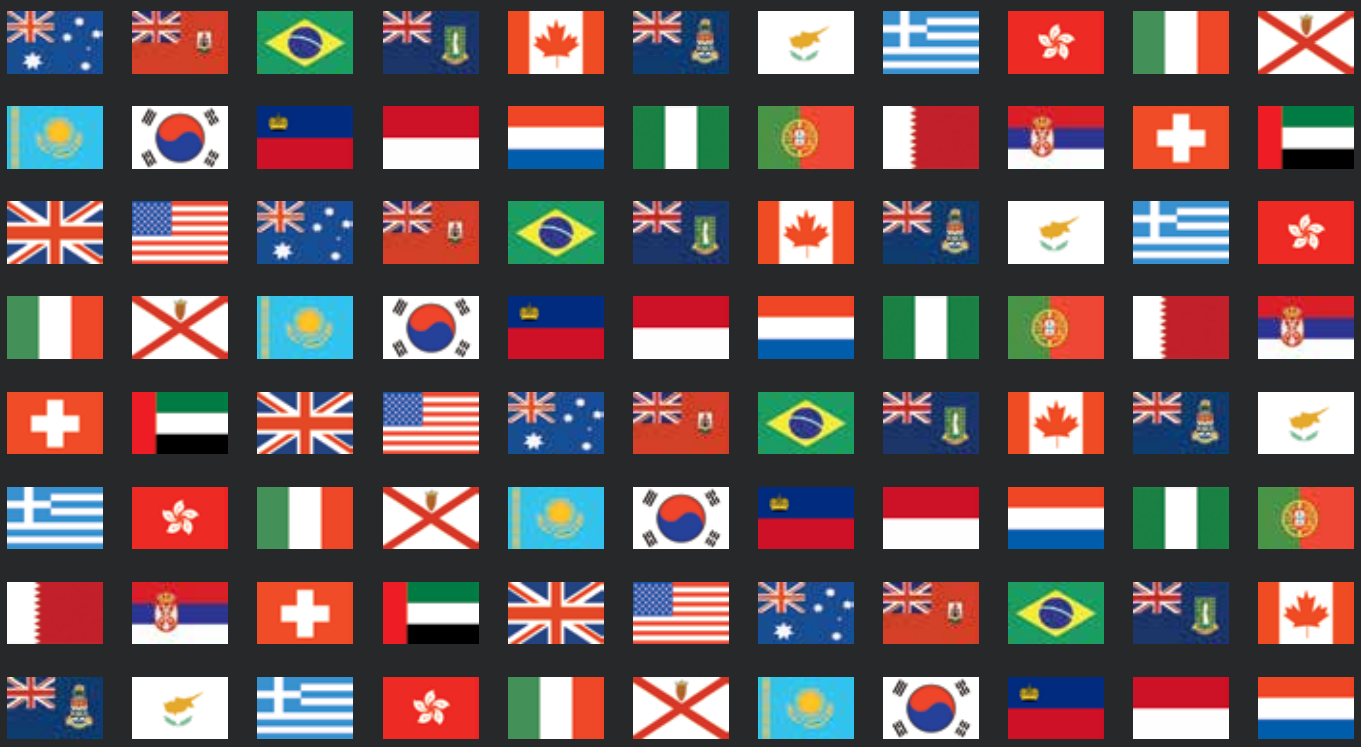
Asset Recovery

Contributing editors
Jonathan Tickner, Sarah Gabriel and Hannah Laming



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GETTING THE DEAL THROUGH

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Canada

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Civil asset recovery

1 Legislation

What are the key pieces of legislation in your jurisdiction to consider in a private investigation?

In Canada, civil legislation relevant to private investigations is primarily made at the provincial level. Such legislation varies in certain respects in name and substance across provinces. However, with the exception of the province of Quebec, all Canadian provinces are based in English common law traditions. The largest province – and the financial centre of Canada – is Ontario. The majority of information in this chapter is based on Ontario law, which is broadly reflective of the laws across the common law provinces. In Quebec (which is generally not addressed in this chapter), relevant legal principles are found in the Civil Code.

In Ontario, for example, there are various legislative sources relevant to undertaking a private investigation. There are two primary legislative sources that provide for court-sanctioned investigations – the Courts of Justice Act, RSO 1990, chapter C 43 and Ontario's Rules of Civil Procedure, O Reg 147/16. Together these statutes provide the legislative foundation for obtaining pre-action disclosure of financial and other relevant information, private search warrants, injunctive relief and the ability to register notice of pending litigation to prevent the dissipation of real property. The availability of such relief is discussed further below.

Depending on the circumstances, various other legislation may also assist with private investigations. At both the provincial and federal level, there is legislation pertaining to how evidence may be obtained and used in courts (eg, Ontario: Evidence Act, RSO 1990, chapter E 23; Federal: Canada Evidence Act, RSC 1985, chapter C 5). There is municipal, provincial and federal legislation providing a regime for accessing documents and information held by government departments and agencies (eg, Ontario: Freedom of Information and Protection of Privacy Act, RSO 1990, chapter F 31; Federal: Access to Information Act, RSC 1985, chapter A 1).

In Ontario, other relevant provincial legislation includes:

- Private Security and Investigative Services Act, 2005, SO 2005, chapter 34, which addresses the licensing of and standards to be met by private investigators;
- Securities Act, RSO 1990, chapter S 5, which allows for, among other things, the appointment of a receiver (with investigative powers) in connection with securities-related wrongdoing;
- Civil Remedies Act, 2001, SO 2001, chapter 28, which addresses compensation for losses suffered as a result of unlawful activity; and
- Fraudulent Conveyances Act, RSO 1990, chapter F 29 and Assignments and Preferences Act, RSO 1990, chapter A 33, both of which deal with, among other things, the steps available to claw-back improper transfers of funds or other assets for the purpose of defeating creditors.

At the federal level, further legislation relevant to private investigations includes:

- Bankruptcy and Insolvency Act, RSC 1985, chapter B 3, which provides various tools to be used by court officers and others to obtain information relevant to corporate entities in financial distress, including as a result of fraud; and
- Privacy Act, RSC 1985, chapter P 21, which relates to an individual's right to access and correct personal information the federal government holds about them and the government's collection, use and disclosure of such information.

In addition to the foregoing, and as discussed below, under the Canadian common law system, the courts are also often responsible for establishing rules and principles that are relevant to conducting private investigations.

2 Parallel proceedings

Is there any restriction on civil proceedings progressing in parallel with, or in advance of, criminal proceedings concerning the same subject matter?

No. Nothing precludes a civil proceeding from progressing in parallel with, or in advance of, criminal proceedings concerning the same subject matter. In fact, section 11 of the Criminal Code, RSC 1986, chapter C 46, explicitly permits such parallel proceedings.

3 Forum

In which court should proceedings be brought?

Before commencing a claim in Canada, a decision should be made about which province the claim should proceed in. Plaintiffs are presumptively entitled to pursue their claims in any province, but normally do so in the place in which the subject matter of the dispute arose (which is also generally where the relevant parties are located). The presumption may be negated if the defendant demonstrates there is no 'real and substantial' connection between the claim and the plaintiff's chosen province, or demonstrates that the chosen forum is not most convenient for the parties under the principle of forum non conveniens (*Van Breda v Village Resorts*, 2012 SCC 17).

Notably, faced with a forum non conveniens argument, Canadian courts will consider, among other things, the law that will govern the dispute. The fact that the law of another province (or international jurisdiction) will govern the dispute is not dispositive, but is one factor that may impact whether the court declines to exercise jurisdiction. However, under Canadian conflict of laws principles, even if a claim proceeds before the courts of a particular province, the courts may apply the law of another province (or international jurisdiction) in appropriate circumstances (eg, if a contract mandates application of a particular jurisdiction's laws). As a result, choosing a particular Canadian province in which to bring a claim may not result in the laws of that province being applied and may therefore limit the substantive advantages to be gained.

Regardless of the province, claims generally proceed in the provincial superior courts, which have court offices in most notable municipalities across each province. The superior courts are also divided by certain subject matters such as bankruptcy, commercial and small claims (in Ontario, for example, under C$25,000). The judges of those subject matter divisions are specialists in those areas, and unique procedures often exist to streamline the court process. Certain claims meeting enumerated criteria may also be heard in the Federal Court. While headquartered in Ottawa, the Federal Court also has locations across Canada.

4 Limitation

What are the time limits for starting civil court proceedings?

The time limits for commencing civil actions are prescribed by provincial legislation. Each province has legislation addressing limitations periods generally (eg, general tort or contract actions). The general limitation periods range from two to six years, depending on the province. In recent years, amendments in various provinces have seen the shortening of general limitations periods, with two years increasingly emerging as the chosen time period. In some general limitations legislation, other more specific causes of action are also addressed. For instance, the province of Manitoba's The Limitation of Actions Act, CCSM chapter L 150 provides a six-year limitation period in respect of any fraudulent misrepresentation action. In addition, each province has subject-matter specific legislation that, in some instances, provides different limitation periods. For example, Ontario's Securities Act provides a three-year limitation period in respect of certain securities-based claims.

Canadian common law provides that, unless specifically altered by legislation, the clock will not begin to run on any limitation period until such time as the claim is 'discovered'. Discovery occurs when the person with the claim actually learned of the facts giving rise to the claim, or when a 'reasonable person' with the abilities and in the circumstances of the person with the claim would have had such knowledge. Some provinces, including Ontario, have codified the common law discovery principle. There remain, however, certain exceptions to the principle, including most notably in cases involving those lacking capacity to commence claims such as minors or persons with certain disabilities.

5 Jurisdiction

In what circumstances does the civil court have jurisdiction? How can a defendant challenge jurisdiction?

The provincial superior courts will generally have jurisdiction simpliciter over civil asset recovery matters. While the courts maintain the inherent jurisdiction to control their own procedure, a presumption in favour of jurisdiction is generally applied. As discussed above, a defendant, however, may challenge the court's jurisdiction, either by advancing the position that there is no 'real and substantial' connection between the dispute and the province or that the chosen jurisdiction is forum non conveniens because there is 'clearly a more appropriate' jurisdiction in which the claim should proceed. In such a case, the defendant would typically request that the court direct the action to proceed, if at all, in another jurisdiction or simply permanently stay the action. The leading Canadian case on issues of jurisdiction is *Van Breda v Village Resorts*, 2012 SCC 17.

6 Admissibility of evidence

What rules apply to the admissibility of evidence in civil proceedings?

In Canada, admissibility of evidence is either governed by provincial or federal legislation, depending on the subject matter of the dispute. In asset recovery matters, provincial legislation will most often apply. In Ontario, the relevant legislation is the Evidence Act and Ontario's Rules of Civil Procedure. For federal matters, the most relevant legislation is the Canada Evidence Act.

In an effort to increase efficiency and decrease wait times, Canadian courts have rules available for summary judgment motions, which can avoid the need for full trials. In Ontario, while the court retains discretion to order viva voce (oral) evidence, evidence on any motion is typically advanced by way of written affidavit. Affiants are cross-examined outside of court and the judge hearing the motion is provided copies of the examination transcripts. Further, on a motion, hearsay evidence is generally permissible, although the court is permitted to consider the weight to be given to such evidence. At a civil trial, the opposite is true. The presumptive trial process includes viva voce evidence and a prohibition on hearsay, both features that can lengthen and complicate trials vis-à-vis motions.

7 Publicly available information

What sources of information about assets are publicly available?

Common sources of publicly available information include personal property security searches (to find registered security interests on assets such as vehicles), litigation searches (to find ongoing court proceedings and previously rendered judgments) and land registry searches (to find information about real property ownership, including any encumbrances on title). Generally, most information beyond these sources is not publicly available.

8 Cooperation with law enforcement agencies

Can information and evidence be obtained from law enforcement and regulatory agencies for use in civil proceedings?

There are various means to seek information and evidence from law enforcement and regulatory agencies. These include applications for information disclosure under the municipal, provincial or federal freedom of information acts (noted above) and applications for production of information obtained by police in the course of a criminal investigation. In the latter case, applications are made to the court pursuant to the common law test originally articulated by the Ontario Court of Appeal in *P(D) v Wagg*. Under the Wagg test, the court will consider factors such as privilege, public interest immunity and whether there exists a prevailing public interest in non-disclosure that overrides the promotion of the administration of justice through full access of litigants to relevant information.

9 Third-party disclosure

How can information be obtained from third parties not suspected of wrongdoing?

The provincial superior courts may, upon request, order production for inspection of documents in the control of a third party provided the documents are not privileged and the court is satisfied that the documents are relevant to a material issue in the action and it would be unfair to require the requesting party to proceed without having access to the documents (eg, under rule 30.10 of Ontario's Rules of Civil Procedure).

A party may also move before the court on an ex parte basis for a *Norwich Pharmacal* or 'disclosure' order. Such orders are most commonly granted to allow for disclosure of confidential information such as bank statements or other financial information. In considering whether to order disclosure, the court will consider whether the requesting party has demonstrated:

- a reasonable claim on the merits;
- a relationship between the third party (with the confidential information) and the claim;
- that the third party is the only practicable source of information;
- that the third party can be indemnified for the costs of the disclosure; and
- that the interests of justice favour the obtaining of the disclosure (*GEA Group AG v Ventra Group*, Ontario Court of Appeal).

10 Interim relief

What interim relief is available pre-judgment to prevent the dissipation of assets by, and to obtain information from, those suspected of involvement in the fraud?

In order to prevent the dissipation of assets, a party may move before the court for a *Mareva* injunction, also often called a 'freezing order'. As the name suggests, such an injunction aims to freeze the assets of an alleged wrongdoer pending the resolution of a claim on its merits. In order to obtain a *Mareva* injunction, a requesting party must demonstrate, among other things, a strong prima facie case of fraud and a real risk of dissipation. *Mareva* injunctions are almost always obtained ex parte and, in such cases, the moving party is required to provide full and fair disclosure of all materials facts, including those facts that may favour the defendant. In addition, an undertaking as to any damages caused by the injunction is required.

In order to obtain information from those suspected of involvement in the fraud (as opposed to innocent third parties, in which case a Norwich order is appropriate), a party may request that the court issue an *Anton Piller* order. Such an order is obtained without notice and effectively serves as a private search warrant, requiring a defendant to allow the plaintiff to search premises and seize evidence in order to avoid destruction of such evidence. An independent supervising solicitor is commonly required to ensure the order is fairly understood and its limits are respected. As with a *Mareva* injunction, the moving party is required to make full disclosure of all material facts and provide an undertaking as to damages.

11 Right to silence

Do defendants in civil proceedings have a right to silence?

No. In a civil action, neither party has the right to remain silent. All relevant, non-privileged information must be produced. Even non-parties may be compelled to give evidence if such evidence is sufficiently material to the proceedings. Subject to certain protections, information must be produced in a civil proceeding even if the evidence is also relevant to a concurrent criminal proceeding.

A significant protection, however, is the deemed undertaking rule. This common law rule provides that where evidence has been produced in a civil proceeding but not filed with the court, the parties and their lawyers may use the evidence only within the proceeding in which the evidence was obtained. In many provinces, the deemed undertaking rule has been codified in the relevant rules of civil procedure (eg, rule 30.1 of Ontario's Rules of Civil Procedure). In addition, both the provincial and federal evidence acts provide that, where a witness is compelled to testify, the witness may elect to declare that the resulting evidence is not admissible against the witness in any subsequent civil or criminal proceeding.

12 Non-compliance with court orders

How do courts punish failure to comply with court orders?

Where parties to a court order fail to comply, a contempt of court order may be issued. The purpose of a contempt order is to compel compliance with the civil order. As a sanction for contempt, the court may render further orders against the non-compliant party, including fines or even imprisonment.

In Ontario, for instance, contempt orders may be issued under rule 60.11 of the Rules of Civil Procedure. The rule requires a three-part test to be met:

- the order that was breached must clearly and unequivocally state what was to be done;
- the party that breached the order must have done so deliberately and wilfully; and
- the evidence must establish contempt beyond a reasonable doubt (*CAS of Ottawa-Carleton v C* (T), Ontario Superior Court of Justice).

13 Obtaining evidence from other jurisdictions

How can information be obtained through courts in other jurisdictions to assist in the civil proceedings?

In appropriate circumstances, Canadian courts will issue written requests to foreign courts. Such 'letters of request' are the same as the better-known letters rogatory process and consist of a request to a foreign court to compel the attendance of a person in the foreign jurisdiction to be examined under oath. Many provinces have codified their rules regarding letters of request, including at rule 34.07 of Ontario's Rules of Civil Procedure.

14 Assisting courts in other jurisdictions

What assistance will the civil court give in connection with civil asset recovery proceedings in other jurisdictions?

Following the Supreme Court decisions in *Morguard Investments v De Savoye* and *Beals v Saldanha*, Canadian courts are generally expected to recognise and enforce the judgments of the courts of both other provinces and foreign jurisdictions anywhere in the world.

Canadian courts will recognise and enforce judgments of foreign (non-Canadian) courts absent a demonstration that:

- the foreign court lacked jurisdiction over the dispute based on the Canadian 'real and substantial' connection test for assuming jurisdiction;
- the foreign judgment was obtained by fraud unknown by the defendant at the time of the judgment;
- an issue with the foreign procedure or due process gives rise to questions about natural justice; or
- the foreign judgment is contrary to Canadian concepts of basic morality.

15 Causes of action

What are the main causes of action in civil asset recovery cases, and do they include proprietary claims?

The main causes of action for civil asset recovery are tort claims including fraud, fraudulent misrepresentation, conspiracy and conversion; breach of contract claims; equitable claims such as unjust enrichment; and proprietary claims such as breach of trust.

16 Remedies

What remedies are available in a civil recovery action?

There are multiple remedies available in a civil recovery action. As noted above, there are preliminary remedies focused on preservation of assets and disclosure of information. Remedies at the conclusion of an action on the merits include:

- a monetary award as compensation for damages;
- tracing and accounting of misappropriated funds;
- disgorgement of any profits;
- seizure of assets;
- interest on the amount of any damages award (pre-judgment and post-judgment); and
- costs and disbursements of the opposing party.

17 Judgment without full trial

Can a victim obtain a judgment without the need for a full trial?

Yes. For instance, a victim can obtain default judgment if the defendant fails to comply with the proper timelines and procedures in an action. In Ontario, rule 19 provides that, in such circumstances, a plaintiff may have the defendant noted in default and thereafter move for judgment without notice or the need for a full trial.

In a defended action, a victim can also move for summary judgment, which, in Ontario, is governed by rule 20 of the Rules of Civil Procedure. To obtain summary judgment, the plaintiff must demonstrate that there is no genuine issue requiring a trial. Following the recent Supreme Court of Canada decision of *Hryniak v Mauldin*, summary judgment is available when the court is able to: make the necessary findings of fact; apply the law to the facts; and provide a proportionate, more expeditious and less expensive means to achieve a just result (relative to a trial). Summary judgment rules can be utilised to resolve all or part of a claim.

18 Post-judgment relief

What post-judgment relief is available to successful claimants?

The post-judgment relief available in Canada includes primarily the relief set out below at question 19.

19 Enforcement

What methods of enforcement are available?

The primary methods utilised to execute a judgment against judgment debtors who do not voluntarily comply with judgments include the following:

- garnishment of bank accounts or wages, with the assistance of a sheriff;
- obtaining a writ of seizure and sale allowing the judgment creditor, with the assistance of a sheriff, to seize certain of the judgment debtor's assets and sell them at public auction;
- injunctions to freeze and prevent the dissipation of assets;

- examinations under oath regarding assets in aid of execution (in Ontario, under rule 60.18 of the Rules of Civil Procedure); and
- applications to the court for the appointment of a receiver, either to supervise the judgment debtor's affairs or take control of the debtor's assets.

In addition, a plaintiff or judgment creditor can bring a fraudulent conveyance claim either in the underlying action or in an effort to enforce a judgment. The limitation periods governing fraudulent conveyance claims must be carefully considered as they typically start to run from the time of the transfer itself (and, therefore, potentially prior to obtaining judgment). As such, it is often prudent to include such claims in the underlying action.

Legislation relevant to the process of enforcing judgments includes, in Ontario, the Bailiffs Act, RSO 1990, chapter B 2 and the Execution Act, RSO 1990, chapter E 24. In addition, as noted above, if a judgment debtor fails to comply with a judgment, the plaintiff may seek a contempt of court order.

20 Funding and costs

What funding arrangements are available to parties contemplating or involved in litigation and do the courts have any powers to manage the overall cost of that litigation?

Historically, strict adherence to the doctrine of champerty and maintenance meant that Canadian courts insisted that litigants maintain fully autonomous control over their claims regardless of financial realities. This approach led to a prohibition on litigation funding arrangements based on public policy rationales such as protecting vulnerable litigants from abuses including high interest rates, ensuring lawyers' duties of loyalty and confidentiality were not compromised, and otherwise maintaining lawyers' professional judgement and efficacy. However, Canadian courts have recently loosened these restrictions and opened the door to litigation funding arrangements in appropriate circumstances.

In 2015, building on the precedents seen in the Canadian class action realm, the Ontario Superior Court of Justice confirmed that funding arrangements are available in commercial litigation, holding there is 'no reason why such funding would be inappropriate in the field of commercial litigation,' a sentiment clearly encompassing fraud and asset recovery actions (*Schenk v Valiant Pharmaceuticals International*). Such an approach has been motivated by the courts' acknowledgement that litigation funding arrangements can promote access to justice. Canadian courts, however, retain discretion to disallow such third-party arrangements that deprive the litigant of too much control over or benefit from the claim.

In addition, in instances where a receiver or trustee has been appointed (for example, in cases of investment fraud or a bankruptcy), Canadian courts retain discretion over the payment from the estate to the receiver or trustee, and to their counsel and other advisers.

Criminal asset recovery

21 Interim measures

Describe the legal framework in relation to interim measures in your jurisdiction.

Section 462.32 of Canada's Criminal Code allows the judge to grant a warrant to search, seize and detain property if the judge is satisfied that there are reasonable grounds that the property could be subject to a criminal forfeiture order.

Section 462.33 allows the judge to grant a restraining order prohibiting any person from disposing or dealing with the property except as authorised by the order. The judge must also be satisfied that there are reasonable grounds that the property could be subject to a criminal forfeiture order.

22 Proceeds of serious crime

Is an investigation to identify, trace and freeze proceeds automatically initiated when certain serious crimes are detected? If not, what triggers an investigation?

All Canadian police forces may initiate investigations on their own accord. Victims or other parties with information may also trigger investigations by making a complaint to the Royal Canadian Mounted Police (RCMP), or the provincial or municipal police.

The Financial Transactions and Reports Analysis Centre of Canada (FINTRAC) can also trigger investigations. The Proceeds of Crime (Money Laundering) and Terrorist Financing Act, SC 2000, chapter 17 obligates designated financial institutions to report suspicious transactions to FINTRAC. FINTRAC analyses these reported transactions. It then shares information with the appropriate police force, which may then commence an investigation.

23 Confiscation – legal framework

Describe the legal framework in relation to confiscation of the proceeds of crime, including how the benefit figure is calculated.

If the offender is convicted of a designated offence and the Attorney General can prove on a balance of probabilities that the property is proceeds of crime and that the offender committed the designated offence in relation to that property, then the court must order the forfeiture of the property to the Crown (see section 462.37(1)).

Even if the offender is convicted of a designated offence, but the court is not convinced that the offender committed the designated offence in relation to the specific property, the court retains discretion to make a forfeiture order if it is convinced beyond a reasonable doubt that the property is nonetheless the proceeds of some crime (see section 462.37(2)).

When imposing a sentence on or discharging an offender, the court may order the offender to make restitution to the victims of the crime (see section 738). The value of the restitution imposed shall not exceed the harm suffered by the victim because of the offence. The court can issue a restitution order to compensate victims for property damage, bodily or psychological harm, the threat of bodily harm in the cases of close family members, and identity theft.

24 Confiscation procedure

Describe how confiscation works in practice.

See question 23.

25 Agencies

What agencies are responsible for tracing and confiscating the proceeds of crime in your jurisdiction?

Depending on the nature of the offence and the location of the misconduct, one of the RCMP or the provincial and municipal police (or some combination) may be involved in investigating proceeds of crime. To the extent court assistance is required:

- the Attorney General of Canada is responsible if the designated offence in question is a contravention of a federal statute or regulation other than the Criminal Code (see section 462.3(3)); and
- the provincial attorney generals are responsible if the designated offence in question is a contravention of the Criminal Code (see section 462.3(4)).

FINTRAC may also be involved in cases involving money laundering or terrorism financing. In such cases, FINTRAC may also collaborate with other Canadian agencies including the Canadian Security Intelligence Service, the Canada Revenue Agency, Citizenship and Immigration Canada, and the Communications Security Establishment Canada.

26 Secondary proceeds

Is confiscation of secondary proceeds possible?

Yes. The Criminal Code's broad definition of the proceeds of crime captures secondary proceeds. Section 462.3(1) provides the following definition:

> *any property, benefit or advantage, within or outside Canada, obtained or derived directly or indirectly as a result of (a) the commission in Canada of a designated offence, or (b) an act or omission anywhere that, if it had occurred in Canada, would have constituted a designated offence.*

The Criminal Code's broad definition of property reinforces this conclusion. Section 2 of the Code provides the following definition:

> *property includes [...] property originally in the possession or under the control of any person, and any property into or for which it has been converted or exchanged and anything acquired at any time by the conversion or exchange.*

27 Third-party ownership

Is it possible to confiscate property acquired by a third party or close relatives?

Yes. The Criminal Code's definition of property includes property controlled by any person and converted property. In *R v Rosenblum*, the British Columbia Court of Appeal ruled that transferring property to a third party or close relatives does not prevent the court from ordering a forfeiture. The court can order the forfeiture if it is satisfied that the property is the proceeds of crime. Section 462.4 of the Criminal Code also gives the court the power to render any transfers of the property following its seizure or the service of a restraint order void, unless the recipient of the property paid valuable consideration and acted in good faith.

The court also has a discretionary power to order the return of property that would otherwise be forfeited to its lawful owner or a person lawfully entitled to possess it (see section 462.41(3)). A person must meet several conditions to be eligible for the return of property. The person must not have been charged with or convicted of a designated offence, must have acquired rights in the property in good faith, and must appear innocent of any complicity or collusion in a designated offence.

28 Expenses

Can the costs of tracing and confiscating assets be recovered by a relevant state agency?

Yes. Section 10 of the Seized Property Management Act, SC 1993, chapter 37 directs the federal Minister of Public Works and Government Services to share the proceeds of disposition of a forfeited property with any Canadian law enforcement agency that participated in the investigation. Law enforcement agencies can thus recoup their costs from the forfeited proceeds.

29 Value-based confiscation

Is value-based confiscation allowed? If yes, how is the value assessment made?

Section 462.37(3) of the Criminal Code allows the court to impose a fine instead of a forfeiture order if the property cannot be subject to forfeiture. The value of the fine must be equal to the value of the property. The court must also impose a term of imprisonment in case the offender defaults on the fine. The fine is a discretionary power. Courts will consider the offender's ability to pay and will generally not impose fines on offenders who lack property or assets (see *R v Savard*, Quebec Court of Appeal; *R v Neves*, Manitoba Court of Appeal).

30 Burden of proof

On whom is the burden of proof in a procedure to confiscate the proceeds of crime? Can the burden be reversed?

See question 23. In addition, for offences concerning criminal organisations and certain offences under the Controlled Drugs and Substances Act, SC 1996 chapter 19 it is the offender who bears the burden of proof. The Attorney General need only demonstrate on a balance of probabilities that the offender engaged in a pattern of criminal activity for the purpose of receiving a material benefit or that the offender's legitimate sources of income cannot reasonably account for the value of all the offender's property for the court to order forfeiture (see section 462.37(2.01-2.02)). If the Attorney General can prove either of these things, the offender must prove on a balance of probabilities that the property is not the proceeds of crime.

31 Using confiscated property to settle claims

May confiscated property be used in satisfaction of civil claims for damages or compensation from a claim arising from the conviction?

Yes. See question 23 regarding restitution orders.

32 Confiscation of profits

Is it possible to recover the financial advantage or profit obtained though the commission of criminal offences?

Yes. Section 462.39 of the Criminal Code allows the court to infer property was obtained or derived from the commission of a designated offence for the purposes of forfeiture if the following requirements are met:

- the value of all of the property of the alleged offender after the commission of the offence exceeds the value of that person's property before its commission; and
- the legitimate sources of income of the alleged offender cannot reasonably account for this increase in value.

The Criminal Code's broad definition of the proceeds of crime also includes any benefit or advantage that is derived from the commission of a designated offence, whether indirectly or directly (see section 462.3(1)).

33 Non-conviction based forfeiture

Can the proceeds of crime be confiscated without a conviction? Describe how the system works and any legal challenges to in rem confiscation.

Ontario, Alberta, Manitoba, British Columbia, Saskatchewan, Nova Scotia, Quebec and New Brunswick have all passed legislation that allow for non-conviction based forfeiture. In non-conviction based forfeiture proceedings, the provincial Attorney General must demonstrate on a balance of probabilities that the property in question is a proceed or an instrument of unlawful activity. It is not necessary for the owner of the property to have been convicted, and even an acquittal does not protect the accused against forfeiture. Still, all provincial legislation has proportionality provisions. For instance, in British Columbia and Ontario, these prevent the judge from ordering forfeiture when it is 'clearly not in the interests of justice'.

Provincial non-conviction based forfeiture legislation has survived a federalism-based legal challenge. In *Chatterjee v Ontario (Attorney General)*, 2009 SCC 19, the Supreme Court of Canada ruled that Ontario's forfeiture legislation did not encroach on the federal power over criminal law. However, challenges to the provincial regime based on the Canadian Charter of Rights and Freedoms are currently pending.

34 Management of assets

After the seizure of the assets, how are they managed, and by whom? How does the managing authority deal with the hidden cost of management of the assets? Can the assets be utilised by the managing authority or a government agency as their own?

Section 462.331 of the Criminal Code provides that, on the application of the Attorney General or a person the Attorney General authorises, the court may appoint a person to take control and manage seized property. When the Attorney General so requests, the court will appoint the Minister of Public Works and Government Services. The Seized Property Management Act authorises the Minister to manage and dispose of seized and forfeited property, including disposal through interlocutory sale or destruction. The Minister is responsible for property maintenance.

35 Making requests for foreign legal assistance

Describe your jurisdiction's legal framework and procedure to request international legal assistance concerning provisional measures in relation to the recovery of assets.

Canada's Department of Justice has an International Assistance Group (the IAG). The IAG reviews and coordinates all mutual legal assistance requests made by (or to) Canada. Canadian prosecutors and law enforcement authorities are encouraged to contact the IAG to discuss the procedural and legal requirements for making requests for mutual legal assistance to Canada. Generally speaking, where assistance is sought from a country that is a party to a mutual legal assistance agreement with Canada, the agreement will set out the types of assistance available to Canada. Most agreements provide for wide measures of cooperation, including;

- search and seizure;
- compelling the production of documentary or physical evidence;
- compelling witness statements or testimony, including by video or audio link;
- transferring sentenced persons to give evidence or to assist in a Canadian investigation;
- lending court exhibits;
- enforcing restraint, seizure and forfeiture orders; and
- enforcing criminal fines.

Where there is a mutual legal assistance agreement with Canada, the IAG provides Canadian police and prosecutors with a standard treaty request template to assist them in drafting their request. Where there is no mutual legal assistance agreement with Canada, the IAG will provide a standard non-treaty request template.

36 Complying with requests for foreign legal assistance

Describe your jurisdiction's legal framework and procedure to meet foreign requests for legal assistance concerning provisional measures in relation to the recovery of assets.

Requests for assistance regarding criminal matters should be submitted to the IAG.

A step-by-step guide entitled *Requesting mutual legal assistance in criminal matters from G8 countries* was published as a result of the 2011 G8 conference and is readily available online (the G8 Guide). The G8 Guide has a section addressing Canada, which outlines that the following steps should be taken when requesting mutual legal assistance from Canada. The key steps include:

- Consult with the IAG before submitting the request.
- Ensure the request is proportionate to the alleged crime.
- Indicate the mechanism used to seek assistance. The request should identify the treaty, convention or other avenue of cooperation being used to seek assistance from Canada.
- Identify the authority conducting the investigation or prosecution (in the requesting country).
- Summarize the case.
- Set out the applicable legal provisions. Include verbatim text of the relevant provisions, including applicable penalties.
- Identify the assistance being sought.

If the requesting state has a mutual legal assistance agreement with Canada, section 9.3 of the Mutual Legal Assistance in Criminal Matters Act allows the federal government to authorise federal or provincial attorney generals to enforce orders from a criminal court of the requesting state to seize or restrain property. In order to file such an order, the Attorney General of Canada must be satisfied that the person has been charged with an offence in the requesting state that would be an indictable offence in Canada.

If the requesting state lacks a mutual legal assistance agreement with Canada, the federal government can refer the request to the RCMP to commence a Canadian investigation and forfeiture proceedings under the Criminal Code. Section 11 of the Seized Property Management Act allows the federal government to enter into agreements with foreign states to share the proceeds of the disposition of the forfeited property if foreign law enforcement agencies participated in the investigation. The Freezing Assets of Corrupt Foreign Officials Act, SC 2011, chapter 10 also allows the foreign government to freeze the assets or restrain property of a foreign state's foreign leaders and senior officials provided that certain preconditions are met.

37 Treaties

To which international conventions with provisions on asset recovery is your state a signatory?

Canada is a signatory to the following international conventions that contain mutual legal assistance provisions covering asset recovery:

- United Nations Convention against Corruption, UN General Assembly, A/58/422 (2003);
- Inter-American Convention Against Terrorism, Organization of American States, AG/RES. 1840, 3 June, 2002;
- Convention on Cybercrime, Council of Europe Treaty No. 185, Budapest, 23 November, 2001;
- United Nations Convention against Transnational Crime, UN General Assembly resolution 55/25, 15 November, 2000;
- International Convention for the Suppression of the Financing of Terrorism, UN General Assembly, 9 December, 1999;
- Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, OECD, 17 December, 1997;
- Inter-American Convention Against Corruption, Organization of American States, 29 March, 1996; and
- United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Vienna, 20 December, 1988.

38 Private prosecutions

Can criminal asset recovery powers be used by private prosecutors?

No. Only the Attorney General can apply for forfeiture orders, warrants and restraint orders.

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