

Ministry of Finance**BRIEFING DOCUMENT**

To: Lori Wanamaker
Deputy Minister of Finance **Date Requested:** November 22, 2019
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Cliff #: 386868

TITLE: Unexplained Wealth Orders

PURPOSE:

(X) FOR DIRECTION

Executive Director approval: _____

ADM approval: _____

DATE PREPARED: November 22, 2019

TITLE: Unexplained Wealth Orders

ISSUE: This note seeks direction on whether to proceed with developing an unexplained wealth order regime for BC.

BACKGROUND:

One of the recommendations of the Expert Panel on Money Laundering in BC Real Estate is for the province to consider unexplained wealth order legislation in British Columbia. The Peter German report, Dirty Money – Part 2, also noted that unexplained wealth order legislation is a recommendation of the Financial Action Task Force.

An unexplained wealth order requires a person to explain what interest they have in whatever property is named in the order, how they obtained the property, and how it is held. Without acceptable proof that the property was lawfully acquired (e.g. the respondent provides proof of sufficient legal income) the property may be confiscated.

Existing Forfeiture Laws in BC

The *Civil Forfeiture Act* allows for the seizure of assets. It targets the proceeds and instruments of unlawful activity and was created to ensure that people cannot profit from unlawful activity or use property in a way that may harm other persons. Recent amendments to the *Securities Act* allow the seizure of property to collect fines imposed under that statute. (Note that these amendments allow for the seizure of property from third persons who received the property from a person who owes fines imposed under the statute, despite the third person having done nothing wrong.) Like assets seized under the *Civil Forfeiture Act*, the intent is to target the property rather than persons.

How Unexplained Wealth Orders Work

An unexplained wealth order is laid against an asset. It puts the burden of proof on the respondent to show the asset was lawfully acquired. Unexplained wealth orders have been used successfully in Ireland since 1996, Australia has had limited success with the measure and very recently England has employed unexplained wealth orders as a tool in its efforts to combat money laundering.

of the unexplained wealth order where the court is satisfied there is a risk that any subsequent recovery order would be frustrated unless the property were preserved.

A reasonable level of evidence is required before applying to the High Court for an unexplained wealth order, and the approval of a High Court Judge is required before an order can be served. This element of the process provides an opportunity to rebut the measure if there are concerns. It is important to note that unexplained wealth orders do not target an individual's liberty; they target assets, and assets are unfrozen if the required proof of income is produced.

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.

Legal Issues

Solicitor Client Privilege

Administration

Countries with unexplained wealth orders charge their tax authorities with the administration of these orders. This is because in addition to the forfeiture of assets, there is often an indication that tax evasion has occurred.

Public Interest Immunity

The following description of unexplained wealth orders is based on the United Kingdom's (UK's) legislation.

Applications for such orders can be made without notice to the High Court by enforcement authorities including the Serious Fraud Office, Her Majesty's Revenue and Customs, and the National Crime Agency. The respondent to the order could be a person, a trust or any entity that can own an asset. If the person can't prove the assets are from a legitimate source, the authorities can take steps to recover those assets.

Applicants must:

1. Specify or describe the property in respect of which the order is sought;
2. Specify the person who they believe holds the property; and
3. Provide any further information that may be demanded by the order.

Before deciding whether to issue an unexplained wealth order, the court needs to be satisfied about the following:

1. That there is reasonable cause to believe the respondent holds the property;
2. That the value of the property is greater than £50,000;
3. That there are reasonable grounds for suspecting that the known sources of the respondent's lawfully obtained income would have been insufficient to enable the respondent to obtain the property; and,
4. That the respondent is:
 - a) an individual who is, or has been, entrusted with prominent public functions by an international organization or by a State other than the United Kingdom or another EEA [European Economic Area] State¹ and includes family members, known close associates or persons otherwise connected with such an individual;
OR
 - b) there are reasonable grounds for suspecting that the respondent or a person connected with the respondent is or has been involved in serious crime (whether in the UK or elsewhere).

Enforcement authorities applying for unexplained wealth orders can apply simultaneously for an interim freezing order to preserve the property that is the subject

¹ Presumably the exclusion of PEPs from the UK or another EEA State is because there are laws to address those situations.

Effectiveness

Ireland introduced unexplained wealth order legislation in 1996 when there was enormous public outrage to criminal activity in the country (a journalist and a Garde were murdered by criminals). The legislation is administered by a specialized group called the Criminal Assets Bureau consisting of police (Garde), tax authorities and social service authorities. The Irish regime is the most comprehensive approach to civil-based confiscation and proceedings are usually successful with over 300 orders issued in 2018. Various articles on the Irish experience suggests that Criminal Assets Bureau is very successful in following through with orders, seizing property, assessing related income tax, VAT and other taxes due to evasion, and collecting improperly claimed social assistance.

Research has further suggested that the Irish regime has had a significant impact on reducing, disrupting and dismantling criminal activities in Ireland, proving a major setback for the Irish criminal fraternity. In addition, there is some evidence that criminals have moved their illicit monies to other jurisdiction, such as Holland and Spain, in fear of Irish seizure.

While unexplained wealth orders have operated in Australia since the early 2000's, no comprehensive review measuring their effectiveness has taken place. However, the limited evidence available suggests that the effectiveness and use has been mercurial at best. It would appear that there has been extensive public criticism of the unexplained wealth order regime, judicial push-back to the use of unexplained wealth orders, inter-agency disputes over jurisdiction and in some cases the application of alternative confiscation laws, which obviate the need for an unexplained wealth order.

The UK introduced unexplained wealth orders in 2018 and appears to be very cautious in using the mechanism by choosing clear cut cases that would withstand challenges. As of July 2019, only four unexplained wealth orders have been issued.

Unexplained wealth orders could potentially be very effective in reducing money laundering in BC because they would raise fear amongst money launderers that their assets could be confiscated. Money launderers would choose other jurisdictions for their criminal activities that do not have unexplained wealth order legislation.

NEXT STEPS:

This note seeks direction on whether to proceed with developing an unexplained wealth order regime in BC.

Solicitor Client Privilege

Solicitor Client Privilege

A Legislative Proposal for unexplained wealth order legislation has been included on the ministry's list for legislation for 2021/22. With the UK legislation as a model, drafting should not be too complex. During this process consideration will be given to consulting with agencies or the public if it is determined to be necessary.

It is becoming increasingly easy for the media and organizations like Transparency International to identify properties in BC that are owned by individuals involved in money laundering including situations that cannot be addressed through the Civil Forfeiture Office. Unexplained wealth order legislation would show that the government is taking steps to implement new tools to address money laundering.

RECOMMENDATION:

Proceed with development of an unexplained wealth order regime for BC.

Solicitor Client Privilege

Attachment

APPROVED / NOT APPROVED



Lori Wanamaker
Deputy Minister



Date

Appendix

UK Unexplained Wealth Order Case Example

Sources: Mondaq – a UK based repository of articles on legal, compliance and commercial issues and Euronews

In February 2018 Zamira Hajiyeva, the wife of a jailed Azeri banker, became the recipient of the U.K.'s first unexplained wealth order. Mrs. Hajiyeva spent almost 16 million pounds across Europe, including at Harrods and luxury boutiques, on 10 credit cards issued by her husband's bank.

Mrs. Hajiyeva's husband, Jahangir Hajiyev, the former head of International Bank of Azerbaijan, is serving a 15-year prison sentence for abuse of his office. His annual earnings as a state employee never went beyond \$70,000. Meanwhile his wife, who had no income of her own, owned a pair of properties in the upmarket Knightsbridge area.

Mrs. Hajiyeva has been attempting to sell jewelry, including at the Christie's auction house, to fund her lifestyle. Under the new legislation, she was ordered to explain how the couple could afford the properties. The unexplained wealth order puts the onus on asset-holders to prove that their wealth is legitimate.

Court Battles

Mrs. Hajiyeva has been in and out of London courts for the better part of 2018 and 2019 both in challenging the unexplained wealth order and dealing with new orders to explain the purchases of a golf course and numerous luxury items.

Mrs. Hajiyeva applied to the High Court to discharge the unexplained wealth order on a number of grounds. The Court's decision has been appealed by Mrs. Hajiyeva and the appeal will be heard late in 2019.

The High Court's Decision (not the Supreme Court of the UK)

The High Court rejected all of the grounds for challenge and upheld the unexplained wealth order. In doing so, the court made the following findings:

Meaning of "PEP": The definition of PEP in the EU Fourth Money Laundering Directive includes a member of the administrative and/or management body of a

State-owned enterprise ("SOE"), or a family member of such a person. The question of whether an enterprise is an SOE must be determined by applying UK law. Both "PEP" and "SOE" were to be defined widely. At all material times, the Government of Azerbaijan was the majority owner, and had ultimate control, of the Bank. The court therefore held that the NCA had established that the Bank was an SOE, and that the respondent and her husband were PEPs.

The "income requirement test": The NCA had not been unreasonable in relying on the fact of Mr. Hajiye's conviction for fraud and embezzlement offences, notwithstanding the concerns raised regarding the fairness of his trial. The threshold for excluding reliance on a foreign conviction on human rights grounds was a high one, especially at this investigatory stage. The court also considered that there was some independent corroborative evidence in support of the conviction, including spending of £16 million on Harrods loyalty cards issued to Mrs. Hajiye between 2006 and 2016. Further, the court considered that, as a state employee between 1993 and 2015, Mr. Hajiye was very unlikely to have generated sufficient lawful income to fund the acquisition of the property.

Human rights: The court rejected grounds for dismissal of the unexplained wealth order based on Article 1, Protocol 1 of the European Convention on Human Rights ("ECHR") (the right to "peaceful enjoyment" of possessions). The unexplained wealth order was, at most, a modest interference with the respondent's right to "peaceful enjoyment" of her property, and any such interference was proportionate given that there were grounds to believe that the property had been obtained through unlawful conduct.

Privilege: The court did not accept that the unexplained wealth order offended the privilege against self-incrimination and spousal privilege. First, there was no statutory right to invoke either privilege in respect of an alleged risk of prosecution for criminal offences outside the UK. Second, the court considered that either Proceeds of Crime Act 2002 had abrogated the privileges by necessary implication, or they were excluded by the Fraud Act 2006 on the facts of this case. Third, the court did not consider that disclosure of information concerning the property under the unexplained wealth order would give rise to a real or appreciable risk of prosecution for the respondent or her husband, in the UK or in Azerbaijan. There were, in any event, already sufficient safeguards concerning the use of any information provided by them to the NCA.

Exercise of the court's discretion: The High Court held that, in all the circumstances, it was appropriate for the unexplained wealth order to be made.

The statutory criteria had been met, any interference with Mrs. Hajiyeva's rights under the ECHR was proportionate and the terms of the order were justified.

Implications of the Decision

This decision has been viewed as a test case for unexplained wealth orders and the outcome may encourage further applications. The decision also confirms the broad definition of both "PEP" and "SOE" under the relevant legislation, which may catch individuals who do not necessarily regard themselves as employees of the State. Ultimately, an unexplained wealth order is an investigatory tool which only gives rise to disclosure obligations. The court noted there was a "strong public interest" in ensuring that orders were not disobeyed and in filling what would otherwise be an "enforcement gap" in respect of unexplained wealth orders giving the regime more teeth.