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CIVIL FORFEITURE - WHAT YOU DON'T KNOW COULD HURT YOU

Property owners may be surprised to learn that eight Canadian provinces have enacted legislation allowing the government to seize property that is associated with unlawful activity. This procedure is called "civil forfeiture".

Recently, this powerful right has been pulled into the limelight as controversy surrounds the unusually aggressive approach taken by civil forfeiture offices in British Columbia; one recent seizure was described by a BC court as an example of "zealous measures outside the proper bounds of its home statute".

However, before property owners begin to fret about whether their property is at risk, they should bear in mind that in Ontario, at least, the incidents of civil forfeiture appear to remain within the intended scope of the legislation.

Still, an understanding of what civil forfeiture actually is and how it works may help landlords better protect themselves against this risk (however remote).

How the Process Works

In Ontario, the Civil Remedies Act came into force in 2002. While the Act does not itself impose criminal penalties, it grants civil courts the power to freeze, take possession of, or forfeit to the Crown, property acquired through, or likely to be used for, unlawful activity.

The scope of "unlawful activity" under the Act is extremely broad, referring to any act that is an "offence under an Act of Canada, Ontario or another province or territory in Canada". It also includes activities committed in foreign jurisdictions that would be offenses under Canadian law if committed in Ontario.

The Act focuses solely on the connection between the property in question and the conduct of unlawful activity. There is no requirement that criminal charges be laid or convictions obtained. The Crown need only prove, on a ***balance of probabilities***, that the property was used to engage in an offence (or obtained through proceeds of an offence). This is of concern for landlords/owners since illegal activities carried on by a tenant could put a landlord's property at risk, even where the owner took no part in them.

The process of obtaining a civil forfeiture order begins when a designated institution (e.g., the police) submits a case to the reviewing authority (a designated independent Crown counsel). If the reviewing authority concurs that the case meets the required criteria, a proceeding to obtain a forfeiture order may be commenced. Real and personal property may be seized under the Act, as well as any interest in property. This means, for example, a court could order the seizure of funds acquired through an illegal operation, or the property in which the illegal operations were conducted.

Narrow Protection Under the Act

The Act provides some protection for owners. Section 7 defines a "responsible owner" as someone who "has done all that can reasonably be done to prevent the property from being used to engage in unlawful activity".

Meeting this standard involves a variety of steps, including: (a) promptly notifying law enforcement whenever the owner knows or ought to know that the property has been or is likely to be used to engage in unlawful activity, and (b) refusing or withdrawing any permission that the person has authority to give, and which the person knows or ought to know has facilitated, or is likely to facilitate, the property being used for an unlawful activity.

Where an owner meets the criteria, courts must, except if it would clearly not be in the interests of justice, make the order necessary to protect the owner's interest.

In the case of *Ontario (Attorney General) v. $4,067,685.10 in Canadian Currency (In Rem)*, the Attorney General brought a motion to preserve the proceeds from the sale of a property

pending a civil forfeiture hearing. The property in question had been used by tenants to operate a large-scale marijuana grow operation and was later associated with a stock fraud scheme. The Court noted that a property may qualify as "proceeds of unlawful activity" where the mortgage on the property was paid down using proceeds of the unlawful activity. In this case, however, the Court found no evidence to support the assertion that the rent paid by the tenants was used to make mortgage payments, and concluded there were no grounds to believe that the property was proceeds of crime.

Though the property had housed illegal operations and was therefore an instrument of unlawful activity, the owner established that it had no knowledge of that activity. As no credible evidence of wrong-doing by the owner was established, the Court held that the owner should not be further deprived of its property. The Attorney General's motion was refused.

The Attorney General sought leave to appeal on the basis that a lease of the property had been listed as an asset in a prospectus filed by a company that was later associated with a stock fraud scheme. The Attorney General argued that the lease lent an air of legitimacy to the prospectus and acted as an inducement to potential investors, making the property an instrument of unlawful activity. The Court disagreed, finding no reasonable grounds to believe that the property was likely to be used to engage in unlawful activity. In other words, there was no "nexus" between the stock fraud scheme and the lease of the property referred to in the prospectus. At most, the Court held, the prospectus could be seen as a source of information for potential investors engaging in the legitimate activity of purchasing stock in the company.

Finding Peace of Mind in the Lease

There is a dearth of law on the application of this Act, leaving landlords and owners unsure of the scope of their obligations. Thankfully, there are a handful of lease clauses that may help landlords to minimize their exposure.

- "All applicable laws": leases should include a provision requiring the tenant to abide by "all applicable laws". This provides evidence that the landlord did not grant permission to the tenant to conduct unlawful activities in the premises, and may also provide grounds for the landlord to terminate the lease.

- Termination rights: leases often include a list of occurrences that are treated as "events of default", entitling the landlord to terminate following a cure period. Timely default notices should be sent, particularly to suspicious tenants, and, if necessary, prompt terminations effected where defaults are not remedied in time.

- Entry rights: most leases grant landlords the right to enter the premises in certain circumstances (e.g. in emergencies or for periodic inspections). If, during the course of an entry, the landlord discovers suspicious activities, the landlord may rely on the above lease provisions to halt these activities or even terminate the lease.

Where a landlord's suspicions are high, its first recourse should be to alert the authorities. Though the lack of judicial guidance raises more questions than answers regarding the extent of the landlord's obligation to monitor its tenants, a properly crafted lease should provide the necessary tools to put an end to suspicious activity in a premises or to terminate a lease altogether.

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