

LECTURE 3

INVESTIGATIVE TECHNIQUES

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In this session, we are going to talk about some of the investigative tools and techniques that you will want to use in locating forfeitable assets and establishing their connection to crime

- Many of these tools – which are set forth in the Proceeds and Instruments of Crime Act – are the same tools that an investigator would use to investigate the crime itself
- As most of you are seasoned investigators, you will already be familiar with most of these techniques
- The point is, the investigator should use these tools not only to investigate the crime, but to investigate the *financial aspects* of the crime
- To develop the facts and the evidence that will be needed to obtain a confiscation order
- And to use them to do that right from the beginning of the investigation, not only at the end when it occurs to someone that maybe the prosecutor might want to ask for a confiscation order

Because you will already be familiar with investigative techniques, I want to make this session less of a lecture and more of a discussion

- So as we discuss each point, I want to call upon you to give examples of how you have used these tools in your investigations
- And to share your experience with your colleagues

As we begin, let me emphasize what I said earlier:

- if you wait until the end of the case to start looking for assets and how to prove that they are subject to confiscation, you may be too late
- you will not only miss the chance to use the financial evidence to help you prove the crime,
- but you will also miss the opportunity to discover the money laundering that was part of the crime
- and find that the assets that should be confiscated have disappeared.

So, what are the obvious steps for the investigator to take:

Production of Documents

The first step in any financial investigation is usually to find out what property the person owns and how he acquired it

- and generally that means asking third parties to produce records

These maybe be public records:

- motor vehicle records may tell you who the owner is of a vehicle, when it was acquired, and whether it was bought for cash or a loan from a lender with a secured interest
- land records may tell you if the person owns real / immovable property and if there is a mortgage on it
- records of divorces, probate and other life events may record the division or distribution of property

Other records will be in the possession of private parties

- in requesting records from a private parties, you must weigh the risks that your investigation will be disclosed to the defendant against the importance of the records
- generally, you may want to keep the investigation covert as long as possible, and so you may want to postpone requesting records from third parties who are likely to disclose the request to the person under investigation

Bank records

In financial investigations, the most important records are usually bank records

- the first step is to find out where the person (or his business, his family members, or his associates) maintains a bank account

Section 59 allows an investigator, including a Customs officer, to issue an “information notice” to a financial institution requiring it ...

- if you have a name, whether that person has an account, and if so, the account number and the current balance
- or, if all you have is an account number, the name of the account holder and the balance in that account

The virtue of an information notice under Section 59 is that it allows you, very quickly, to find out if a person has an account somewhere

- or if you have obtained an account number from somewhere else (e.g. email records, or records from another bank account) to find out whose account it is

An information notice does not require a court order

- it can be issued by the investigator
- and as provided in § 65, it may not be disclosed to the account holder
- thus allowing you to conduct this preliminary investigation covertly

Once you know that a person has an account at a financial institution, you may ask the prosecutor to request a magistrate’s court to issue a production order for the records of the account under § 51

- to obtain such an order, you must have reasonable grounds to believe that the information is relevant to a criminal offense
- or that it may assist in tracking or identifying the proceeds of an offense, assessing the value of those proceeds, or tracking, identifying or assessing the value of property the person may own

- in other words, the law specifically allows the use of production orders to gather information needed to pursue the forfeiture of assets
- and their use is not limited to criminal investigations but may be used in civil forfeiture cases as well.
- For example, you may request bank records of a business owned by a foreign national who you suspect has invested the proceeds of a foreign crime in a business in Botswana

Other records

Bank records are critical records in any investigation regarding the possible forfeiture of property, but they are not the only important records

- Assuming it is permitted by your law, you will also want to request the production of email and text records held by telecommunications providers
- Credit card transaction records held by credit card payment processors
- AML/KYC records held by cryptocurrency trading platforms
- Credit reports held by credit reporting agencies
- Records of loan applications (which often require the borrower to list his assets)
- Bankruptcy filings

Witness interviews

Once you have collected the records from both public and private sources regarding the person's assets, you will be ready to start interviewing witnesses.

- I don't know if there is a provision in the law that allows the prosecutor to compel a person to submit to a deposition under oath
- If so, that can be a critical investigative tool
- But in all events, you'll want to interview anyone who may be in a position to know what assets the defendant has, and how he obtained them
- You'll want ask where the defendant has investments and who manages them for him

- and equally important, how does the defendant use those assets and who else knows where they came from

The interviews that are part of a financial investigation are important not only for locating assets and how they were acquired, but also for dealing with claims by third parties

When the prosecutor asks the court to make a confiscation order, all manner of third parties may show up and exercise their right to object

- the defendant's wife will say, "I had no idea the money we used to buy the house came from a fraud scheme," or "I had no idea my husband was using my car to smuggle drugs"
- or his grandmother will appear and say, "that car belonged to me, not the defendant; see, it is titled in my name"
- the investigators and prosecutors should anticipate all of this by asking witnesses, in the course of the investigation,
- what was the wife's role? Was she ever present when the use of the car was discussed?
- Who had custody of the vehicle that the grandmother says was hers? Has she ever seen it? Did she ever drive it? Where was the car kept and who paid for the maintenance?
- All of which would help to show that she is merely a nominee and not the true owner who exercised dominion and control over the vehicle.

Without doubt, the witnesses who turn out to be the best sources of this kind of information are the defendant's ex-wife, or ex-girlfriend

Monitoring Orders

So far, in discussing the review of financial records, I've been talking about historical records

- That is, records of transactions that occurred in the past
- The purchases of vehicles, the sale of real property, the exchange of cryptocurrencies

- But often we would like to know in real time what transactions a defendant is conducting right now

Section 54 permits the magistrate's court or the High Court to issue a monitoring order to a financial institution

- Requiring it to reveal the details of all transactions concerning a given person or account within a specified period of time.
- Such an order can be very useful in helping you determine when to issue a seizure warrant for a given account, *e.g.*, by timing it to when a major deposit is made
- Importantly, under § 56, monitoring orders, like information notices, may not be disclosed by the financial institution to the account holder

Searches and Seizures

Section 67 authorizes searches for, and seizures of, property subject to confiscation in the same manner as the investigator would search for and seize evidence of the crime

- The things to be searched would include not only the person's residence or place of business (where he may maintain financial records)
- But critically his computer and mobile phone, which will contain all manner of information (including photographs, texts, travel records, etc.) linking the person both to criminal activity and to his assets

Surveillance

The last investigative tool or technique that I will mention is surveillance

- Many confiscation cases are based on evidence that an investigator observed someone using a particular vehicle to distribute drugs, or observed him meeting with his confederates in a particular residence
- You may also be able to use electronic surveillance, GPS trackers, cell phone tower data, and so forth