

The Recovery of Stolen Assets in Canada: Civil and Criminal Remedies

By: Caroline E. Abela, Partner, WeirFoulds LLP¹

You have to be fast on your feet and adaptive or else a strategy is useless.
– Charles de Gaulle

Fact Scenario: Michel LeGrande is a victim of fraud. He is a real estate tycoon who, through a company, assembled substantial liquid assets to fund the development of a condominium in Florida. All funds were held through accounts at South Beach Bank. The bank recently discovered that an executive at the real estate company, working with an insider at the bank, diverted USD200,000,000 from the company to numerous offshore accounts. The fraudsters are not to be found. The money is known to have been transferred to London, Geneva, the Middle East and Canada. What are the available remedies in Canada to recover the stolen funds?

In Canada, the fraud victim has four avenues that would aid in the recovery of the stolen funds: (1) the pursuit of civil remedies; (2) the pursuit of criminal remedies; (3) the pursuit of both the civil and criminal remedies in parallel; and (4) a request for support from the United States. The suitability of the remedies depends on the time and resources available to the victim. A further discussion of each option available to the victim is outlined below.

1. CIVIL REMEDIES

i) Mareva Injunction

The most expedient and effective remedy for our victim is a Mareva injunction. A Mareva injunction is the first essential step that the victim must pursue in order to preserve the funds. A Mareva injunction protects a claimant's right to property until the trial has been completed. This is achieved by freezing the assets to avoid their removal, concealment or dissipation.

¹ Thank you to Nicole Truman (student-at-law) and Kayla Theeuwen (summer student) for their contributions to this paper.

Consequently, should the plaintiff be successful in obtaining judgment, there will be assets ultimately available to satisfy such judgment. In this type of situation, a Mareva injunction will be served *ex parte*, with the materials supporting the injunction being served on the defendants (if they are to be found) after the injunction has been granted. In Canada, the test to grant a Mareva injunction is:

- (a) the plaintiff must make full and frank disclosure of all material matters within his or her knowledge;
- (b) the plaintiff must give particulars of the claim against the defendant, stating the grounds of the claim and the amount thereof, and the points that could be fairly made against it by the defendant;
- (c) the plaintiff must give grounds for believing that the defendant has assets in the jurisdiction;
- (d) the plaintiff must give grounds for believing that there is a real risk of the assets being removed out of the jurisdiction, or disposed of within the jurisdiction or otherwise dealt with so that the plaintiff will be unable to satisfy a judgment awarded to him or her; and
- (e) the plaintiff must give an undertaking as to damages.²

In addition to the test above, the conditions precedent to grant a Mareva injunction are: (1) the Court must find the presence of a serious question to be tried; (2) the Court must find that irreparable harm will occur if the injunction is not granted; and (3) the Court must find that the balance of convenience favours the moving party.³

In the 2011 case of *Sibley & Associates LP v. Ross*, the Ontario Superior Court of Justice stated that in cases involving allegations of fraud, such as the scenario being faced by the corporate victim, the requirement that the plaintiff show there is a risk of removal or dissipation of assets can be established by inference, as opposed to direct evidence. Justice Strathy stated the following:

it seems to me that in cases of fraud, as in any case, the Mareva requirement that there be risk of removal or dissipation can be established by inference, as opposed to direct evidence, and that inference can arise from the circumstances of the fraud itself, taken in the context of all the surrounding circumstances. It is not necessary to show that the defendant has bought an air ticket to Switzerland, has sold his house and has cleared out his bank accounts. It should be sufficient to show that all the circumstances, including the circumstances of the fraud itself, demonstrate a serious risk that the defendant will attempt to dissipate assets or put them beyond the reach of the plaintiff.⁴

² *Chitel v Rothbart* (1982), 39 OR (2d) 513 at para. 44, 141 DLR (3d) 269 (Ont CA).

³ *RJR MacDonald Inc. v. Canada (Attorney General)* [1994] 1 SCR 311 at para. 4.

⁴ 2011 ONSC 2951 at para. 63, 334 DLR (4th) 645.

Once a Mareva injunction has been successfully obtained, the order will be served on the financial institution(s) known to be holding the fraudster's assets. Ideally, the specific branch and account numbers will be known and listed in the order; however, an order may also contain a blanket prohibition against the financial institution from dealing with the assets that are subject to the Mareva injunction.

ii) *Interim Preservation of Funds*

The least attractive alternative to a Mareva injunction would be the pursuit of an interlocutory order for the preservation of the funds pending the outcome of litigation.⁵ This is not an attractive option as it would require notice (in some form) to the fraudster. The court will also need to be satisfied that the funds were fraudulently obtained.⁶ For example, Rule 45 of the Ontario *Rules of Civil Procedure* state:

*The court may make an interim order for the custody or preservation of any property in question in a proceeding or relevant to an issue in a proceeding, and for that purpose may authorize entry on or into any property in the possession of a party or of a person not a party.*⁷

The test to grant an order for the preservation of assets is:

1. the assets sought to be preserved constitute the very subject matter of the dispute;
2. there is a serious issue to be tried regarding the plaintiff's claim to that asset;⁸ and
3. the balance of convenience favours granting the relief sought by the applicant or moving party.⁹

Rules also exist in several Canadian provinces regarding the preservation of a specific fund pending litigation. The Ontario *Rules of Civil Procedure* Rule 45.02, Manitoba *Rules of Civil Procedure* Rule 45.02 and the New Brunswick *Rules of Court* Rule 35.03 for example, deal with the interim preservation of specific funds, stating:

*Where the right of a party to a specific fund is in question, the court may order the fund to be paid into court or otherwise secured on such terms as are just.*¹⁰

⁵ Interim custody of property, Alta. Rule (1968) 467; Alta. Rule 6.25; Man. Rule 45.01 Nfld. Rule 22.02; N.W.T. Rule 468; N.S. Rule 42.09; N.S. Rule (1972) 43.04; Ont. Rule 45.01; P.E.I. Rule 45.01; Sask. Rule 387A, 388; Fed. Rule 377, 379.

⁶ In *Croatian (Toronto) Credit Union Ltd. v. Vinski* (2011), 22 CPC (7th) 182, 13 RPR (5th) 307 (SCJ [Comm. List]), the court refused to make an order that certain funds remain after the sale of a property in an alleged mortgage fraud because the court was not satisfied that the funds for the purchase of the property were fraudulently obtained from the plaintiff. The court granted a Mareva injunction instead.

⁷ *Supra* note 5 at Rule 45.

⁸ There is some authority that states you need to demonstrate a strong prima facie case. However, the overwhelming authority has placed the test as "serious issues to be tried".

⁹ *Taribo Holdings Ltd. v. Storage @ccess Technologies Inc.* (2002) 27 CPC (5th) 194, [2002] OJ No. 3886 (Ont. Sup. Ct.)

In Ontario, the test to grant an order to preserve a specific fund pending litigation is comprised of the same three parts as outlined above. Again, as opposed to a motion for a Mareva injunction, the plaintiff is not required to give an undertaking with respect to damages.

iv) Statement of Claim

Injunctive relief will grant the victim security that the asset will exist once judgment is obtained. However, in order to put the money in the hands of the victim an action for fraud must be commenced.

2. CRIMINAL REMEDIES

i) RCMP Investigation

The power to initiate the criminal process lies with the Royal Canadian Mounted Police (RCMP). In order to pursue criminal remedies, the RCMP must commence an investigation. Such an investigation is discretionary and dependent on the circumstances of the crime and the available resources.

The RCMP defines a “major fraud” as including corporate, investment, securities, mass marketing, and credit fraud. The Commercial Crime Branch deals with major fraud of a provincial, national or international significance so long as at least one of the following elements are present:

- (a) the case engages one or more of the RCMP’s strategic priorities i.e. organized crime, national security, etc.;
- (b) there is a substantial value or financial loss;
- (c) there is a substantial impact on victims;
- (d) there is a high degree of criminal sophistication;
- (e) the case requires special investigative expertise;
- (f) a municipal, provincial or federal government is a victim; or
- (g) an investigation would satisfy public or national interests.¹¹

Therefore, the corporate fraud in our fact scenario would fall under the jurisdiction of the Commercial Crime Branch.

¹⁰ *Ibid.*

¹¹Online: <<http://www.rcmp-grc.gc.ca/ccb-sddc/fraud-eng.htm>>.

In November 2012, the RCMP announced their commitment to investigating corporations and white collar criminals through the use of “traditional police investigative techniques and methods, including wiretaps and undercover operations...”¹² Where it is deemed to be warranted, the RCMP will undertake a fulsome investigation. For example, in 2010, the RCMP laid 64 fraud charges against 13 Toronto-area residents following a two-year investigation. The investigation involved the execution of search warrants on 50 bank accounts to identify specific transactions the accused were believed to have been involved in and the examination of thousands of documents for evidence the RCMP believed provided a paper trail for each fraud.¹³

ii) Preservation of Assets by RCMP

The RCMP has the option to seize property or, in the case of bank accounts, subject the accounts to restraint orders.¹⁴ For example, in May 2013, the RCMP moved to freeze both the bank accounts (containing millions of dollars) and the real estate holdings of one former executive of SNC-Lavalin as part of their investigation into alleged fraud, bribery and money laundering of over \$120 million by SNC-Lavalin and two of its former executives.¹⁵

With the use of an affidavit sworn by an RCMP investigator, the RCMP requested a court to freeze four Canadian bank accounts and a family trust belonging to one of the two executives, as well as a bank account in Cairo. Additionally, the RCMP requested that six properties owned by the accused and/or his family members be frozen. Similarly, the RCMP requested that international authorities place a restraining order on a condominium owned in Florida by the same former executive.

iii) Jurisdiction

A Canadian court may have jurisdiction over an accused notwithstanding that an individual is not physically present within Canada at the time of the offence, if the act or omission takes effect within Canada.¹⁶ Therefore, the physical presence of the defendant in Canada is not required, so long as the “effects of his actions” were intentionally felt in Canada.¹⁷ This assists Canadian law enforcement agencies and courts to deal with criminal activities that spread across more than one country’s borders.

The Supreme Court of Canada addressed the concept of territoriality in the 1985 case *Libman v R.*¹⁸ In *Libman*, the Court held:

¹²*Ibid* and from Douglas Quan, “RCMP to use more undercover agents, wiretaps to go after white-collar criminals” *The National Post* (November 25, 2012), online: The National Post <<http://news.nationalpost.com>>.

¹³Major Fraud Investigation Results in 64 Charges (September 3, 2010), online: RCMP <<http://www.rcmp-grc.gc.ca>>.

¹⁴ *Criminal Code* RSC, 1985, c. C.46, s. 490

¹⁵John Nicol and Dave Seglins “RCMP moving to freeze assets in widening SNC-Lavalin probe” *CBC News* (May 23, 2013), online: The CBC <<http://cbc.ca>>.

¹⁶EG Ewaschuk, *Criminal Pleadings and Practice in Canada*, loose-leaf (consulted on September 26, 2013), 2d ed (Toronto: Canada Law Book, 2013), ch. 1 at 32.2. See also section 481.2 of the *Criminal Code*.

¹⁷*Ibid.*

¹⁸[1985] 2 SCR 178, 21 DLR (4th) 174.

*All that is necessary to make an offence subject to the jurisdiction of our courts is that a significant portion of the activities constituting that offence took place in Canada. As it is put by modern academics, it is sufficient that there be a "real and substantial link" between an offence and this country.*¹⁹

The concept of territorial jurisdiction and the real and substantial link test set out in *Libman* was recently discussed by the Ontario Superior Court of Justice in *R v. Karigar*.²⁰ In *Karigar*, the accused was charged under the *Corruption of Foreign Public Officials Act* with offering or agreeing to give bribes to Air India officials. The dealings with such officials occurred in India. The Court accepted jurisdiction stating that the substantial connection link is not limited to the essential elements of the offence.²¹ Rather, territorial jurisdiction is established because almost all the real evidence (including documents and emails) were found and seized in Canada²² and the accused prosecution in Canada would not offend international comity.²³

Offences under the *Criminal Code* that may be prosecuted in Canada even though the offence was committed either wholly or in part outside of Canadian borders include offences such as the possession of property obtained by crime (s.354(1)) of the *Criminal Code*²⁴ which states:

354. (1) Every one commits an offence who has in his possession any property or thing or any proceeds of any property or thing knowing that all or part of the property or thing or of the proceeds was obtained by or derived directly or indirectly from

(a) the commission in Canada of an offence punishable by indictment; or

(b) an act or omission anywhere that, if it had occurred in Canada, would have constituted an offence punishable by indictment.

Under s. 7(7) of the *Criminal Code*, if the accused is not a Canadian citizen, the Attorney General of Canada must consent to the proceedings:

If the accused is not a Canadian citizen, no proceedings in respect of which courts have jurisdiction by virtue of this section shall be continued unless the consent of the Attorney General of Canada is obtained not later than eight days after the proceedings are commenced.

Because, in our fact scenario, there is a bank account and electronic evidence situated in Canada, there is an arguable case connecting the crime to Canada. Additionally, although the location of

¹⁹*Ibid* at para 74.

²⁰2013 ONSC 5199.

²¹*Ibid* at para 39.

²²*Ibid* at para 41.

²³*Ibid*.

²⁴Tim Quigley, *Procedure in Canadian Criminal Law*, loose-leaf (consulted on September 26, 2013), 2d ed (Toronto: Thomson Reuters Canada Ltd, 2005), ch 3 at 17.

the alleged fraudsters is unknown, the *Criminal Code* would permit proceedings to be initiated against the fraudsters. In that regard, the usual criminal charges are available to the Crown: fraud (s. 380), theft (s. 322 and 334), and laundering the proceeds of crime (s. 462.31).

iv) *Criminal Forfeiture*

Criminal seizure, restraint and forfeiture apply to assets derived or obtained either directly or indirectly from the commission of almost all criminal offences.²⁵

Criminal asset forfeiture is primarily conviction-based. Therefore, the Crown must typically obtain a criminal conviction against an offender before seeking a forfeiture order. The Crown must establish that the target of the order either was the result of or was used in the commission of an offence for which the offender was convicted.²⁶

v) *Civil Forfeiture*

Another available remedy to the police and Crown is civil forfeiture. Civil forfeiture requires allegations of criminal wrongdoing, but unlike criminal forfeiture, civil forfeiture does not require a prior criminal conviction.

Civil forfeiture became a remedy in Ontario in 2001 by the introduction of the *Remedies for Organized Crime and Other Unlawful Activities Act*. This act is known today as the *Civil Remedies Act*²⁷ (the "CRA"). Amongst the purposes of the CRA are the compensation of individuals who have suffered either pecuniary or non-pecuniary losses as a result of unlawful activities, and the prevention of persons who engage in unlawful activities and others from retaining property acquired as a result of unlawful activities.²⁸ In Ontario, civil forfeiture legislation focuses solely on the connection between property and unlawful activity, and is not dependant on any criminal charges or convictions.²⁹

Section 2 of the CRA defines unlawful activity as "an act or omission that is an offence under an Act of Canada, an Act of Ontario or another province or territory". The definition also extends to offences in jurisdictions outside Canada provided the conduct there would be an offence if committed in Ontario.³⁰

Civil forfeiture is initiated when a law enforcement agency or a government ministry submits a case to Crown Counsel at the Ministry of the Attorney General. Crown Counsel will then review the case to determine whether to proceed. If so, the case information will be sent to the

²⁵ *Civil Forfeiture in Ontario 2007 – An Update on the Civil Remedies Act, 2001*, online: Ontario Ministry of the Attorney General <<http://www.attorneygeneral.jus.gov.on.ca>> at 4.

²⁶ *Ibid.*

²⁷ RSO 2001, c C-28.

²⁸ *Ibid* at s. 1.

²⁹ Ministry of the Attorney General, News Release, "Civil Forfeiture in Ontario" (July 6, 2011) online: <<http://www.news.ontario.ca>>.

³⁰ *Ontario (Attorney General) v Chaterjee*, 2009 SCC 19 at para. 20.

Ministry's Civil Remedies for Illicit Activities Office. This office will bring proceedings to court on behalf of the Attorney General. Forfeiture proceedings under the CRA are initiated by an application or action under the Ontario *Rules of Civil Procedure*. Proceedings are taken *in rem* against the property itself and can be initiated without joining the owners or possessors as defendants; however, these parties may be added to the proceedings at a later date.³¹

The *Civil Remedies Act* states that the Superior Court of Justice can make an order forfeiting property located in Ontario to the Crown if the Court finds that the property is "proceeds of an unlawful activity."³² The Superior Court of Justice can also make an interlocutory order to preserve the property that is the subject of a forfeiture proceeding, and that such a motion can be made without notice.³³ In civil forfeiture proceedings, the civil standard of proof applies (being on a balance of probabilities).

On September 24, 2013, the Ministry of the Attorney General announced that the Ministry had obtained a court order to recover \$17 million for the victims of an international investment fraud scheme through the *Civil Remedies Act*. Although the money was held in accounts in Canada, as the majority of victims were from the United States and Latin America, the forfeited money would be transferred to the United States Department of Justice for distribution to the victims.³⁴

3. CONCURRENT PROCEEDINGS

Concurrent civil and criminal proceedings arising from the same underlying events are permitted in Canada. Section 11 of the *Criminal Code* of Canada states:

*No civil remedy for an act or omission is suspended or affected by reason that the act or omission is a criminal offence.*³⁵

For example, earlier this year York University accused a former assistant Vice-President of perpetrating a fraud scheme. York launched a civil lawsuit against the ring leader (the former assistant VP) and a number of his co-conspirators for more than \$3 million for their alleged role in the fraud. At the same time, Toronto police charged the assistant VP and one of his alleged co-conspirators with fraud and laundering the proceeds of crime in connection with the same alleged fraud.³⁶

A serious consideration regarding running civil and criminal proceedings concurrently include the fraudsters claiming that they may suffer prejudice in the form of unwanted additional publicity or by being forced to simultaneously defend both proceedings. As a result, the accused

³¹*Ibid* at para. 21.

³²*Civil Remedies Act* at s. 3.

³³*Ibid* at s. 8.

³⁴Ministry of the Attorney General, News Release, "Attorney General Recovers \$17 Million for Victims of Ponzi Scheme" (September 24, 2013) online: <<http://www.news.ontario.ca>>.

³⁵RSC 1985, c. C-46.

³⁶Tony Van Alphen, "Judge says York didn't have to pay big severance to accused former executive", *The Toronto Star* (January 24, 2013) online: Toronto Star <<http://www.thestar.com>>.

James Bradshaw and Timothy Appleby, "Former York U managers cleared on fraud charges", *The Globe and Mail* (May 1, 2013) online The Globe and Mail <<http://www.theglobeandmail.com>>.

may request a stay of the civil trial until the completion of the criminal proceedings. In our fact scenario, the fraudsters cannot be found so this would not be a defence brought about by them. It is beyond the scope of this paper to explore the arguments available to both parties in such a situation.

4. JOINT EFFORTS OF THE INTERNATIONAL TEAM

i) Mutual Legal Assistance

If a foreign state or entity that is party to an agreement with Canada respecting mutual legal assistance in criminal matters requires assistance in an investigation, a request can be made to the Ministry of Justice. The International Assistance Group, which is part of the Federal Prosecution Service at the headquarters of the Department of Justice, will then review, administer and coordinate each request for assistance.³⁷

There are specific principles that provide a framework for mutual legal assistance in Canada.³⁸ These principles include:

- (a) Dual criminality: as a general rule, dual criminality is not required, however, a treaty may create exceptions in certain cases;
- (b) The observation of relevant *Charter* provisions: in particular, ss. 9, 11(c) and 13; and
- (c) Confidentiality: The existence and nature of the request is subject to confidentiality. Disclosure of the request may only be made when a court file has been opened in Canada and has *not* been ordered sealed by the court. In addition, the information gained from a request can only be used for the purpose for which it was sought.

The Mutual Legal Assistance ("MLA") treaty process has been judicially criticized by the Supreme Court of Canada. In *Global Securities Corp v British Columbia (Securities Commission)*³⁹, a case dealing with the issue of whether a provincial securities commission may legally gather information for securities regulators in other jurisdictions, Justice Iacobucci discussed the means by which information can be shared inter-jurisdictionally. He characterized the MLA process as a "relatively formal, cumbersome set of procedures that lack the efficiency of inter-agency administrative cooperation pursuant to MOUs [memoranda of understanding]."⁴⁰

³⁷ *Halsbury's Laws of Canada*, Extradition and Mutual Legal Assistance (Botting), (Canada: LexisNexis Canada Inc, 2011) at HEX-73. The IAG was established in 1988 under the Department of Justice's Federal Prosecution Service specifically to carry out the functions assigned to the MOJ as the central authority for Canada under the Act. The IAG deals only with requests for assistance in criminal matters.

³⁸ Information Exchange Network, "Principles for Providing a Framework for Mutual Legal Assistance and Extradition and More Information: Canada 2004", online: <http://www.oas.org/juridico/mla/en/can/en_can-mla-gen-g8iag.html#_Toc79050594>.

³⁹ 2000 SCC 21 at para. 29, [2000] 1 SCR 494.

⁴⁰ *Ibid* at para. 29

ii) Test to Approve Requests for Search, Seizure and Evidence for Use Abroad

Where a foreign state or jurisdiction makes a request to Canada for a search and seizure order, or the use of any device or investigative technique in Canada and the Minister of Justice approves this request, the Minister must provide a “competent authority” with any documents or information necessary to apply for a search or other warrant. Therefore, once the Minister of Justice approves the request, the Attorney General of Canada (or attorney general of a province) as the “competent authority” applies *ex parte* for a search warrant before a judge of a superior court where it is believed that the evidence sought may be found.⁴¹

Before a judge will issue a search or other warrant, the judge must be satisfied there are reasonable grounds to believe that:

- (a) an offence has been committed;
- (b) evidence of the commission of the offence or information that may reveal the whereabouts of a person who is suspected of having committed the offence will be found in a building, receptacle or place in the province; and
- (c) it would not, in the circumstances, be appropriate to make an order under subsection 18(1) (evidence for use abroad).⁴²

When a state or entity requests evidence regarding an offender, an application must be made *ex parte* for an order for the gathering of such evidence to a judge of a province in which it is believed that all or part of the evidence may be found.⁴³

Section 18(1) of the *Mutual Legal Assistance in Criminal Matters Act*⁴⁴ states that where a judge may make an order for the gathering of evidence where satisfied that there are reasonable grounds to believe that:

- (a) an offence has been committed; and
- (b) evidence of the commission of the offence or information that may reveal the whereabouts of a person who is suspected of having committed the offence will be found in Canada.⁴⁵

⁴¹*Canada (Attorney General) v Hudak*, 2004 BCSC 960 and *supra* note 65 at s 11(2).

⁴²*Mutual Legal Assistance in Criminal Matters Act* at s. 12(1).

⁴³*Ibid* at s. 17(2).

⁴⁴RSC 1985, c 30 (4th Supp).

⁴⁵*Ibid* at s. 18(1).

iii) Test to Approve Foreign Orders for the Restraint, Seizure and Forfeiture of Property Located in Canada

When a written request by a criminal court is received by the Minister of Justice for the enforcement of an order for the restraint or seizure of property located in Canada, the Minister of Justice may authorize the Attorney General of Canada or an attorney general of a province to make arrangements for the enforcement of the order.⁴⁶

There are conditions that must be satisfied before the Attorney General of Canada (or an attorney general of a province) will make arrangements for the enforcement of an order for restraint or seizure are set out in s.9.3(3) of the *Mutual Legal Assistance Act*. The two conditions are that:

- (a) the person has been charged with an offence within the jurisdiction of the state or entity requesting enforcement of the order; and
- (b) the offence would be an indictable offence if it were to be committed in Canada.⁴⁷

In addition to satisfying the conditions outlined above, where a written request is presented to the Minister by a state or entity for the enforcement of an order of forfeiture of property situated in Canada, an additional condition of “the conviction and the order not being subject to further appeal”⁴⁸ must be met before an order will be registered by the Attorney General of Canada (or an attorney general of a province) for the forfeiture of property.

The *Mutual Legal Assistance Act* set out grounds under which the Minister of Justice may refuse a request for forfeiture. Amongst the enumerated grounds include:

- (b) if the Minister of Justice is of the opinion that enforcement of the order would prejudice an ongoing proceeding or investigation;
- (c) if the Minister of Justice is of the opinion that enforcing of the order would impose an excessive burden on the resources of federal, provincial or territorial authorities.⁴⁹

The Act applies to requests made by a state or entity pursuant to an agreement. Under the Act, an agreement means a treaty, convention or other international agreement that is in force, to which Canada is a party and that contains a provision respecting mutual legal assistance in

⁴⁶*Ibid* at s. 9.3(1).

⁴⁷*Ibid* at s. 9.3(3).

⁴⁸*Ibid* at s. 9.4(5)(c).

⁴⁹*Ibid* at s. 9.4(2).

criminal matters.⁵⁰ As of July 2013, Canada has entered into 57 bilateral mutual legal assistance treaties.⁵¹

iv) Treaty Between Canada and the US

The *Treaty Between the Government of Canada and the Government of the United States of America on Mutual Legal Assistance in Criminal Matters*⁵² (the “**Treaty**”) requires that both Canada and the US provide mutual assistance in all matters relating to the investigation, prosecution and suppression of offences. The Treaty provides that assistance pursuant to other agreements, arrangements, or practices may also be given (i.e. less formal means of assistance such as by way of letters of request).⁵³ It further provides a general procedure by which requests for assistance may be made.⁵⁴

Article XVII of the Treaty outlines the obligation on behalf of both Canada and the United States to notify and assist one another where proceeds of crime are believed to be located in the other country:

1. The Central Authority of either Party shall notify the Central Authority of the other Party of proceeds of crime believed to be located in the territory of the other Party.
2. The Parties shall assist each other to the extent permitted by their respective laws in proceedings related to the forfeiture of the proceeds of crime, restitution to the victims of crime, and the collection of fines imposed as a sentence in a criminal prosecution.⁵⁵

Canada may only confiscate the proceeds of criminal offences where the foreign jurisdiction makes its request under a treaty or convention. The person whose property is to be confiscated must have been criminally convicted by the requesting country. Before Canada will take action on the request, the requesting country must also provide Canada with a confiscation order issued by a criminal court from within their jurisdiction. Dual criminality is a requirement when asking Canada to enforce a foreign confiscation order.⁵⁶

Section 11 of the *Seized Property Management Act*⁵⁷ enables Canada to, on a reciprocal basis, share forfeited proceeds of crime with other countries where the law enforcement agencies in the

⁵⁰*Ibid* at s. 2(1).

⁵¹Government of Canada, “Canada Treaty Information”, online: <<http://www.treaty-accord.gc.ca>>.

⁵²*Treaty between the Government of Canada and the Government of the United States of America on Mutual Legal Assistance in Criminal Matters*, Canada and the United States, 18 March 1985, E101638 – CTS 1990 No 19, art I.

⁵³*Ibid* at article III.

⁵⁴*Ibid* at article VI.

⁵⁵*Treaty Between the Government of Canada and the Government of the United States of America on Mutual Legal Assistance in Criminal Matters*, Canada and United States, E101638 - CTS 1990 No.19.

⁵⁶G20 Anti-Corruption Group, *Requesting Mutual Legal Assistance in Criminal Matters from G20 Countries: A Step-By-Step Guide*, 2012 at 25.


⁵⁷RSC 1993, c-37.

other country have aided in the investigation of offences leading to the forfeiture. According to s. 7(1) of the *Forfeited Property Sharing Regulations*,⁵⁸ to determine the sharing breakdown, the Attorney General of Canada will assess the contribution of the Canadian government and each of the relevant jurisdictions that participated in the investigation to determine:

- (a) the nature of information provided by the agencies of the Government of Canada and each jurisdiction, and the importance of that information; and
- (b) the participation by the agencies of the Government of Canada and each jurisdiction in the investigation and prosecution that lead to forfeiture or the imposition of a fine.

The Attorney General will then assign a percentage to represent the contribution of the Canadian Government and of each relevant jurisdiction as follows:

- (a) where the contribution of the Government of Canada or a jurisdiction constitutes the predominant portion of the total contribution, it shall be considered to be 90 per cent;
- (b) where the contribution of the Government of Canada or a jurisdiction constitutes a significant portion of the total contribution, it shall be considered to be 50 per cent; and
- (c) where the contribution of the Government of Canada or a jurisdiction constitutes a minimal portion of the total contribution, it shall be considered to be 10 per cent.⁵⁹

Author	Caroline E. Abela
	<p>Caroline leads the firm's Anti-Corruption, Anti-Money Laundering and Regulatory Compliance group. Her litigation practice focuses on complex business litigation, with an emphasis on multi-jurisdictional disputes. Caroline has been successful in obtaining injunctions and an injunction which restrained a foreign plaintiff from interfering in foreign proceedings. She has appeared as counsel before all levels of courts in Ontario, as well as the Federal Court of Canada.</p> <p>Contact Caroline at 416.947.5068 or cabela@weirfoulds.com</p>

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⁵⁸SOR/1995-76, s. 7(1).

⁵⁹Ibid at s. 7(1)(3).