater than GBP 50,000) if it is satisfied that:

- There are reasonable grounds for suspecting that either:
  - The 'known sources of the respondent's lawfully obtained income would have been insufficient for the purposes of enabling the respondent to obtain the property'; or
  - The property has been 'obtained through unlawful conduct';

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14 Ibid., p.1616.

15 Proceeds of Crime Act 2002 (UK).

16 Money Laundering and Proceeds of Crime Act No.4 of 2013 (as amended by the Money Laundering and Proceeds of Crime (Amendment) Act 2019) (Zimbabwe), s.37B.

17 Proceeds and Instrumentalities of Crime Act, 2019-17 (Barbados), ss.135-138.

18 Criminal Property Forfeiture Act (Manitoba), Part 1.2.

19 Criminal Proceeds (Recovery) Amendment Bill (New Zealand), ss.15, 21 and 33.

- And that either:
  - The respondent is a politically exposed person (from outside the United Kingdom or a European Economic Area state); or
  - There are reasonable grounds to suspect that the respondent, or someone connected to the respondent, has been involved in serious crime.<sup>20</sup>

If an unexplained wealth order is issued, the person will be obligated to provide a statement that:

- Sets out the ‘nature and extent of the respondent’s interest’ in the relevant property;
- Explains how they obtained the property including, in particular, how any costs incurred in obtaining it were met;
- Sets out any details of a settlement that holds the property (where the property is held by the trustees of a settlement); or
- Sets out any other relevant information.<sup>21</sup>

If after the UWO is issued, the person ‘does not comply’ or ‘does not purport to comply’ with the order, then this will give rise to a rebuttable presumption that the property in question was not obtained lawfully. This presumption will be taken into account in any subsequent and separate civil recovery proceeding relating to the property.<sup>22</sup>

If the person does comply, or purports to comply, and the property in question is subjected to an interim freezing order alongside the UWO, then the agency that sought the order has a maximum of 186 days to decide to pursue additional proceedings before the freezing order is lifted.<sup>23</sup> If there is no such freezing order in place then the time for a decision is not restricted.<sup>24</sup>

## 4.1 Manitoba’s UK-style UWO

The UK-style UWO mechanism in Manitoba, known as a ‘preliminary disclosure order’, was introduced into the *Criminal Property Forfeiture Act* in May 2021.<sup>25</sup> The Manitoban mechanism

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20 Proceeds of Crime Act 2002 (UK), s.362B.

21 Ibid., s.362A.

22 Ibid., s.362C.

23 Ibid., s.362D.

24 Ibid., s.362D(5).

25 The Criminal Property Forfeiture Act 2004 (Manitoba).

functions almost exactly like the UK UWO mechanism with one exception: it cannot be applied solely on the basis that someone is a politically exposed person. In essence, it is an ‘information gathering tool’ to assist the Director of the Manitoban Criminal Property Forfeiture Unit to make a decision on whether or not to commence a separate civil forfeiture proceeding.<sup>26</sup> Similar to the UK mechanism, it empowers a court to obligate a person to set out ‘the nature and extent of their interest’ in certain property if the court is satisfied that:

- The person holds the property;
- The value of the property exceeds CAD 100,000;
- The known sources of the respondent's lawfully obtained income and assets would have been insufficient to enable the respondent to acquire the property; and
- The person, ‘or a person who does not deal with the respondent at arm's length, is, or has been, involved in unlawful activity’.<sup>27</sup>

If the person does ‘not provide all the information and documents required to be provided under the preliminary disclosure order’ then a rebuttable presumption arises that the relevant property is the proceed or instrument of unlawful activity – and this will be taken into consideration during any subsequent civil forfeiture proceeding.<sup>28</sup>

Under the Manitoba model, the Director can bring a civil forfeiture proceeding either contemporaneously with the UWO or afterwards. Practically speaking however, the UWO mechanism would likely be used where there is an insufficient underlying investigation to support the launching of a civil forfeiture proceeding – but where further information would inform the Director on whether or not a civil forfeiture proceeding would be suitable. For instance, during the Commission proceedings the Director gave a case example where they found that a person connected to drug trafficking held assets over CAD 1.1 million, despite the fact that they did not have a known job. The Director indicated that a UWO would have been practical in this case to acquire the additional information required to determine the feasibility of civil forfeiture proceedings.<sup>29</sup>

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26 Proceedings at Hearing of May 5, 2021 (Transcript of Interview of Melinda Murray, Manitoba Criminal Property Forfeiture Unit), Commission of Inquiry into Money Laundering in British Columbia, p.44.

27 The Criminal Property Forfeiture Act 2004 (Manitoba), s.2.3(6).

28 Ibid., s.17.18.

29 The Final Report of the Commission of Inquiry into Money Laundering in British Columbia, p.1602.



## 5 Has the UK-style UWO been successful?

### 5.1 The United Kingdom mechanism

The UK UWO mechanism has received a significant amount of criticism in the UK. Just recently, the Foreign Affairs Committee of the UK parliament published a report describing the mechanism as ‘spectacularly unsuccessful’.<sup>30</sup> When it was introduced, it was envisioned that around twenty UWOs would be sought per year in the UK by the numerous law enforcement agencies that have the power to apply for them.<sup>31</sup> To date however, only nine UWOs relating to four investigations<sup>32</sup> have been sought by one of these agencies, the National Crime Agency (‘NCA’), and only one case has resulted in the successful recovery of funds.<sup>33</sup>

A number of reasons have been put forward to explain both the lack of application and the lack of success. These are discussed below.

### 5.2 Legal costs

It has been argued that law enforcement agencies have been dissuaded from seeking UWOs due to the risk that they would face significant legal costs if their application was unsuccessful.<sup>34</sup> This risk was confirmed in the NCA’s first failed UWO application, *NCA v Baker*,<sup>35</sup> in which the agency received a GBP 1.5 million bill for legal costs.<sup>36</sup> A March 2022 amendment to the mechanism has now made it extremely difficult to claim costs against a government agency seeking a UWO, however it is too early to tell whether or not this will encourage agencies to seek an increased number of UWOs going forward.<sup>37</sup>

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30 Foreign Affairs Committee, ‘The cost of complacency: illicit finance and the war in Ukraine’, HC 168 2022-23, published 30 June 2022, at [12].

31 Ibid.

32 Shachi, A., *Unexplained Wealth Orders*, Commons Library Research Briefing CBP9098, 14 April 2022, p.18, available at: <https://researchbriefings.files.parliament.uk/documents/CBP-9098/CBP-9098.pdf>.

33 Notably, while the amount recovered was substantial – almost GBP 10 million – it was confiscated as part of a settlement with the respondent rather than through a subsequent civil recovery procedure (see RUSI, *Unexplained Wealth Orders – UK experience and lessons for British Columbia* (Exhibit 382 of the Commission of Inquiry into Money Laundering in British Columbia), p.16.). Consequently, while the information received through the UWO likely played a significant role in the settlement, it was not possible to gauge the degree to which the settlement was influenced by it.

34 Foreign Affairs Committee, ‘The cost of complacency: illicit finance and the war in Ukraine’, HC 168 2022-23, published 30 June 2022, at [12].

35 *National Crime Agency v Baker* [2020] EWHC 822.

36 Shachi, A., *Unexplained Wealth Orders*, Commons Library Research Briefing CBP9098, 14 April 2022, p.17, available at: <https://researchbriefings.files.parliament.uk/documents/CBP-9098/CBP-9098.pdf>.

37 Proceeds of Crime Act 2002 (UK), s.362B (as amended by the Economic Crime (Transparency and Enforcement) Act 2022).

### 5.2.1 Time limits

The original provisions of the mechanism required an agency to make a decision on pursuing a separate civil recovery mechanism within 60 days of a UWO response, in cases where an interim freezing order was in effect. It has been argued that the original limit was too restrictive and dissuaded agencies from seeking UWOs – particularly in international cases.<sup>38</sup> While this time limit was also amended in March 2022 to a maximum of 186 days, it is currently unclear whether or not this will result in an increase in UWO applications.

### 5.2.2 Constraints regarding complex structures

The original wording of the law also arguably made it very difficult for agencies to seek UWOs in cases where respondents had used complex corporate structures to disguise their beneficial ownership of assets. This issue has also been addressed in recent amendments to the law, and agencies are now permitted to seek UWOs against ‘responsible officers’ (e.g. directors of companies allegedly held by the respondent).<sup>39</sup> Once again however, it is too early to assess whether these amendments will be effective.<sup>40</sup>

### 5.2.3 No obligation to establish the lawful sources of property

There are other issues that have not been addressed in the recent amendments that may continue to prevent the mechanism from being utilised. One is the lack of clarity surrounding what the recipient of a UWO must do to be considered to have complied with the order.<sup>41</sup>

Compliance with a UK UWO does not require a person to prove the lawful sources of the asset in question. Unlike traditional mechanisms targeting unexplained wealth, the UK mechanism does not truly obligate a person to prove – to a court standard – that their assets have come from lawful sources. Instead, the recipient of a UWO simply needs to ‘comply’ or at the very least be able to ‘purport’ that they have complied with an order to discharge their obligation.<sup>42</sup>

38 RUSI, *Unexplained Wealth Orders – UK experience and lessons for British Columbia* (Exhibit 382 of the Commission of Inquiry into Money Laundering in British Columbia), p.6.

39 Proceeds of Crime Act 2002 (UK), s.362B (as amended by the Economic Crime (Transparency and Enforcement) Act 2022).

40 United Kingdom Government, *Fact Sheet: Unexplained Wealth Order reforms* (Policy Paper on the Economic Crime (Transparency and Enforcement) Bill 2022), 4 March 2022, accessed 5 August 2022 at: <https://www.gov.uk/government/publications/economic-crime-transparency-and-enforcement-bill-2022-over-arching-documents/factsheet-unexplained-wealth-order-reforms-web-accessible#contents>.

41 RUSI, *Unexplained Wealth Orders – UK experience and lessons for British Columbia* (Exhibit 382 of the Commission of Inquiry into Money Laundering in British Columbia), p.6, p.12.

42 One commentary suggests that ‘[t]aken in context, and considering the object of the UWO regime, purported compliance would appear to mean a response which, on its face, appears to be in compliance with the UWO, but in fact is not, or may not be. It would not seem to matter whether the respondent is aware of the falsity of the response and so a deliberately fabricated response would seem to be in purported compliance with a UWO provided that, on its face, it appeared to be compliant.’ (A Mitchell et. al, ‘Mitchell, Taylor and Talbot on Confiscation and Proceeds of Crime’, Vol. 2, Thomson Reuters, 2019 at [XIII 162]).

While a person must obviously provide information of some kind to demonstrate that they have responded to the order in some way, this ambiguity surrounding ‘purported’ compliance means that respondents to a UWO can avoid any subsequent presumptions against them by providing opaque, or largely unverifiable information regarding the sources of their property (particularly if there are time limits that might be applicable and which may prevent the law enforcement agency from properly verifying the legitimacy of the respondent’s claims). This is particularly the case for UWOs that relate to internationally sourced assets (for example, in *Baker*) and especially assets from jurisdictions that are unlikely to cooperate with requests for assistance.

This specific characteristic of the UK UWO makes it much less wide reaching than more traditional UWO mechanisms that exist in other countries where an obligation is placed on the person in question to actually prove the lawful sources of assets.

#### 5.2.4 A limited focus on property

Limitations also exist with the UK mechanism regarding the types of property that can be targeted by the order. The UK mechanism can only be applied to tangible and intangible ‘property’. This differs from other traditional unexplained wealth laws (such as those in Australian jurisdictions) that can be used to target a larger category of wealth that a person may have enjoyed – including all ‘property’, ‘services’, ‘advantages and benefits’ or ‘consumer goods and consumer durables that have been consumed or discarded’.<sup>43</sup> It is possible that this may have limited the number of cases to which a UK UWO can be applied.

#### 5.2.5 Resource issues

It is also often claimed that limited law enforcement budgets have prevented UK agencies from prioritising UWOs. As noted recently by the UK’s Foreign Affairs Committee, ‘a law is only as effective as its enforcement,’ and it is very likely that resourcing issues have contributed to the low rate to which UWOs have been sought.<sup>44</sup>

UK UWOs are potentially resource intensive, as any information received in response to a UWO still needs to be assessed and potentially verified before a decision can be made to pursue separate civil recovery proceedings. Combined with the cost risks mentioned above, it is argued that agencies in the UK have not been willing, or even able, to designate the appropriate amount of resources to applying the UWO mechanism.

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43 Criminal Property Forfeiture Act 2002 (Australia – Northern Territory); Crime (Confiscation of Profits) Act 1993 (Australia - Tasmania).

44 Foreign Affairs Committee, ‘The cost of complacency: illicit finance and the war in Ukraine’, HC 168 2022-23, published 30 June 2022, at [12].

### 5.3 The Manitoba mechanism

With regards to the Manitoban ‘preliminary disclosure order mechanism’, no known orders have been sought to date, so it is still too early to tell whether or not this mechanism will have an impact.

## 6 Would a UK-style UWO be constitutionally acceptable in British Columbia?

Canada's Constitution divides powers and responsibilities across the federal government level and the provincial level (including territories). The federal government has an authority over criminal law matters, while the provinces have authority over property and civil law issues. This division of powers could potentially affect the introduction of a UK-style UWO into a Canadian jurisdiction. To explore this issue, the Commission engaged former Supreme Court Justice, the Honourable Thomas A. Cromwell C.C. ('Cromwell') to provide a legal opinion covering the constitutional implications that may arise if a UWO was introduced. This opinion forms Appendix 1 of the final report.

In terms of compatibility with the constitution, Cromwell states that a UWO mechanism would be 'properly classified as falling within provincial legislative authority over property and civil rights in the province' as it would be 'concerned with obtaining evidence about property for the purpose of initiating or pursuing forfeiture proceeds under the [*Civil Forfeiture Act*] and only for those purposes.'<sup>45</sup> Therefore, with some exceptions, Cromwell concludes that a UK-style UWO mechanism would be constitutionally permissible for British Columbia to enact.<sup>46</sup>

With regards to exceptions, he notes that the classification of a UWO (and the wider Civil Forfeiture Act) as a property-based regime would likely be nullified if the Civil Forfeiture Office shared information with law enforcement agencies or tax authorities for the purposes of prosecutions, or if the Civil Forfeiture Office was embedded within a law enforcement agency.<sup>47</sup> For a mechanism to be permissible in a British Columbian context, information obtained through it, including derivative information, would have to have subsequent use immunity and could not be used in criminal proceedings. This would also be important for the mechanism to comply with the *Canadian Charter of Rights and Freedoms* (see Section 9 below).

Furthermore, Cromwell notes that if a UWO was specifically directed at politically exposed persons ('PEPs') – like in the UK – there could be a jurisdictional challenge given that the federal government has exclusive authority to conduct foreign relations.<sup>48</sup> The risk of a challenge could potentially be mitigated however, if the legislative amendments included non-binding

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45 T.A. Cromwell, Constitutionality of possible changes to the British Columbia Civil Forfeiture Act, 9 February 2021 (Appendix 1 to the Final Report of the Commission of Inquiry into Money Laundering in British Columbia), p.1770.

46 The Final Report of the Commission of Inquiry into Money Laundering in British Columbia, p.1772.

47 T.A. Cromwell, Constitutionality of possible changes to the British Columbia Civil Forfeiture Act, 9 February 2021 (Appendix 1 to the Final Report of the Commission of Inquiry into Money Laundering in British Columbia), p.1754.

48 Ibid., p.1772.

considerations that the court could take into account when considering a UWO request, including for example, a disproportion between known income verses assets, or that the person is a PEP.

Finally, Cromwell also notes that a UWO mechanism would not be permissible if it could be used to target instruments of unlawful activity.<sup>49</sup>

Beyond constitutional issues, concerns were also raised that a UK-style UWO in British Columbia would violate the *Canadian Charter of Rights and Freedoms* ('the Charter'). It is unlikely however, that a UK-style UWO, or even a more traditional UWO model would violate the Charter. This issue is examined in more detail in Section 9.

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49 Ibid., p.1770.

## 7 Is a UK-style UWO likely to be successful in British Columbia?

The report suggests that the recommended mechanism should form part of the *Civil Forfeiture Act* and should therefore be applied by the Civil Forfeiture Office.<sup>50</sup> This reflects the model that was chosen for the Manitoban mechanism (which was introduced in the *Criminal Property Forfeiture Act* and can be applied by the Criminal Property Forfeiture Unit).<sup>51</sup> Putting aside any constitutional or Charter challenges that may arise with the introduction of a UK-style UWO such as this, this section will examine the likelihood that a mechanism of this kind would be effective in British Columbia .

In essence, it is difficult to assess whether a UK-style UWO would contribute significantly to reducing the prevalence of money laundering in the jurisdiction. As noted above, it is still unclear whether the UK mechanism itself has had an effect on illicit financial flows in the UK, and there are many that would argue that its impact has been minimal to date.

Sceptics would also point out that a UK-style UWO in British Columbia would also need to be adapted to fit the existing systemic context in the jurisdiction, and particularly the strict delineation between federal law enforcement agencies investigating criminal actions and provincial agencies seeking civil forfeiture. These adaptations would arguably reduce the reach of a British Columbian mechanism in comparison to the UK model for a number of reasons.

Firstly, the UK mechanism can be applied by numerous law enforcement agencies, with either the power to commence and conduct their own investigations, or the ability to direct other agencies to conduct investigations on their behalf. A mechanism in the *Civil Forfeiture Act* could only be applied by one agency, the Civil Forfeiture Office, which does not commence its own investigations, and instead relies predominantly on information provided to it by other law enforcement agencies.<sup>52</sup> This is likely to limit the ability of this office to identify potential unexplained wealth cases, as the office would be completely dependent on information provided to them by separate agencies before they could commence an action.

Furthermore, the resources and capacity of the British Columbian Civil Forfeiture Office to conduct financial investigations relating to unexplained wealth is limited when compared to an agency such as the UK's NCA. The NCA has a significant financial investigation and analysis

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50 The Final Report of the Commission of Inquiry into Money Laundering in British Columbia, p.1617.

51 The Criminal Property Forfeiture Act 2004 (Manitoba).

52 The Official Website of the Government of British Columbia, 'Civil Forfeiture Legislation', accessed 8 August 2022 at <https://www2.gov.bc.ca/gov/content/safety/crime-prevention/civil-forfeiture-office/civil-forfeiture/legislation>.

capacity, while the Civil Forfeiture Office does not have permanent forensic investigators or accountants on staff.<sup>53</sup> Unless the resources of the Civil Forfeiture Office are increased to match the investigational capacity of a national police agency such as the UK's NCA then it will be more difficult to apply a UK-style UWO in British Columbia. This difficulty is also compounded in cases requiring the collection of internationally-located intelligence to assess the legitimacy of purported lawful sources of certain assets. The UK's NCA has the ability to access a wide network of international intelligence which would not be as readily available to the British Columbian Civil Forfeiture Office.

It is also important to note that the UK mechanism can be applied to assets throughout England, Wales and Northern Ireland (with an accompanying mechanism that can be applied in Scotland). By comparison, Canada's patchwork of nine civil forfeiture jurisdictions poses an inherent limitation to a British Columbian mechanism, as it could only be used to apply to assets within British Columbia. As noted above, a key justification in the report for recommending a UWO was that it would 'discourage foreign corrupt official and others involved in criminal activity from moving their illicit wealth to British Columbia through the purchase of real estate and other assets'.<sup>54</sup> While this is certainly a valid justification in itself, the fact that a British Columbian mechanism would not have a nationwide effect like in the UK would make it very easy for criminals to simply move some or all of their illicit assets to other provinces where UWOs do not exist – meaning that the total amount of money laundering in Canada as a whole is unlikely to be effected.

That said, those for the introduction of a British Columbian UWO would argue that the likelihood of success of this mechanism could be substantially increased in a number of ways.

As a starting point, British Columbia could benefit from the experience in the UK by already legislating a mechanism that takes into account the flaws uncovered in the original UK mechanism. Specifically, the British Columbian mechanism could be introduced with provisions limiting the ability of a respondent to claim costs against a government agency seeking a UWO by extending s.8(8) of the *Civil Forfeiture Act*. Legislators could also expand any time limitations on the Civil Forfeiture Office regarding a decision to pursue an action – giving them adequate time to verify or disprove supposed 'explanations' from respondents. Furthermore, legislators could design the mechanism so that it could be applied to nominee owners of assets suspected of belonging to the respondent. Importantly, the British Columbian mechanism could include stricter compliance conditions with a UWO, so that respondents are not able to simply avoid a

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53 Proceedings at Hearing of December 18, 2020 (Transcript of Interview of Phil Tawtel, Executive Director British Columbia Civil Forfeiture Office), Commission of Inquiry into Money Laundering in British Columbia, p.47. Note that this interview was conducted on December 18 2020 and it is not known to the authors of this report whether or not the Civil Forfeiture Office has enhanced its investigational capacity since then through the permanent engagement of financial accountants.

54 The Final Report of the Commission of Inquiry into Money Laundering in British Columbia, p.1617.



rebuttable presumption through providing an inadequate response and merely ‘purporting’ to comply with an order.

Other actions could also be taken to counter the limitations posed by the British Columbian legal context on the design and application of the potential UWO mechanism.

Firstly, to counter limitations caused by the jurisdictional divisions regarding civil forfeiture, the Director could regularly exercise their power under s.22 of the *Civil Forfeiture Act* to enter into agreements with agencies in other jurisdictions. This could include agreements with counterparts in other provinces, domestic law enforcement and regulatory agencies, and even agencies in international jurisdictions. For example, the Civil Forfeiture Office has previously entered into agreements with agencies like the Securities and Exchange Commission in the United States to pursue civil forfeiture cases involving British Columbian assets. These agreements could be entered into with law enforcement from any other province or country of origin for suspected recoverable assets identified in British Columbia.

Secondly, several of the Commission’s other recommendations can also be implemented to counter limitations caused by the hard boundary between civil and criminal agencies. Specifically, if law enforcement agents prioritise following the money in profit-oriented crime more vigorously, if there is an anti-money laundering commissioner appointed and if a dedicated money laundering intelligence and investigative unit is created, it is far more likely that cases of unexplained wealth will be identified and forwarded to the Civil Forfeiture Office, triggering their ability to actually seek UWOs in a large number of cases.<sup>55</sup>

Most importantly, the success of a British Columbian UWO will depend largely on the capacity of the Civil Forfeiture Office to apply it. Therefore, the resources of the Civil Forfeiture Office should be increased, specifically with regards to its capacity to conduct financial investigations and analysis. Proving, or disproving, the financial sources of an asset predominantly involves the skilled capacities of financial investigators and forensic accountants. As noted above, as of late-2020 the agency did not have any forensic investigators on staff. To increase the chance of success of any introduced UWO mechanism, the resources of the Civil Forfeiture Office will need to increase significantly.

Alternatively, to increase the Civil Forfeiture Office’s ability to recover unexplained wealth, legislators could also consider introducing more traditional mechanisms that require a person to not only provide information – like a UK-style UWO – but to also establish, to a court standard, that certain property was legitimately acquired. This alternative avenue is explored below.

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<sup>55</sup> The Final Report of the Commission of Inquiry into Money Laundering in British Columbia, Recommendations 1, 3 and pp.89-95.

## 8 An alternative avenue: unexplained wealth laws that both reverse the burden of proof and permit confiscation

In Exhibit 382 of the hearings for the Commission, ‘Unexplained Wealth Orders – UK experience and lessons for British Columbia’, the Royal United Services Institute (‘RUSI’) writes:

*...given the centrality of concerns about grand corruption and high-end money laundering to the adoption of UWOs, neither the current operation of the UK’s UWOs nor the concept of a UWO as an investigative tool appear to be the best model to emulate. If the objective is to collect information on unexplained wealth, the state may be best served by adjusting its existing disclosure orders or similar tools. Conversely, if a policy decision is taken to facilitate the forfeiture of wealth of unknown provenance, a simpler system such as that used in Ireland or Australia could be preferable.<sup>56</sup>*

Civil laws targeting unexplained wealth in Australia and Ireland differ substantially from the UK-style UWO. Rather than simply imposing an obligation on a person to provide information, these mechanisms may also place a burden on a person to prove, on the balance of probabilities, that their wealth has come from lawful sources. If a person is unable to do so, the court may confiscate the total amount of wealth that has not been explained.

These types of laws exist in numerous jurisdictions around the world.<sup>57</sup> They are significantly more powerful than UK-style UWOs, and have also generated a significant amount of debate surrounding the impact that their reversed burden mechanisms may have on legal rights.<sup>58</sup>

The following section will outline two models of these types of laws – namely those of Western Australia and Ireland. Subsequent sections will explain the debate surrounding the reversed burden mechanisms contained in these laws, and will explore the feasibility of introducing an unexplained wealth law of this kind into a Canadian jurisdiction.

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56 RUSI, Unexplained Wealth Orders – UK experience and lessons for British Columbia (Exhibit 382 of the Commission of Inquiry into Money Laundering in British Columbia), p.28.

57 Including, for example, the federal and state jurisdictions of Australia, as well as Ireland, Kenya, Mauritius, Trinidad and Tobago, Peru, Tanzania (Zanzibar), the Philippines and the Bahamas.

58 Dornbierer, A., 2021. *Illicit Enrichment: A Guide to Laws Targeting Unexplained Wealth*. Basel: Basel Institute on Governance, p.139, available at: [illicitenrichment.baselgovernance.org](http://illicitenrichment.baselgovernance.org).

## 8.1 The Western Australian Unexplained Wealth Declaration

The state of Western Australia was the first Australian jurisdiction to introduce a civil procedure-based unexplained wealth mechanism in 2000. The mechanism, contained in Western Australia's proceeds of crime legislation,<sup>59</sup> was brought in to deter crime by removing the 'primary financial motivation for it', and to target key figures in criminal organisations who benefit from crimes that they can't be directly linked to.<sup>60</sup>

The Western Australian mechanism permits the court to make an 'unexplained wealth declaration' if it is 'more likely than not' that the total value of a respondent's wealth is greater than the value of their lawfully acquired wealth.<sup>61</sup>

In proceedings to determine whether a declaration of this kind should be made, the onus is on a respondent to prove the lawful sources of any wealth that the state has established is under their control. Specifically:

*Any property, service, advantage or benefit that is a constituent of the respondent's wealth is presumed not to have been lawfully acquired unless the respondent establishes the contrary.*<sup>62</sup>

Originally, an unexplained wealth declaration could only be sought by the Director of Public Prosecutions ('DPP'). Since September 2018 however, the Corruption and Crime Commission ('CCC') have also been empowered to apply this mechanism.<sup>63</sup>

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59 Criminal Property Confiscation Act 2000 (Australia - Western Australia).

60 Joint Standing Committee on the Corruption and Crime Commission (Western Australia), Report 6: The Corruption and Crime Commission's Unexplained Wealth Function (The review by the Honourable Peter Martino), 24 March 2022, at [3.5].

61 Criminal Property Confiscation Act 2000 (Australia - Western Australia), s.12(1).

62 Criminal Property Confiscation Act 2000 (Australia - Western Australia), s.12(2).

63 Corruption, Crime and Misconduct and Criminal Property Confiscation Amendment Act 2018 (Australia - Western Australia), s.7.

### 8.1.1 Has the Western Australian mechanism been successful?

Up until recently, the mechanism had largely been viewed as unsuccessful.<sup>64</sup> In the first 16 years that the unexplained wealth mechanism was available, less than 30 declarations were made, including only one declaration from 2011–2019.<sup>65</sup>

The rate to which this mechanism has been applied however, has increased exponentially since the CCC were empowered to use it in September 2018. In the financial year of 2020-2021 alone, the CCC conducted investigations in 12 matters.<sup>66</sup> While 10 of these matters are still ongoing, and involve a combined AUD 6 million in frozen assets, another 2 cases were successfully concluded – with one resulting in the issuing of an unexplained wealth order for AUD 629,729 and another concluded through the issuing of a separate criminal benefits declaration (similar to a civil recovery order) for over AUD 11 million.<sup>67</sup>

While the DPP – an independent prosecution agency – still seeks unexplained wealth declarations, the DPP themselves assert that they are not the best agency to do so, and contend that the ‘lack of sufficiently close integration between the investigation and prosecution functions... has resulted in difficulties with the effective implementation of unexplained wealth laws’.<sup>68</sup> Hindrances such as these relating to a division of functions and resources have been flagged in a number of studies,<sup>69</sup> and were one of the key reasons used to justify the granting of powers to an additional agency – the CCC – to both investigate unexplained wealth as well as conduct court proceedings to recover it.<sup>70</sup>

As alluded to by Dr. Natalie Skead in her testimony for the Commission, the effective application of unexplained wealth legislation is arguably dependent on specific and targeted expertise,

64 The Final Report of the Commission of Inquiry into Money Laundering in British Columbia, p.1598; Proceedings at Hearing of December 17, 2021 (Transcript of Interview of Natalie Skead, University of Western Australia), Commission of Inquiry into Money Laundering in British Columbia, p.56; RUSI, Unexplained Wealth Orders – UK experience and lessons for British Columbia (Exhibit 382 of the Commission of Inquiry into Money Laundering in British Columbia), p.25.

65 *Review of the Criminal Property Confiscation Act 2000 (WA) (Report of the Honorable Wayne Martin AC QC)*, May 2019, at [13.3], accessed 10 August 2022 at: <https://www.parliament.wa.gov.au/publications/tablesdisplaypaper/4013477c99a84d2750a777e2482584c70012db72/%24file/tp-3477.pdf>.

66 Corruption and Crime Commission (Western Australia), Annual Report 2020-21, p.35, available at: <https://www.ccc.wa.gov.au/sites/default/files/2021-10/Corruption%20and%20Crime%20Commission%20Annual%20Report%202020-21.pdf>.

67 Ibid.

68 *Review of the Criminal Property Confiscation Act 2000 (WA) (Report of the Honorable Wayne Martin AC QC)*, May 2019, at [13.6], accessed 10 August 2022 at: <https://www.parliament.wa.gov.au/publications/tablesdisplaypaper/4013477c99a84d2750a777e2482584c70012db72/%24file/tp-3477.pdf>.

69 For example see Smith, M. and Smith, R., Exploring the procedural barriers to securing unexplained wealth orders in Australia (Report to the Criminology Research Advisory Council Criminology Research Grant), December 2016, accessed 11 August 2022 at: <https://www.aic.gov.au/sites/default/files/2020-05/unexplained-wealth.pdf>.

70 Western Australia, Parliamentary Debates (Second Reading of the Corruption, Crime and Misconduct and Criminal Property Confiscation Amendment Bill 2017), Legislative Assembly of Western Australia, 16 August 2017 (Attorney General John Quigley).

including lawyers, investigators and forensic accountants.<sup>71</sup> Technical and physical surveillance capabilities are also an asset.<sup>72</sup> The availability of all these functions to the CCC, as well as the close working relationship between the CCC's investigation and legal officers, have arguably contributed to the CCC's recent successes, and have allowed it to develop a 'fully operating and capable unexplained wealth function'.<sup>73</sup> Consequently, following a review conducted in 2022 of the CCC's unexplained wealth function, the Western Australian Parliament's Joint Standing Committee on the Corruption and Crime Commission recommended an increase in funding to the CCC to further expand its capacity to pursue unexplained wealth.<sup>74</sup>

## 8.2 Ireland's *Proceeds of Crime Act* mechanism

There is some uncertainty over whether the confiscation mechanism contained in Ireland's *Proceeds of Crime Act*<sup>75</sup> can be classified as an 'unexplained wealth mechanism'.<sup>76</sup> The Irish mechanism permits the civil confiscation of property in cases where a court is satisfied that certain property 'constitutes, directly or indirectly, proceeds of crime' or was 'acquired, in whole or in part, with or in connection with property that, directly or indirectly, constitutes proceeds of crime'.<sup>77</sup> This differs with other mechanisms that can clearly be classified as unexplained wealth mechanisms – such as the Western Australian model above – which permit the confiscation of property purely on the basis that its lawful source cannot be justified by the person who controls it.

It is also unclear however, whether or not the Irish mechanism should be classified as a civil recovery or NCBF mechanism. Unlike many of these types of mechanisms, the Irish mechanism permits the use of 'belief' evidence of a law enforcement officer when determining whether certain property has a criminal connection.<sup>78</sup> Furthermore, the 'belief' evidence (once established on a *prima facie* basis to be reasonable grounded) may also trigger a shift in the burden of proof onto a person to provide evidence that the property in question has not come from unlawful

71 Proceedings at Hearing of December 17, 2021 (Transcript of Interview of Natalie Skead, University of Western Australia), Commission of Inquiry into Money Laundering in British Columbia, p.60.

72 Joint Standing Committee on the Corruption and Crime Commission (Western Australia), *Report 6: The Corruption and Crime Commission's Unexplained Wealth Function (The review by the Honourable Peter Martino)*, 24 March 2022, at [3.26], accessed 11 August 2022 at [https://www.parliament.wa.gov.au/Parliament/commit.nsf/\(Report+Lookup+by+Com+ID\)/D37971919A2CDBB14825880E00281ED3/\\$file/Report%206%20-%20The%20CCC's%20unexplained%20wealth%20powers%20-%20Martino%20report.pdf](https://www.parliament.wa.gov.au/Parliament/commit.nsf/(Report+Lookup+by+Com+ID)/D37971919A2CDBB14825880E00281ED3/$file/Report%206%20-%20The%20CCC's%20unexplained%20wealth%20powers%20-%20Martino%20report.pdf)

73 Ibid., at [3.22] – [3.27].

74 Ibid., p.2.

75 Proceeds of Crime Act 1996 (Ireland).

76 Dornbierer, A., 2021. *Illicit Enrichment: A Guide to Laws Targeting Unexplained Wealth*. Basel: Basel Institute on Governance, p.82. Available at: [illicitenrichment.baselgovernance.org](http://illicitenrichment.baselgovernance.org)

77 Proceeds of Crime Act 1996 (Ireland), ss.2-4.

78 Proceeds of Crime Act 1996 (Ireland), s.8. In practice, the belief evidence tendered before the High Court in Ireland is of a similar quality to the evidence that the Director tenders to obtain in an interim preservation order under the *Civil Forfeiture Act*.

sources.<sup>79</sup> If the person is unable to do so, then the property can be confiscated. This arguably makes the Irish model more similar in nature to the unexplained wealth mechanisms rather than traditional civil recovery mechanisms.<sup>80</sup>

The mechanism is applied by a national and independent statutory body, the Criminal Assets Bureau ('CAB'), which is made up of officers on special leave from the An Garda Síochána (the national police service), the Office of the Revenue Commissioners and the Department of Social Protection. The CAB's operations also include a legal function performed by members of the Chief State Solicitors Office.<sup>81</sup> The CAB can receive intelligence and information from numerous sources – including both referrals from other law enforcement agencies, as well as reports from the public.<sup>82</sup>

### 8.2.1 Has the Irish mechanism been successful?

Regardless of its classification as a civil recovery or unexplained wealth mechanism, the Irish mechanism is lauded as having 'significantly disrupted economic crime' and is certainly a successful model that can and should be considered by policy makers seeking to target unexplained wealth.<sup>83</sup> The mechanism was covered extensively during the hearings of the Commission.<sup>84</sup> It was also used as an example of a successful recovery mechanism in the Ministry of Finance Briefing Document on Unexplained Wealth alluded to in the wording of Recommendation 101 of the report, which described the Irish mechanism as 'the most comprehensive approach to civil-based confiscation' and one that 'has had a significant impact on reducing, disrupting and dismantling criminal activities in Ireland'.<sup>85</sup>

The accolades are not unwarranted, as the CAB have consistently applied the Irish mechanism to recover assets. For example, in 2021 alone, 25 orders were made relating to assets with a

<sup>79</sup> The Final Report of the Commission of Inquiry into Money Laundering in British Columbia, p.1593, referencing Proceedings at Hearing of December 16, 2021 (Transcript of Interview of Kevin McMeel, Criminal Assets Bureau (Ireland)), pp.48-49; Proceeds of Crime Act 1996 (Ireland), ss.3-4.

<sup>80</sup> They are especially similar to the unexplained wealth mechanisms in jurisdictions such as New South Wales (Australia) and Kenya, in which a burden of proof can be placed on a person only once a reasonable suspicion has been established that some sort of criminal activity has occurred (see Dornbierer, A., 2021. *Illicit Enrichment: A Guide to Laws Targeting Unexplained Wealth*. Basel: Basel Institute on Governance, p.35).

<sup>81</sup> The Criminal Assets Bureau, *Annual Report 2021*, published July 2022, p.6, p.13.

<sup>82</sup> Proceedings at Hearing of December 16, 2021 (Transcript of Interview of Kevin McMeel, Criminal Assets Bureau (Ireland)), p.76.

<sup>83</sup> Shachi, A., *Unexplained Wealth Orders*, Commons Library Research Briefing CBP9098, 14 April 2022, p.4; RUSI, *Unexplained Wealth Orders – UK experience and lessons for British Columbia* (Exhibit 382 of the Commission of Inquiry into Money Laundering in British Columbia), p.23.

<sup>84</sup> See, for example, The Final Report of the Commission of Inquiry into Money Laundering in British Columbia, pp.1590-1596 and Proceedings at Hearing of December 16, 2021 (Transcript of Interview of Kevin McMeel, Criminal Assets Bureau (Ireland); Proceedings at Hearing of December 15, 2021 (Transcript of Interview of Helena Wood and Anton Moiseienko of RUSI).

<sup>85</sup> Ministry of Finance (British Columbia), Briefing Document – *Unexplained Wealth Orders*, 22 November 2019 (Exhibit 62 of the Commission of Inquiry into Money Laundering in British Columbia), p.5.

combined value of Euro 8,386,853.<sup>86</sup> In 2020, 29 orders were made relating to a combined value of Euro 57,688,693 (though a large portion of this value was made up of a single seizure of cryptocurrency worth Euro 53,000,000).<sup>87</sup>

The potential reasons for the success of this mechanism were also raised during the hearings of the Commission. Much of the success is attributed to the institutional design of the CAB. Specifically, a ‘crucial structural benefit’ and a ‘distinct advantage’ of the CAB is its multidisciplinary approach.<sup>88</sup> Each investigations team is effectively a multi-disciplinary unit made up of officers from each of the composite agencies of the CAB – including police investigators, tax investigators and social protection investigators.<sup>89</sup> Each team is also supported by co-located legal officers and a separate ‘analyst unit’ made up of forensic accountants and technical experts.<sup>90</sup> Furthermore, the organisation has extensive investigation powers, and can apply for search warrants as well as production orders.<sup>91</sup> This largely sets it apart from other civil recovery agencies – including that of British Columbia – which is largely reliant on referrals from law enforcement and has limited powers to conduct its own investigations.<sup>92</sup>

The CAB is also considered to have had a largely protected budget and is considered much better resourced in comparison with counterparts in the UK.<sup>93</sup>

### 8.3 Would a Western Australian or Irish mechanism be constitutionally possible in British Columbia?

Constitutional issues would prevent both a carbon copy of the Western Australian or Irish model from being introduced into British Columbia.

Actions under the Western Australian model are not *in rem*, but against a specific person. If an unexplained property declaration is made, the state authority can apply it in the same way as a civil damages award, and execute the declaration against all the assets of the defendant required to satisfy the value of the order (including assets that have a legitimate provenance).

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86 The Criminal Assets Bureau, *Annual Report 2021*, published July 2022, pp.47-48.

87 Ibid., pp.47-48.

88 Proceedings at Hearing of December 16, 2021 (Transcript of Interview of Kevin McMeel, Criminal Assets Bureau (Ireland)), pp.28-29.

89 Ibid., pp.28-29.

90 Ibid.

91 The Final Report of the Commission of Inquiry into Money Laundering in British Columbia, p.1592.

92 The Final Report of the Commission of Inquiry into Money Laundering in British Columbia, p.1590, referencing Proceedings at Hearing of December 16, 2021 (Transcript of Interview of Kevin McMeel, Criminal Assets Bureau (Ireland)), pp.143-144.

93 The Final Report of the Commission of Inquiry into Money Laundering in British Columbia, p.1590, referencing Proceedings at Hearing of December 15, 2021 (Transcript of Interview of Helena Wood and Anton Moiseienko of RUSI), pp.92-93.

This would potentially go against the constitutional division of powers between the provinces (that hold the responsibility for civil matters) and the federal level of government (that has responsibility over criminal matters).<sup>94</sup> As noted by Cromwell, the fact that mechanisms such as this detach an inquiry from a specific property means that they are likely to be ‘constitutionally problematic’ in Canada.<sup>95</sup>

With regards to the Irish model, the hybrid model of the CAB – which mixes investigative, taxation, and civil forfeiture elements – is unlikely to be compatible with constitutional requirements relating to the division of these functions in Canada, and specifically the sharing of information between them.<sup>96</sup> Similar arguments could also be made against the Western Australian model on these grounds as well. As noted by Cromwell, if the agency responsible for civil forfeiture in British Columbia was legislatively embedded within a law enforcement agency, or was even sharing information with law enforcement agencies that could be used in prosecutions, this would likely violate the constitutional division of legislative powers between the federal and provincial levels of government.<sup>97</sup>

Beyond constitutional issues, questions were also raised during the Commission as to the compatibility of these models and the UK model with established legal rights such as the presumption of innocence and the privilege against self-incrimination. It is unlikely, however, that either of these models would violate these rights (this is also explored in greater detail in the section below).

In any case, while carbon copies of the Western Australian and Irish models would not be compatible with the Canadian legal context, legislators could consider incorporating certain permissible characteristics of both these models into a British Columbian UWO. One characteristic that could potentially still be included is a reversed burden of proof onto a person to establish the legitimacy of certain property. Arguably, this characteristic alone would still substantially increase the likelihood of success of any introduced mechanism.

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94 It should be noted however that Part IV of Ontario’s *Civil Remedies Act* has a provision allowing the court to issue a damages award, which could be an argument for the viability of Western Australia’s approach.

95 T.A. Cromwell, Constitutionality of possible changes to the British Columbia Civil Forfeiture Act, 9 February 2021 (Appendix 1 to the Final Report of the Commission of Inquiry into Money Laundering in British Columbia), p.1769.

96 The Final Report of the Commission of Inquiry into Money Laundering in British Columbia, p.1595.

97 T.A. Cromwell, Constitutionality of possible changes to the British Columbia Civil Forfeiture Act, 9 February 2021 (Appendix 1 to the Final Report of the Commission of Inquiry into Money Laundering in British Columbia), p.1754.



## 9 Would either a UK-style UWO or a traditional unexplained wealth mechanism violate established legal rights in Canada?

While the laws in Western Australia and Ireland have achieved success, there is uncertainty over whether or not these laws, or even a UK-style UWO, could be introduced in British Columbia on the basis that they violate established legal rights in the Charter.

Specifically, concerns were raised throughout the Commission proceedings that these types of laws violate the presumption of innocence and the privilege against self-incrimination. These concerns were addressed in depth by Cromwell in his opinion, discussed below, which assessed whether an unexplained wealth mechanism would violate ss.7, 11 and 13 of the Charter (it should be noted though that Cromwell did not conduct a contextual s.1 analysis on the compatibility of these laws with the Charter, which would undoubtedly also be considered in any legal challenge).

### 9.1 The presumption of innocence and the unfair reversal of the burden of proof

As noted in the report, unexplained wealth laws are not without controversy and concerns have arisen regarding their impact on the presumption of innocence.<sup>98</sup> For example, the British Columbia Civil Liberties Association ('BCCLA') argued in its closing submissions that unexplained wealth laws would 'undermine the presumption of innocence' protected by s.11(s) of the Charter because they would 'reverse the onus of proof'.<sup>99</sup>

Each the UK, Western Australian, and Irish mechanism permit the reversal of the burden of proof at different points during their application. Under a UK-style UWO, if a person does not comply, or cannot purport to have complied with a UWO to provide information, then a burden may be placed onto the owner of the property in a separate civil recovery proceeding to prove that the property in question has come from lawful sources. In an application for a Western Australian unexplained wealth declaration, the burden of proof is reversed early in the proceedings, once the state has established the existence of any property, service, advantage or benefit that is a constituent of the respondent's wealth. In Ireland, once it 'appears' to the court – either through belief evidence or otherwise – that certain property is somehow connected to crime, a

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98 The Final Report of the Commission of Inquiry into Money Laundering in British Columbia, p.10.

99 The British Columbia Civil Liberties Association, Closing Submissions, the Commission of Inquiry into Money Laundering in British Columbia, at [35] and [38].

burden of proof is also reversed onto a person to show, to the satisfaction of the court, that this is not the case.

While reversed burdens of proof are not unique to unexplained wealth mechanisms, it is a characteristic that has generated a significant amount of debate. The policy argument for shifting the burden of proof in such mechanisms is straightforward: reversed burdens make it far more likely that unexplained wealth can be secured and confiscated.<sup>100</sup> The argument that such reversed burdens may infringe on the presumption of innocence principle however, and may 'remove the safeguards which have evolved at common law to protect innocent parties from the wrongful forfeiture of their property' should also be explored.<sup>101</sup>

### 9.1.1 Do civil procedure-based unexplained wealth laws violate the presumption of innocence?

In Canada, the presumption of innocence is protected by s.11 of the Charter which states that any person 'charged with an offence has the right... to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal'.<sup>102</sup>

As explained by the United Nations Human Rights Committee:

*The presumption of innocence, which is fundamental to the protection of human rights, imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt, ensures that the accused has the benefit of doubt, and requires that persons accused of a criminal act must be treated in accordance with this principle.*<sup>103</sup>

As alluded to by the Commissioner in the report however:

*While some have suggested that unexplained wealth orders give rise to concerns about the presumption of innocence and the right to silence, it is important to understand that the Civil Forfeiture Act does not impose any*

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100 N. Skead, Overview Report: Selected Writings of Dr. Natalie Skead (Exhibit 376 of the Commission of Inquiry into Money Laundering in British Columbia), p.57.

101 N. Skead, Overview Report: Selected Writings of Dr. Natalie Skead (Exhibit 376 of the Commission of Inquiry into Money Laundering in British Columbia), p.57, referencing Law Council of Australia, Submission No 6 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Inquiry into the Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009 [Provisions], August 2009, p.16.

102 The Canadian Charter of Rights and Freedoms, s.11(d).

103 The United Nations Human Rights Committee General Comment No. 32 (on the International Covenant on Civil and Political Rights, Article 14: Right to equality before courts and tribunals and to a fair trial) CCPR/C/GC/32, 23 August 2007.

*criminal penalties, and that any information provided in response to such an order cannot be used in a criminal prosecution.*<sup>104</sup>

The report echoes Cromwell’s legal opinion which argued that s.11 of the Charter – which includes the presumption of innocence protection – is unlikely to apply to a UWO mechanism in the *Civil Forfeiture Act*. Cromwell justifies this on the basis that a person who is targeted by a UWO, would not be ‘charged with an offence’, and therefore would not benefit from any of the protections outlined in s.11.<sup>105</sup>

Cromwell’s opinion also notes however, that according to the Canadian Supreme Court decision of *R v Wigglesworth*,<sup>106</sup> even if a person has not been ‘charged with an offence’ the s.11 protections may apply if either the proceedings are ‘criminal in nature’ or where the proceedings result in the imposition of ‘true penal consequences’ on the person subjected to those proceedings.<sup>107</sup>

As explained by Cromwell, the question of whether or not proceedings are criminal in nature does not depend on the ‘nature of the act which gave rise to the proceedings, but the nature of the proceedings themselves.’<sup>108</sup> Therefore, as a UWO proceeding would likely lack ‘the conventional characteristics of a criminal prosecution (such as summons or arrest, the laying of an information or trial in a court of criminal jurisdiction)’ it would instead ‘be considered administrative or regulatory and not criminal in nature’.<sup>109</sup>

Furthermore, the question of whether the proceedings impose ‘a true penal consequence’ will always hinge on the possibility of imprisonment being imposed on a person subjected to the proceedings, or whether a fine or penalty imposed would ‘redress “a wrong done to society at

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104 The Final Report of the Commission of Inquiry into Money Laundering in British Columbia, p.1617.

105 T.A. Cromwell, Constitutionality of possible changes to the British Columbia Civil Forfeiture Act, 9 February 2021 (Appendix 1 to the Final Report of the Commission of Inquiry into Money Laundering in British Columbia), at [93] – [95].

106 *R v Wigglesworth* [1987] 2 SCR 541.

107 T.A. Cromwell, Constitutionality of possible changes to the British Columbia Civil Forfeiture Act, 9 February 2021 (Appendix 1 to the Final Report of the Commission of Inquiry into Money Laundering in British Columbia), at [93].

108 T.A. Cromwell, Constitutionality of possible changes to the British Columbia Civil Forfeiture Act, 9 February 2021 (Appendix 1 to the Final Report of the Commission of Inquiry into Money Laundering in British Columbia), at [94] referencing *R v Shubley*, [1990] 1 SCR 3 at pp 18-19; *Martineau v Canada* (Minister of National Revenue), 2004 SCC 81.

109 T.A. Cromwell, Constitutionality of possible changes to the British Columbia Civil Forfeiture Act, 9 February 2021 (Appendix 1 to the Final Report of the Commission of Inquiry into Money Laundering in British Columbia), at [94] referencing *Martineau v Canada* (Minister of National Revenue), 2004 SCC 81 at para 45.

large, as opposed to the purpose of maintaining the effectiveness” of a discrete regulatory or disciplinary regime’.<sup>110</sup>

Cromwell concluded that:

*...a person who is the subject of civil forfeiture proceedings is not a “person charged with an offence” within the meaning of s.11 of the Charter and therefore does not benefit from any of the protections set out in that section. There is no “charge,” the proceedings are not “criminal in nature” and civil forfeiture is not a “true penal consequence.”<sup>111</sup>*

While it is impossible to predict any future reasoning of the judiciary, if Cromwell’s opinion is followed then a court is unlikely to hold that the reversed burden mechanism in a UK-style UWO violates a person’s presumption of innocence.

Arguably, for the exact same reasons above, mechanisms in Australia and Ireland would also not be considered criminal in nature, and would therefore be unlikely to violate s.11.

This viewpoint is reinforced by jurisprudence in Ireland with regards to the constitutionality of their *Proceeds of Crime Act* mechanism. The Irish mechanism has repeatedly faced challenges on the grounds that it is, in substance, a criminal mechanism masquerading as a civil one, without the protections normally offered by criminal procedures.<sup>112</sup> The Irish courts have rejected this argument in a number of cases. For example, in *Murphy v. GM PB PC Ltd*, the High Court confirmed the civil nature of the mechanism, reasoning that its proceedings do not contain the ‘indicia of crime’ in that no one is charged with a criminal offence, no offence is created, no sanctions are imposed, and there is no *mens rea*.<sup>113</sup> The court has also held that forfeiture under the *Proceeds of Crime Act* does not constitute a penalty or a punishment but is instead a measure imposed on the respondent with the aim of restoring or remedying a situation.<sup>114</sup>

It is also important to note that even if a Canadian UWO was hypothetically deemed to be a criminal mechanism – and assessed as such – it is also arguable that it would still not violate the presumption of innocence principle. With the exception of a controversial decision in

110 T.A. Cromwell, Constitutionality of possible changes to the British Columbia Civil Forfeiture Act, 9 February 2021 (Appendix 1 to the Final Report of the Commission of Inquiry into Money Laundering in British Columbia), at [96] referencing *R v Wigglesworth*, [1987] 2 SCR 541; *Martineau v Canada* (Minister of National Revenue), 2004 SCC 81 at para 60; *Guindon v Canada*, 2015 SCC 41; and *Goodwin v British Columbia* (Superintendent of Motor Vehicles), 2015 SCC 46.

111 T.A. Cromwell, Constitutionality of possible changes to the British Columbia Civil Forfeiture Act, 9 February 2021 (Appendix 1 to the Final Report of the Commission of Inquiry into Money Laundering in British Columbia), at [96] referencing *Ontario (Attorney General) v Chatterjee*, 2007 ONCA 406 at [39]-[44].

112 *Murphy v. GM PB PC Ltd*, [1999] IEHC 5 (HC) at [92].

113 *Murphy v. GM PB PC Ltd*, [1999] IEHC 5 (HC) and *Melling v. O’Mathghahn*, [1962] IR 1, as referenced in Booz Allen Hamilton, *Comparative Evaluation of Unexplained Wealth Orders*, 2012, p.142.

114 *Ibid.*

Ukraine, the vast majority of legal challenges against criminal illicit enrichment laws on this basis have failed in both common law and civil law jurisdictions.<sup>115</sup>

### 9.1.2 Are the reversed burdens in civil unexplained wealth laws unreasonable?

Even if a future Canadian UWO mechanism is unlikely to violate the presumption of innocence principle, another question that should be addressed is whether or not the reversed burdens in these mechanisms are reasonable in a civil context. In civil cases, the burden of proof generally lies on the plaintiff for all the essential elements of an action. Unexplained wealth laws however, shift a burden onto the defendant at a certain point in proceedings to establish the lawful source of their wealth. Understandably, questions have been raised as to whether or not this shift is reasonable.

A number of justifications were outlined, albeit briefly, in the Western Australian case of *Director of Public Prosecutions v Morris*.<sup>116</sup> In this case, the District Court of Western Australia upheld the reversed burden contained in the state's unexplained wealth mechanism on the basis that the burden only obligates a person to prove facts that could be considered within their specific knowledge, and that the evidence required for the person to discharge this burden should be easily obtainable.<sup>117</sup> In his reasoning, Wager DCJ referred to a previous case which had also upheld a reversed burden regarding a freezing order – *Director of Public Prosecutions for Western Australia v Gypsy Jokers Motorcycle Club Inc*,<sup>118</sup> in which Templeman J stated:

*In my view a person who becomes the owner of substantial property by legitimate means ought reasonably to be expected to be able to prove that fact, on the balance of probabilities, without any great difficulties. If the route by which property came into the ownership of an objector is lawful, it will usually be documented in some way.*<sup>119</sup>

These views have been echoed in a number of Australian parliamentary reviews regarding the federal mechanism, which have also justified the reversed burdens on the basis that '[d]etails of the source of a person's wealth will be peculiarly within his or her knowledge,'<sup>120</sup> and have

115 Dornbierer, A., 2021. *Illicit Enrichment: A Guide to Laws Targeting Unexplained Wealth*. Basel: Basel Institute on Governance, p.122. Available at: [illicitenrichment.baselgovernance.org](http://illicitenrichment.baselgovernance.org)

116 *Director of Public Prosecutions v Morris* [No2][2010] WADC 148.

117 *Ibid.*

118 *Director of Public Prosecutions for Western Australia v Gypsy Jokers Motorcycle Club Inc* (2005) WASC 61.

119 *Director of Public Prosecutions for Western Australia v Gypsy Jokers Motorcycle Club Inc* (2005) WASC 61 at [68], as referenced by *Director of Public Prosecutions v Morris* [No2][2010] WADC 148 at [19].

120 Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws*, ALRC Report 129, Tabled 2 March 2016 at [9.118] referencing the Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, 10th Report of 2009 (September 2009).

concluded that ‘with appropriate safeguards unexplained wealth laws represent a reasonable, and proportionate response to the threat of serious and organised crime in Australia’.<sup>121</sup>

Notably, the report itself offers a similar justification, with the Commissioner writing:

*Where the asset was purchased with legitimate funds, it should not, in most cases, be difficult for the property owner to furnish evidence of that fact. People who legitimately own valuable assets, such as houses and luxury vehicles, are “uniquely well placed” to establish the provenance of those assets and it is difficult to think of a situation where a person who owns a valuable asset would be unable to furnish evidence as to the source of that asset.*<sup>122</sup>

In further justifying the reversed burdens in unexplained wealth mechanisms, courts have also considered the ‘heavy resource obligation’ that would be placed on the state if it was expected to lead evidence to establish that a respondent’s assets were not lawfully acquired. For instance, in *Director of Public Prosecutions v Morris*, the court noted:

*I considered that the Criminal Confiscation Bill 2000 – explanatory notes in relation to s. 12(2) was of assistance because it noted:*

*Sub-clause (2) places an onus of proof onto the respondent to establish that his wealth was lawfully acquired. This is because it is easier for a person to establish that his wealth is lawfully acquired rather than for the state to establish the contrary. This provision is central to the advancement of the objectives of the Act. Failure to include such a provision would place heavy resource obligations on the state in seeking to establish that a person’s wealth was not lawfully acquired.*<sup>123</sup>

This reasoning was similarly echoed in parliamentary reviews of the Western Australian mechanism. For example, a 2019 review noted the ‘resource implications’ of requiring the state to prove such matters as the lawful acquisition of assets and recommended that the reversed burden mechanism in the law be retained.<sup>124</sup>

When assessing the reasonableness of reversed burdens in civil unexplained wealth laws, it is also important to note that presumptions of criminality and resulting reversed burdens of proof

121 Parliamentary Joint Committee on Law Enforcement, Parliament of Australia, *Inquiry into Commonwealth Unexplained Wealth Legislation and Arrangements* (March 2012) at [2.24].

122 The Final Report of the Commission of Inquiry into Money Laundering in British Columbia, p.1617.

123 *Director of Public Prosecutions v Morris* [No2] [2010] WADC 148 at [6].

124 Review of the Criminal Property Confiscation Act 2000 (WA) (Report of the Honorable Wayne Martin AC QC), May 2019, at [13.11], Recommendation 15, noting submissions by E. Greaves available at: <https://egreaves.com.au/cpca-report-submissions>.

are not characteristics unique to these types of laws. In fact, they exist in a wide range of civil laws, including those in Canada. For example, a number of reversed burden mechanisms already exist in British Columbia's *Civil Forfeiture Act*. Specifically, if CAD 10,000 or more in cash is found in proximity to a controlled substance, or even if it was found simply 'bundled or packaged in a manner not consistent with standard banking practices', then there is a presumption that the cash is proceeds of an unlawful activity unless evidence can be provided to the contrary.<sup>125</sup> Additionally, if a driver of a motor vehicle failed to stop when requested to by police or used the vehicle to flee from police, then there is a presumption that the vehicle is the proceeds of unlawful activity unless evidence can be provided to the contrary.<sup>126</sup> Furthermore, links to or even 'participation in' an unlawful activity (for which there was no charge or conviction) can lead to presumptions that certain assets were proceeds of crime in Saskatchewan's Seizure of *Criminal Property Act*,<sup>127</sup> New Brunswick's *Civil Forfeiture Act*,<sup>128</sup> and Nova Scotia's *Civil Forfeiture Act*.<sup>129</sup> And of course, a reversed burden already exists in Manitoba's UK-style UWO, covered above.

## 9.2 The privilege against self-incrimination

Concerns regarding a potential UWO's impact on the privilege against self-incrimination have also been raised. For example, in their closing submissions, the BCCLA states that '...UWOs undermine the *Charter* protection against self-incrimination by compelling an individual to provide evidence that could be used against them'.<sup>130</sup>

As Cromwell observes, the privilege against self-incrimination is protected in Canada by a number of sections in the Charter. It is protected by s.7, which ensures 'the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice' (and courts have held that the 'principles of fundamental justice' include a residual protection against self-incrimination).<sup>131</sup> It is further protected under s.11(c), which ensures that anyone charged with an offence has the right 'not to be compelled to be a witness in proceedings against that person in respect of the offence'. Finally it is also protected by s.13, which ensures that a 'witness who testifies in any proceedings has the right

125 Civil Forfeiture Act 2005 (British Columbia), s.19.03.

126 Ibid., s.19.05.

127 Seizure of Criminal Property Act (Saskatchewan), s.14.

128 Civil Forfeiture Act 2010 (New Brunswick), s.19.

129 Civil Forfeiture Act 2007 (Nova Scotia), s.20.

130 The British Columbia Civil Liberties Association, Closing Submissions, the Commission of Inquiry into Money Laundering in British Columbia, at [43].

131 See for example R. v. P. (M.B.), [1994] 1 S.C.R. 555 at 577; R. v. S. (R.J.), [1995] 1 S.C.R. 451 at 512; R. v. Jarvis, [2002] 3 S.C.R. 757 at [67]; as referenced by Government of Canada, *The Canadian Charter of Rights and Freedoms*, accessed 17 August 2022 at: <https://www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccd/check/art7.html>

not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence’.

Cromwell argues that a UWO mechanism compelling a person to provide information is unlikely to be struck down on the basis that it violates these provisions.<sup>132</sup> He notes however, that it is important that the UWO scheme be created in a way that ensures that its predominant purpose is not to obtain incriminating evidence that will determine penal liability.<sup>133</sup> Cromwell also specifies that the provisions in the UK UWO regarding self-incrimination do not entirely meet the Canadian Charter standards, noting that any similar provision in a Canadian UWO would need to not only prevent the use of the compelled information in subsequent criminal proceedings, but also any derivative use, that is the use of any ‘evidence discovered as a result of the compelled statement’.<sup>134</sup>

Unexplained wealth laws in other jurisdictions have not largely been tested in relation to self-incrimination. The issue was raised however, in the first proceeding regarding the UK UWO mechanism, *National Crime Agency v Zamira Hajiyeva*<sup>135</sup> and the subsequent Court of Appeal case of *Zamira Hajiyeva v National Crime Agency*.<sup>136</sup> In these cases, Mrs Hajiyeva was issued a UWO requiring her to provide information on the source of funds used to purchase real estate property in London. The NCA suspected that the property was the proceeds of corruption offences committed by Mrs Hajiyeva’s husband, the former chairman of the state-owned International Bank of Azerbaijan. Mrs Hajiyeva sought to discharge the order on a number of grounds, including that the order infringed on her privilege against self-incrimination. This was despite the fact that the UK UWO mechanism includes a provision outlining that a ‘statement made by a person in response to a requirement imposed by an unexplained wealth order may not be used in evidence against that person in criminal proceedings’.<sup>137</sup> Mrs Hajiyeva’s claims were dismissed in both cases on the basis that the court felt that parliament had intended the privilege

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132 T.A. Cromwell, Constitutionality of possible changes to the British Columbia Civil Forfeiture Act, 9 February 2021 (Appendix 1 to the Final Report of the Commission of Inquiry into Money Laundering in British Columbia), at [111].

133 Ibid., at [114].

134 Ibid., at [118].

135 *National Crime Agency v Mrs Zamira Hajiyeva* [2018] EWHC 2534 (Admin).

136 *Mrs Zamira Hajiyeva v National Crime Agency* [2020] EWCA Civ 108.

137 Proceeds of Crime Act 2002 (United Kingdom), s.362F.



be ‘abrogated’ in the context of the UWO procedure, and that there was not a ‘real and appreciable risk’ that the respondent would face prosecution in the UK.<sup>138</sup>

### 9.3 The right to be secure against unreasonable search and seizure

S.8 of the Charter outlines that everyone has the right to be secure against unreasonable search or seizure. In his opinion, Cromwell also addresses whether a UWO’s capacity to compel a person to produce documents would violate this right. He states that while this function of a UWO would be subjected to scrutiny under s.8, a determination of whether the acquisition of documents in this sense would be reasonable would not need to meet the same ‘exacting’ standards applicable to criminal investigations (such as the need for a search to be authorised in advance by a judicial officer, or based on reasonable and probable grounds to believe that relevant evidence will be found).<sup>139</sup> As an example, he highlights that ‘statutory regulatory powers compelling production of business, tax and similar records’ are not subjected to these requirements, and states that:

*...if the Civil Forfeiture Office obtains documents or records from defendants or third parties, using its own statutory powers and for the purposes of implementing the civil forfeiture scheme, the compelled production will meet the s.8 standard of reasonableness.*<sup>140</sup>

Cromwell also notes one exception, however, and outlines that:

*...issues may arise in a forfeiture proceeding if the [Civil Forfeiture Office] relies on documents received from the police, which they obtained in the course of a criminal investigation. In that case, challenges to the propriety of the [Civil Forfeiture Office’s] use of those documents has focused on whether*

138 Mrs Zamira Hajiyeva v National Crime Agency [2020] EWCA Civ 108 at [51]; National Crime Agency v Mrs Zamira Hajiyeva [2018] EWHC 2534 (Admin) at [110] - [112], and [115]; Mrs Zamira Hajiyeva v National Crime Agency [2020] EWCA Civ 108 at [50]; National Crime Agency v Mrs Zamira Hajiyeva [2018] EWHC 2534 (Admin) at [115]; Both courts also noted that the Mrs Hajiyeva had not actually identified the elements of the requested information that would give rise to the risk (see for instance Mrs Zamira Hajiyeva v National Crime Agency [2020] EWCA Civ 108 at [50]: ‘Although the appellant had asserted both privileges in her witness statement, she did not identify what elements of the requested information would give rise to the alleged risk. In short, she had not said which answers to which questions might incriminate her. Mere assertion of the privilege against self-incrimination was not sufficient (see JSC BTA Bank v Ablyasov [2009] EWCA Civ 1125, per Sedley LJ at [39]). Although she said that she had been advised that her responses to the questions posed in Schedule 3 to the UWO and the requirement to produce documents in Schedule 4 to the UWO could be used to incriminate her and/or her husband in criminal proceedings in the United Kingdom, or in Azerbaijan, the court had to be satisfied of the risk of prosecution (see R (CPS) v Bolton Magistrates’ Court [2004] 1 WLR 835), which the judge was not.’).

139 T.A. Cromwell, Constitutionality of possible changes to the British Columbia Civil Forfeiture Act, 9 February 2021 (Appendix 1 to the Final Report of the Commission of Inquiry into Money Laundering in British Columbia), p.1782 citing Thomson Newspapers Ltd. v Canada (Director of Investigation and Research, Restrictive Trade Practices Commission), [1990] 1 SCR 425.

140 T.A. Cromwell, Constitutionality of possible changes to the British Columbia Civil Forfeiture Act, 9 February 2021 (Appendix 1 to the Final Report of the Commission of Inquiry into Money Laundering in British Columbia), p.1783-1784.

*law enforcement complied with the usual s.8 requirements that apply in the course of criminal investigations when they obtained the documents.*<sup>141</sup>

Similarly, Cromwell also addresses whether an interim freezing order or an interim preservation order attached to a UWO proceeding would amount to unreasonable 'seizure' under s.8. While he notes that powers of this kind would also be subjected to scrutiny under s.8 of the Charter, he states that neither are likely to infringe on this right.<sup>142</sup>

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141 Ibid., p.1784.

142 Ibid., pp.1785-1787.

## 10 Safeguards that could be adopted to prevent the infringement of legal rights

While unexplained wealth laws are unlikely to infringe on legal rights such as the presumption of innocence or the privilege against self-incrimination, different safeguards can be incorporated into these laws to reduce the risk of abuse and alleviate concerns.

A common legislative safeguard in laws of this kind is a provision that empowers a court to refuse to make an order relating to unexplained wealth if it would go against the ‘public interest’.<sup>143</sup> While the ‘public interest’ is generally a flexible concept in common law, the inclusion of a provision along these lines should theoretically allow a court to prevent the application of an unexplained wealth mechanism in circumstances where it would amount to a gross violation of justice.<sup>144</sup> Similar safeguards already exist in Canadian civil forfeiture legislation, including the *Civil Forfeiture Act*, in which a court is empowered to refuse to make an order when it ‘is clearly not in the interests of justice’.<sup>145</sup> The Canadian version of the safeguard has been extensively litigated in British Columbia and Ontario and thus comes with an established body of jurisprudence.<sup>146</sup> Therefore it could easily be applied to any UWO incorporated in this law.

In a similar vein, concerns have arisen over the onerous burden that may arise in specific situations where it may be legitimately difficult for a respondent to establish the lawful sources of certain property.<sup>147</sup> To avoid unfairly burdening a respondent in such situations, a provision can be included in a mechanism to cover situations ‘where it is not reasonably possible for the person to establish that a component of his or her wealth was lawfully acquired (due to the effluxion of time, the circumstances in which the component was acquired or any other reason)’.<sup>148</sup> This will empower a court to exclude certain components of a person’s property from unexplained wealth proceedings when it would be too difficult for them to prove how they legitimately acquired that property.

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143 For example, the unexplained wealth mechanisms in the Criminal Assets Recovery Act 1990 (Australia – New South Wales), Criminal Proceeds Confiscation Act 2002 (Australia – Queensland), and the Proceeds of Crime Act (Australia) all have a provision of this kind.

144 Dornbierer, A., 2021. *Illicit Enrichment: A Guide to Laws Targeting Unexplained Wealth*. Basel: Basel Institute on Governance, p.70. Available at: [illicitenrichment.baselgovernance.org](http://illicitenrichment.baselgovernance.org)

145 Civil Forfeiture Act 2005 (British Columbia), s.6.

146 Simser, J., Civil Asset Forfeiture in Canada, s.4:50.

147 N. Skead, Overview Report: Selected Writings of Dr. Natalie Skead (Exhibit 376 of the Commission of Inquiry into Money Laundering in British Columbia), p.58.

148 Serious and Organised Crime (Unexplained Wealth) Act 2009 (Australia - South Australia), s.9(11).

Furthermore, to alleviate concerns that reversed burdens may lead to an unfair financial cost being placed on a defendant to establish the lawfulness of assets,<sup>149</sup> laws can include provisions that allow respondents to access restrained funds to pay for legal services to defend an action. For example, Ireland's mechanism includes a provision along these lines.<sup>150</sup> It is worth noting however, that this would be a significant departure from the approach currently used in the *Civil Forfeiture Act*, where costs follow the event.<sup>151</sup>

Monetary thresholds can also be included to ensure that mechanisms are only used in cases where a significant amount of assets are unexplainable. For instance, the UK mechanism specifies that property targeted by a UWO must be of a value greater than GBP 50,000.<sup>152</sup> The Commission recommends a monetary threshold along these lines for a potential British Columbian UWO (suggesting CAD 75,000) to 'ensure that the provision is only used to target higher value assets'.<sup>153</sup> The threshold relating to Manitoba's mechanism is CAD 100,000.<sup>154</sup>

As mentioned previously, to safeguard against infringing on the privilege of self-incrimination, unexplained wealth mechanisms can include provisions that specify that any information obtained through proceedings relating to the mechanism cannot be used in separate criminal proceedings. Provisions of this kind exists in the mechanism in the Bahamas, as well as the United Kingdom.<sup>155</sup> As noted by Cromwell, it is likely that such a mechanism in Canada would also need to extend to evidence discovered as a result of information provided during proceedings to avoid potential infringements on *Charter* provisions.

Another important safeguard that can prevent an unexplained wealth mechanism being abused is to define and conduct regular parliamentary reviews of the law and its application. The Federal Australian *Proceeds of Crime Act* includes a section on 'oversight' that empowers a parliamentary body – the Parliamentary Joint Committee on Law Enforcement – to gather information from law enforcement agencies regarding their application of the unexplained wealth mechanism.<sup>156</sup> Through this section, the committee is empowered to launch formal inquiries into the use of the mechanism, receive submissions from government bodies and special interest

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149 N. Skead, Overview Report: Selected Writings of Dr. Natalie Skead (Exhibit 376 of the Commission of Inquiry into Money Laundering in British Columbia), p.58; The British Columbia Civil Liberties Association, Closing Submissions, the Commission of Inquiry into Money Laundering in British Columbia, at [27].

150 Proceeds of Crime Act 1996 (Ireland), s.6.

151 While the Act appears to be silent on legal expenses, s.8(8) likely prohibits a court from granting access at the interim preservation order stage.

152 Proceeds of Crime Act (United Kingdom), s.362B.

153 The Final Report of the Commission of Inquiry into Money Laundering in British Columbia, p.1620.

154 The Criminal Property Forfeiture Act 2004 (Manitoba) s.2.3 (6)(a)(ii).

155 Proceeds of Crime Act (United Kingdom), s.362F; The Proceeds of Crime Act 2018 (Bahamas), s.75(3).

156 Proceeds of Crime Act 2002 (Australia), s.179U.

groups, and make recommendations for amendments to the mechanism itself.<sup>157</sup> The effectiveness of this safeguard can also be reinforced through established reporting procedures for an agency tasked with applying the UWO mechanism.<sup>158</sup>

Safeguards can also be incorporated into the decision-making structures of the public agencies responsible for applying an unexplained wealth mechanism to prevent these agencies from acting unreasonably. For instance, the legal arm of Ireland’s CAB is made up of ‘co-located’ but ‘independent’ staff of the Chief State Solicitors Office.<sup>159</sup> These staff provide direct legal support to the agency’s cases, but are separate from the CAB hierarchical structure and cannot be dismissed by the Chief Bureau Officer.<sup>160</sup> This provides them with ‘an element of independence’ in performing their function, an ability to effectively ‘veto’ the progress of certain files, and to prevent the CAB from acting *ultra vires*.<sup>161</sup>

The unexplained wealth mechanism in Mauritius is also applied by a single agency, the Integrity Reporting Services Agency.<sup>162</sup> To safeguard against the unreasonable application of the mechanism, the director of this agency is legislatively required to present each case to an independent board for review and approval. The board consists of a chairperson, who must be a retired judge, and two other members who are both appointed by the President of Mauritius on the advice of the Prime Minister.<sup>163</sup>

Finally, to reduce the risk that an agency will unreasonably apply an unexplained wealth mechanism for the sake of covering their own operating budget, the funding of any agency responsible for applying such mechanisms should not be dependent on the value of assets being confiscated. For example, both Ireland’s CAB and Manitoba’s Criminal Property Forfeiture Unit are not self-funded.<sup>164</sup> The Commission recommends this safeguard, noting that the British Columbian Civil Forfeiture Office should transition away from a self-funding model.<sup>165</sup>

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157 See for example the Parliamentary Joint Committee on Law Enforcement, Inquiry into Commonwealth Unexplained Wealth Legislation and Arrangements, 19 March 2012.

158 These obligations already exist for several civil forfeiture agencies in Canada. For instance, the Director in British Columbia is required to produce an annual report, and the agencies in Ontario and Manitoba are statutorily required to produce reports as well: the Criminal Property Forfeiture Act 2004 (Manitoba) s.19.10 and the *Civil Remedies Act* 2001 (Ontario) s.20.1.

159 Proceedings at Hearing of December 16, 2021 (Transcript of Interview of Kevin McMeel, Criminal Assets Bureau (Ireland)), p.26.

160 Ibid., p.28.

161 Ibid., pp.26-28.

162 The Good Governance and Integrity Reporting Act 2015 (Mauritius).

163 Ibid., ss.5, 7 and 8.

164 The British Columbia Civil Liberties Association, Closing Submissions, the Commission of Inquiry into Money Laundering in British Columbia, at [30]; The Final Report of the Commission of Inquiry into Money Laundering in British Columbia, p.1600.

165 The Final Report of the Commission of Inquiry into Money Laundering in British Columbia, p.1614-1615.

## 11 Conclusion

The amount of illicit funds laundered in British Columbia each year is estimated to be in the billions of dollars.<sup>166</sup> As stated in the Commission's report however 'the value of assets seized through the asset forfeiture system in British Columbia is shockingly low' and 'the failure to vigorously pursue these assets' is 'a missed opportunity to disrupt and deter the activities of organized crime groups and others involved in serious criminality.'<sup>167</sup> There is no doubt that there needs to be a significant response at a governmental level to both reduce the amount of illicit funds flowing into British Columbia, and to more effectively seize those that do.

The Commission recommends a number of actions to tackle this issue, including the introduction of a UK-style UWO in British Columbia. Whether or not such a mechanism would result in the identification and recovery of substantial amounts of illicit funds is far from certain – particularly as the UK's mechanism has not achieved a significant amount of success to date. A UK-style UWO would also need to be adapted to fit British Columbia's existing constitutional context, and particularly the strict delineation between federal law enforcement agencies investigating criminal actions and provincial agencies seeking civil forfeiture. It is arguable that these adaptations would reduce the reach of a British Columbian mechanism in comparison to the UK model.

Despite this, the likelihood of success of a UK-style UWO in British Columbia could be increased in a number of ways, including through addressing some of the limitations identified in the original UK mechanism. For example, the ability of a respondent to avoid a presumption by merely 'purporting' that they have complied with an order should not be included. The limitations above relating to the division of powers and information sharing could also be somewhat negated through the implementation of other recommendations in the report designed to counter money laundering and identify potential proceeds of crime – such as the appointment of an anti-money laundering commissioner.

Beyond the introduction of a UK-style UWO, legislators should also consider whether there are other mechanisms targeting unexplained wealth that are likely to be more effective. Two models have arguably had more success than the UK UWO – the Irish model, and to a lesser extent, the Western Australian model. Both of these models differ from a UK-style UWO on a number of points. Importantly, they do not place an obligation on a person simply to provide (potentially unverifiable) information. Instead they place a direct burden on the person to establish the lawful sources of their wealth. Furthermore, both the Irish and Western Australian models can be

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166 Ibid., p.2.

167 Ibid., p.1566.

implemented through multi-functional civil, administrative and criminal justice agencies with intelligence, analytical, investigational and legal capacities, and with the authority to receive information from both law enforcement and non-law enforcement sources, and initiate their own actions.

Unlike with a UK-style UWO however, which could be largely introduced and implemented in a way that is constitutionally compliant, introducing carbon copies of either the Western Australian or Irish models would raise major constitutional issues. For example, issues would arise from the fact that the Western Australian model is not *in rem*, and proceedings under the model can be detached from specific property. This would be contrary to the current *in rem* approach of the *Civil Forfeiture Act*, and could violate constitutional requirements surrounding the division of powers at federal and provincial level. Additionally, the multidisciplinary agencies and information sharing structures through which these models are implemented would also not be constitutionally permissible in Canada.

Despite this however, there are elements of both the Irish and Western Australian models that could be considered for a British Columbian UWO. Crucially, the inclusion of a reversed burden mechanism requiring proof that a specific property was legitimately acquired is unlikely to violate Charter rights regarding the presumption of innocence.

Assuming that an unexplained wealth mechanism of some kind can be introduced into the Canadian context, policy makers should also consider a number of further issues that could influence the potential success of such a mechanism. Most importantly, if a UWO is introduced, the government must make sure that the agency responsible for applying it has the adequate resources and capabilities to do so. The Commission's recommendations are clear on this point. An often touted reason for the lack of success of the UK UWO is the inadequate resourcing provided to agencies to apply the law. Furthermore, a strong reason for the lack of initial success with the Western Australian mechanism was the fact that it was not being applied by an agency with all the inhouse capabilities required to do so. A law is only going to be effective as the agency responsible for applying it. Therefore, it is critical that any agency tasked with pursuing unexplained wealth in British Columbia, or anywhere in Canada, is given the proper tools and resources to perform this function.

Additionally, due to the fact that money can be laundered with ease across both provincial and international borders, policy makers should couple any British Columbian initiatives to counter money laundering with wider-reaching initiatives, particularly those recommended by the Commission. Considering the current patchwork approach to civil forfeiture, provinces and territories should enhance inter-provincial dialogue to explore more consistent and coordinated approaches to civil forfeiture generally and on UWOs specifically. Federal-level initiatives should also be explored, including the feasibility of introducing illicit enrichment provisions in the criminal law (to bring the country in line with recommendations in both the United Nations Convention Against Corruption and the Inter-American Convention Against Corruption) or to include

UWO provisions into existing legislation such as the *Special Economic Measures Act* or the *Magnitsky Act*.<sup>168</sup>

As stated by the Commission, ‘there can be few things more destructive to a community’s sense of well-being than a governing regime that fails to resist those whose opportunities are unfairly gained at the expense of others’. It is therefore essential that government take decisive action to counter this, including through the introduction of new, and stronger mechanisms to target proceeds of crime.<sup>169</sup>

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168 Special Economic Measures Act, SC 1992 and Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law), SC 2017.

169 The Final Report of the Commission of Inquiry into Money Laundering in British Columbia, p.2.