Asset Recovery

Contributing editors
Jeremy Garson, Daniel Hudson and Gareth Keillor
Herbert Smith Freehills LLP

2019

GETTING THE DEAL THROUGH

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Seventh edition

Getting the Deal Through is delighted to publish the seventh edition of *Asset Recovery*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on Ukraine.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We would like to thank the contributing editors, Jeremy Garson, Daniel Hudson and Gareth Keillor of Herbert Smith Freehills LLP for his assistance with this volume. We also extend special thanks to Jonathan Tickner, Sarah Gabriel and Hannah Laming of Peters & Peters Solicitors LLP, who contributed the original format from which the current questionnaire has been derived, and who have helped to shape the publication to date.

GETTING THE DEAL THROUGH

London
September 2018

Canada

Maureen Ward and Nathan Shaheen
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Civil asset recovery

1 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.

2 Forum

In which court should proceedings be brought?

Before commencing a claim, a decision should be made about which province the claim should proceed in. Claimants 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 claimant's chosen province, or demonstrates that the chosen forum is not the 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, 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 provincial superior courts are also divided by certain subject matters, such as bankruptcy, and 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.

3 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 limitation periods, with two years increasingly emerging as the chosen time period. In some general limitation legislation, other more specific causes of action are also addressed. For instance, the province of Manitoba's 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.

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 of and in the circumstances of the claimant 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 the capacity to commence claims such as minors or persons with certain disabilities.

4 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. Although the courts maintain the inherent jurisdiction to control their own procedure, a presumption in favour of jurisdiction is generally applied. As discussed in question 2, 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 a *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.

5 Time frame

What is the usual time frame for a claim to reach trial?

The time frame for a claim to reach trial varies significantly, often based on the nature of the claim, the province in which the claim is being advanced and the particular court in which the claim is commenced. For instance, in Ontario, the Superior Court of Justice has a Commercial List Division that specialises in complex financial disputes, and often hears claims involving asset tracing and recovery. A claim on the Commercial List is likely to be advanced more quickly than in a regular division of the same court. Still, litigation is a long process and claims can often take multiple years to reach trial, particularly if the parties engage in multiple interlocutory motions. For this reason, pre-judgment asset tracing and preservation mechanisms such as *Mareva* injunctions can be critical.

6 Admissibility of evidence

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

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, courts have rules available for summary judgment motions, which can avoid the need for full trials. In Ontario, although 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 by way of motions.

7 Witnesses

What powers are available to compel witnesses to give evidence?

There are various powers available to compel witnesses to give evidence at different stages of a proceeding. Each province has procedural rules governing how and when a witness may be compelled to give evidence. For instance, Ontario's Rules of Civil Procedure provide a mechanism to compel an examination for discovery of 'any person who there is reason to believe has information relevant to a material issue in the action' (Rule 31.10), and to summons a witness to trial (Rule 53.04). In addition, in common law, a party may obtain a *Norwich Pharmacal* or 'disclosure order' requiring a third party to provide evidence relevant to tracing assets and discovery claims, including testimony. Courts can also issue 'letters rogatory' requesting a foreign court to compel the evidence of a witness in a foreign jurisdiction.

8 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.

9 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, 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.

10 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 the following:

- 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).

11 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 material 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 claimant 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.

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 (*Children's Aid Society 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 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 other provinces and foreign jurisdictions anywhere in the world.

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

- 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 following are the main causes of action for civil asset recovery:

- tort claims, including fraud, fraudulent misrepresentation, knowing assistance, 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 question 11, there are preliminary remedies focused on preservation of assets and disclosure of information. Remedies at the conclusion of an action on the merits are as follows:

- a monetary award as compensation for damage;
- 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 claimant 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 claimant 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 primarily includes the relief set out in 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, to either supervise the judgment debtor's affairs or take control of the debtor's assets.

In addition, a claimant or judgment creditor can bring a fraudulent conveyance claim in either 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 in question 12, if a judgment debtor fails to comply with a judgment, the claimant 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 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.

More recently, however, courts loosened the restrictions on litigation funding. 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. 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), 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 the 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 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. It analyses these reported transactions, 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 the proceeds of crime and that the offender committed the designated offence in relation to that property, the court must order the forfeiture of the property to the Crown (see section 462.37(1) of the Criminal Code).

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 is as follows:

- 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 attorneys general 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 Services and Procurement and Accessibility 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

Update and trends

Over the past year, courts have clarified and strengthened the tools available to fraud victims for tracing and securing assets. For instance, in *2092280 Ontario Inc v Voralto Group Inc*, the Ontario Divisional Court confirmed that the risk of asset dissipation – a requirement for a *Mareva* injunction or 'freezing order' – may be inferred from evidence of fraud in the circumstances of the case. The ability to satisfy the asset dissipation requirement on the basis of such an inference eases the historical requirement of positively demonstrating that an alleged fraudster's assets were being lost or removed, which was a difficult standard to meet in light of the often concealed nature of a fraudster's private affairs.

In *SFC Litigation Trust v Chan*, the Divisional Court confirmed that an Ontario court can issue a worldwide *Mareva* injunction to freeze assets of an alleged fraudster abroad, even where there are no such assets held in the province. The Divisional Court held that an Ontario court's in personam jurisdiction over the alleged fraudster (and satisfaction of the other *Mareva* injunction criteria) provided the basis to freeze assets abroad. This approach is likely to be adopted by courts across Canada, and expands the circumstances in which Canadian courts can freeze assets.

In addition, the Supreme Court of Canada recently considered and addressed the proper approach to *ex turpi causa*, the legal doctrine that provides that 'no cause of action may be founded on an immoral or illegal act'. Most often, consideration of the *ex turpi causa* doctrine has arisen where a company brings a claim that arises from, or is connected to, some wrongdoing by an insider of the company. Although the doctrine has at times been strictly interpreted (and therefore precluded companies' claims somehow connected to wrongdoing), in *Livent Inc v Deloitte & Touche*, the Supreme Court confirmed a more modern, liberal approach. This approach emphasises that the *ex turpi causa* doctrine is designed to protect the integrity of the justice system and should be used sparingly, namely only when the individual wrongdoer would personally profit from the company's claim. In doing so, the Supreme Court appears to have opened the door to further claims seeking to trace and recover misappropriated assets and hold responsible parties to account.

Finally, in October 2017, Parliament passed the Justice for Victims of Corrupt Foreign Officials Act, more commonly known as Canada's 'Magnitsky Act'. Following the lead of the US Magnitsky Act, the Act provides the Canadian government the authority to target and freeze the assets of foreign nationals determined to be responsible for, or complicit in, significant corruption or gross violations of internationally recognised human rights.

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 and *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) of the Criminal Code). 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 through the commission of criminal offences?

Yes. Section 462.39 of the Criminal Code allows the court to infer that 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 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.

Alberta, British Columbia, Manitoba, New Brunswick, Nova Scotia Ontario, Quebec and Saskatchewan 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 Services and Procurement and Accessibility. 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.

The Department of Justice has an International Assistance Group (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, 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 the following:

- 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 are as follows:

- 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);
- summarise the case;
- set out the applicable legal provisions. Include verbatim text of the relevant provisions, including applicable penalties; and
- 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 attorneys general 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:

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