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1 Money Laundering, Asset Forfeiture and Compliance I

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I. Introduction[1]

This paper surveys criminal asset forfeiture in Canada. Asset forfeiture deprives an offender of the proceeds of their offence as well as the instrumentalities that enabled the offence. Broadly speaking there are two classes of forfeitable assets in Canada:

- (Proceeds of crime (sometimes referred to in this paper as PoC); and
- Offence-related property, ORP, which are instrumentalities used in indictable offences as well as serious distribution and production drug offences.

Where forfeiture is impractical, the courts can order a fine in lieu of a forfeiture; if that fine isn't paid, the offender faces additional consecutive jail time. In other words, a potential penal sanction provides an incentive to repatriate assets that have been hidden, offshore or otherwise. There are a myriad of offence-specific forfeiture provisions which this paper doesn't cover.[2] That said, the strength of Canadian criminal forfeiture legislation is that specific provisions are not mutually exclusive in the face of general provisions. The authors of this paper have considerable experience with forfeiture issues from three perspectives, policing, prosecuting and civil forfeiture.

The word forfeiture has roots in the word felony. The Saxon words fee (landholding) and lon (price) combine to define an act or omission that could result in the loss of property. Saxon and Scandinavian jurisprudence survived the Norman invasion of 1066 and forfeiture became part of the law in feudal England. Not only would the death penalty visit those convicted of treason against the King, their land and holdings could be forfeited; a treason conviction meant that one could not pass wealth on to one's heirs. In modern terms, criminal asset forfeiture is a consequence visited upon convicted criminals, denying or invalidating their interests in property implicated in crime. Criminal asset forfeiture generally occurs in one of two ways: as an order against a person's assets following conviction or as an in-rem order (against the thing itself as opposed to the thing's owner). Canada adopted much of our current regime in 1989, following the Vienna Convention on drug trafficking. Canada prohibited money laundering related to drugs and allowed for the forfeiture of drug proceeds. Amendments in 2002 built the basis for the current criminal asset forfeiture law around proceeds. ORP provisions were first introduced in 1997 and refined through amendments in 2001 and 2007.[3] Criminal asset forfeiture represents a

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[1] Simser, Jeffrey; Valiquette, Gary; Mauti, Frank. The views expressed in this article are those of the authors and do not represent the views of their employer (the Government of Ontario) or former employer (Toronto Police Service). Jeffrey Simser is a civil lawyer and Gary Valiquette is an assistant crown attorney both with the Ministry of the Attorney General; Frank Mauti is a retired Toronto Police Service officer with extensive experience investigating proceeds of crime cases. The authors are grateful for the editing efforts of our friend (and a subject-matter expert in his own right) Stephen Sterling.

[2] Examples of specific forfeiture provisions range from ammunition (s. 491) to devices to obtain unlawful access to computer services (s. 342.2) through to terrorism offences (s. 83.14) and weapon offences (s. 115). General section references in this paper refer to the Code, formally cited as the *Criminal Code* R.S.C., 1985, c. C-46.

[3] *R. v. Craig*, [2009] 1 SCR 762.

recognition by Parliament that basic criminal penal sanctions were inadequate to attack criminal organizations and deter modern criminal activities.[4]

Generally speaking, criminal asset forfeiture, sometimes referred to as conviction-based forfeiture, allows a court to forfeit certain categories of asset related to a crime for which a conviction has been obtained,[5] namely property that enabled crime (offence-related property or ORP) or property derived from crime (POC or proceeds of crime). Criminal asset forfeiture has a number of policy objectives:

- **Profit Motive**: criminal forfeiture ensures that "crime does not pay" by removing the profit-making motive or fruits of the crime. A significant amount of criminal activity is acquisitive. Asset forfeiture allows the state to separate the fruits of the crime from the offender as well as third parties in possession of PoC or ORP.
- **Disruption**: organized crime poses a real and daunting challenge to law enforcement, civil society, democratic institutions and the rule of law. Asset forfeiture disrupts organized crime.
- **Deterrence**: criminals and their enablers, seeing assets taken away, are deterred.
- **Incapacitation**: money and instruments of crime are the lifeblood of organized crime; a well-run criminal organization will deploy expendable foot soldiers to protect the operating minds of the enterprise. Asset forfeiture disrupts organized crime in three ways: the enterprise must spend time, energy and resources to hide or launder their money; the "glue" that keeps the criminal organization together, money, is disrupted; finally, the operating minds of the enterprise are impacted.[6]

Proceeds of crime and money laundering legislation are foundational in the fight against organized crime.[7] The tools are there. The challenge for Canadian law enforcement is implementation:

- proceeds of crime investigations are resource-intensive and require specialist skills;
- prosecutions are complex, involve voluminous disclosure and are intensely contested;
- there is rarely "low-hanging fruit" amongst sophisticated criminals; the operating minds of the enterprise have long learned to separate their lines of business (for example, drug couriers typically run independently of money couriers as a risk mitigation device); and finally
- financial investigations are often outside the comfort zone for prosecutors, judges and investigators swamped with routine cases.

A. What is Criminal Asset Forfeiture?

Canada's general criminal law has been codified under a Criminal Code (the "Code")[8] for more than a century. The Code's criminal asset forfeiture provisions permit a court, under certain circumstances, to restrain, seize and forfeit specified property implicated in criminal activity. Virtually any type of property can be attached in this

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[4] Simser, J *Civil Asset Forfeiture in Canada* (Toronto: Canada Law Book—loose leaf first published in 2012) at 1:20.10; German, P *Proceeds of Crime and Money Laundering* (Toronto: Thomson Reuters, loose leaf first published in 1998) p. 2-1 to 2-15; Hubbard,R; Murphy, D ODonnell, F; DeFreitas *Money Laundering and Proceeds of Crime* (Toronto: Irwin Law, 2004)pp. 79-82. Note: as discussed below, there can be forfeiture even if there's property not directly related to the crime for which a conviction was obtained. See for example sections. 491.1(2) or 462.37(2) of the Criminal Code R.S.C., 1985, c. C-46 (the "Code").

[5] Criminal asset forfeiture being conviction-based has several *in rem* exceptions, for example: criminally tainted property under section 490(9) of the Code; absconding and deceased defendants under section 490.2 of the Code or section 17 of the CDSA (*Controlled Drugs and Substances Act*, SC 1996, c 19).

[6] Cassella, S *Overview of Forfeiture* (Washington: International Law Institute, November 7, 2018).

[7] Earlier versions of the Code used "enterprise crime" as a restrictive gateway definition, but that approach was repealed in 2001, c. 32, s. 12(2).

[8] As a colony Canada inherited the British common law approach which was reformed in the 19th Century through a codification process, hence the Code.

regime, from simple things like cash through to more complex property, like virtual currencies and websites. The court extinguishes the offender's interest in the property. Property law abhors a void. Forfeiture fills the void by passing title to the state.

The Supreme Court of Canada in *Quebec (Attorney General v. Laroche)*,[9] made clear that the purpose of criminal asset forfeiture for proceeds was much broader than mere punishment and included:

- Ensuring crime doesn't pay by, amongst other things, focusing on the property and not just on the offender;
- Neutralizing "criminal organizations by taking the proceeds of their illegal activities away from them;" and,
- Recognizing that to be effective, the forfeiture tools need to be speedy, accessible and applied before assets disappear.

In respect of ORP, the purpose of depriving the offender of the tools or instruments of crime is three-fold:[10]

- Punitive by depriving the offender of ORP;
- A deterrent, by increasing the cost of doing crime; and
- To prevent future crime, by taking away the tools for recommitting the crime.

B. Proceeds and ORP

The definition of a "proceed of crime" has been drafted in very broad terms:

> means 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.[11]

Designated offences include all federally indictable offences as well offences designated (or excluded) by regulation.

This definition is not a net concept and captures both the profit and the cost or investment to the offender in the commission of the crime. As one court noted:

> The proceeds of crime provisions in the *Criminal Code* recognize that a very large amount of criminal activity is motivated by greed and profit and that allowing an offender to retain the fruits of his crimes is extremely unsound public policy. The breadth of the definition in the *Criminal Code* recognizes the fact that profit-motivated criminals in general and money-launderers who work for them in particular can be very creative in concealing, moving, converting and seemingly legitimizing the profits of their crimes. Thus, the very broad definition of "proceeds of crime" in the *Criminal Code*, which very intentionally denies the offender the ability to retain his profits by mere conversion.[12]

There are also specific offences in the Code related to money laundering and the possession of property obtained by crime (see 2.1 and 2.2 below).[13] No conviction for these particular offences is required as a precondition for forfeiture.

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[9] [2002] 3 SCR 708, 2002 SCC 72 see paras 25 and 26.

[10] *R. v. Gisby* (2000), 148 C.C.C. (3d) 549 (Alta.CA), at paras. 19-21.

[11] S. 462.3. Designated offences are, generally, offences that could be prosecuted as indictable offences.

[12] *R. v. Honickman*, 2015 ONCJ 770 at para 33.

[13] Code ss. 462.31 and s. 354. See for example *R. v. Daoust*, [2004] 1 SCR 217.

Globally there is a category of property known in some jurisdictions as instruments or instrumentalities which can also be forfeited criminally in Canada as offence-related property (ORP). In a case called *Trac*, the courts describes the definition of ORP as "broad and reaches any property used in any manner in connection to the commission of an indictable offence".[14] Offence-related property can be defined either by its intended or actual use and is conceptually broader than proceeds of crime (PoC). All proceeds are ORP but not all ORP are proceeds. ORP is defined in section 2 of the Code as follows:

> offence-related property means any property, within or outside Canada,
>
> (a) by means or in respect of which an indictable offence under this Act or the Corruption of Foreign Public Officials Act is committed,
>
> (b) that is used in any manner in connection with the commission of such an offence, or
>
> (c) that is intended to be used for committing such an offence;

ORP can be forfeited following conviction or as part of a separate *in rem* proceeding (see 2.8 below).[15]

C. Other Forms of Forfeiture

There are other forms of forfeiture not discussed in this article. There are stand-alone conviction-based forfeiture provisions. Civil asset forfeiture allows a court to forfeit, in an *in rem* proceeding, the proceeds and instruments of unlawful activity. Such proceedings are brought in the civil courts and are independent of the criminal justice process.[16] Forfeiture is a tool used to protect national borders from a customs, excise and smuggling perspective.[17] Forfeiture also protects Canadian national security, making property used or possessed for terrorist purposes forfeitable.[18] Forfeiture can support regulatory systems. Canada recently allowed regulated sales of Cannabis and forfeiture was one of the regulatory tools given to support the system.[19] There are a variety of other systems, regulating everything from imitation firearms through to wildlife conservation.[20]

D. Law Enforcement in Canada

Canada, as a federal state, constitutionally divides powers and responsibilities across three levels of government: the federal government (which passes criminal laws), ten provinces and three territories (which prosecute criminal laws) and local authorities (like the City of Toronto).[21] Law enforcement in Canada is layered through the three levels of government. The Royal Canadian Mounted Police (RCMP) is the national police which is responsible for enforcing federal criminal laws (federal statues) nationwide and in some jurisdictions also acts as a provincial and local police force (in parts of Western, Eastern and Northern Canada). Some provinces, like Ontario and Quebec in central Canada, have both provincial and local police forces. Some have criticized the RCMP lack of

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[14] *R. v. Trac*, 2013 ONCA 246.

[15] Code ss. 490.1 and 490.2.

[16] Nine Canadian provinces and Territories have a civil forfeiture regime: Simser, J *Civil Asset Forfeiture in Canada* (Toronto: Canada Law Book—loose leaf first published in 2012).

[17] See for example section 90 of the *Excise Act*, RSC 1985, c E-14, Part 2 of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, SC 2000, c 17 which requires people entering Canada to report cash and financial instruments over $10,000. See also *Martineau v. M.N.R.*, [2004] 3 SCR 737, 2004 SCC 81.

[18] Code ss. 83.03 and 83.04.

[19] See section 16 of *Cannabis Control Act, 2017*, SO 2017, c 26, Sch 1.

[20] *Imitation Firearms Regulation Act*, 2000, SO 2000, c 37; *Fish and Wildlife Conservation Act*, 1997, SO 1997, c 41.

[21] This is an intentional simplification: federal prosecutors handle drug offences; provincial legislatures pass regulatory and quasi-criminal laws; for some criminal offences, either a federal or provincial prosecutor may act. See ss. 91 and 92 of The Constitution Act, 1867, 30 & 31 Vict, c 3.

resources devoted to proceeds of crime and money laundering investigations.[22] Many large urban Canadian police agencies have small specialized proceeds of crime units while others collaborate with other policing agencies with the training and expertise to investigate and follow the money. For example, the Ontario Provincial Police has a specialized integrated Asset Forfeiture Unit that is dedicated to proceeds of crime and is supplemented with members of municipal and regional police forces in Ontario. Resource limitations mean that Canadian law enforcement does not investigate flows beyond our borders with a regularity or fluency commensurate with the problem. Not only are offshore investigations resource intensive to conduct, sharing the necessary information to obtain cooperation in some jurisdictions will put the investigation itself at risk. As asset tracing can be challenging, net-worth techniques (discussed below) can be an effective way to investigate proceeds of crime, particularly if there is a cross-border dimension to a case.

E. Regulatory Oversight and Anti-Money Laundering (AML) Efforts

Regulatory barriers to keep dirty money out of the financial system compliment criminal asset forfeiture. Money laundering, the act of transforming or disguising the illicit origins of property so that the asset moves beyond the reach of law enforcement, is a serious issue around the world. Canada, to honor international obligations,[23] created a financial intelligence unit (FIU) in 2000 called the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC). FINTRAC's mandate is to assist law enforcement and government agencies in the detection, prevention and deterrence of money laundering and terrorist financing activities. This FIU acts as a regulator, requiring certain business sectors to have anti-money laundering (AML) programs which include monitoring monetary transactions, keeping records and filing transaction reports with FINTRAC. Regulated financial entities must develop a 'risk-based approach' and adhere to a 'know your customer' philosophy. FINTRAC fulfills its statutory mandate by analyzing the data currency and suspicious transactions reports as well as voluntary information reports and disclosing that analysis to law enforcement.[24] This "pass-through" technique denies front-line law enforcement the ability to directly access information. Law enforcement rely wholly on the ability of the non-law enforcement (analyst) staff at FINTRAC to properly find, identify and disclose information relevant or necessary to a given investigative target.

FINTRAC collects and is meant to analyze:

- Suspicious Transaction Reports filed where there are reasonable grounds to suspect that a transaction or an attempted transaction is related to the commission or attempted commission of a money laundering offence or a terrorist activity financing offence.
- Large Cash Transactions filed for transactions involving $10,000 or more in cash over a twenty-four-hour period.
- International Electronic Funds Transfers submitted for cross border transfers of $10,000 (Cdn) or more.
- Terrorist Property reports filed for property that is or is suspected to be involved in terrorism.[25]
- Casino Disbursements submitted for transactions of $10,000 (Cdn) or more.

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[22] *No federally funded RCMP officers dedicated to money laundering in B.C., report reveals* CBC News: *https://www.cbc.ca/news/canada/british-columbia/peter-german-money-laundering-report-2019-1.5089036*.

[23] See: *https://www.fatf-gafi.org/* For information on FIUs see: *https://egmontgroup.org/en*.

[24] *Standing Committee on Finance Confronting Money Laundering and Terrorist Financing: Moving Canada Forward* (Ottawa, 42nd Parliament, 1st Session, November 2018); *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, SC 2000, c 17 created FINTRAC and the regulatory overlay; see also Simser, J in this publication, William H. Byrnes & Robert J. Munro, (eds) *Money Laundering, Asset Forfeiture and Recovery and Compliance—A Global Guide* Ch. TOPIC 12: CANADA'S AML FRAMEWORK (Matthew Bender 2018).

[25] Part II.1 of the Code.

Voluntary information reports, VIRs, are also submitted to FINTRAC from law enforcement and government agencies as part of a 'sharing'[26] process in the hope of receiving in return relevant designated financial information/intelligence (disclosure) from FINTRAC. There are ways in which the process can be improved. If FINTRAC discloses 'tombstone' data to law enforcement (e.g. account numbers, name of the account holder, date, time, place and value of the transaction), it is likely that law enforcement will need to engage in another round of investigation (e.g. search warrants on banks and so on); several rounds are required if transactions cross borders. The Financial Action Task Force (FATF) in their 2016 Evaluation of Canada noted this as a weakness in the Canadian system.[27] FINTRAC as an agency operates at an arm's length from law enforcement and other partners. Once the statutory threshold for a disclosure is met, FINTRAC must provide information to police and also to tax authorities (Canada Revenue Agency or CRA), Canada Border Services Agency, the Communications Security Establishment (addresses national intelligence), securities regulators and foreign FIUs. As discussed in section 5.1 below, Canada still needs to enact a number of transparency measures to make AML efforts effective.

F. Taxation

CRA is Canada's federal tax authority and can disclose information to law enforcement under certain circumstances. Tax information can be vital to any financial crime investigation, supporting asset identification, and fines in lieu of forfeiture. A criminal could well under-report his or her income to CRA, particularly if the source of same is illegal. Tax information assists an investigator navigate between the known holdings and properties of an investigative target and formally reported income. The disparity in the net-worth of a target can support a proceeds investigation and ultimately forfeiture.[28] Accounts used to hold, launder or hide proceeds of crime are susceptible to forfeiture. The *Income Tax Act*[29] permits CRA disclosure to law enforcement investigators of taxpayers' information where criminal proceedings have been commenced by the laying of charges and where tax information would be relevant. There is also a *Criminal Code* process for investigators to obtain disclosure where no charges have been laid but the investigation is ongoing for a limited category of very serious crimes, including some drug and criminal organization offences.[30]

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[26] FINTRAC (*http://www.fintrac-canafe.gc.ca/intro-eng.asp*) can collect from the public or from law enforcement. An investigator cannot 'request' information from FINTRAC, but by providing information to FINTRAC through a VIR, the FINTRAC analyst will understand the investigator's interests and can examine the data base for pertinent information that could be disclosed if there are reasonable grounds for the analyst to suspect that the information would be relevant to investigating or prosecuting a money-laundering or terrorist-financing offence.

[27] FATF *Canada Mutual Evaluation Report, Anti-Money Laundering and Counter-Terrorist financing measures*, September 2016: *http://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-Canada-2016.pdf*.

[28] By the means of the net-worth equation of asset minus liabilities equals to the person's equity. (A-L=E) Therefore what he owns minus what he owes is equal to his net-worth.

[29] *Income Tax Act* R.S.C., 1985, c. 1 (5th Supp.) s. 241(3).

[30] Code, s. 462.48.

II. Proceeds of Crime

Proceeds of crime provisions enable the disgorgement of property to which, given its provenance, an offender was never entitled. The Supreme Court of Canada stated:

> Parliament's intention in enacting the forfeiture provisions was to give teeth to the general sentencing provisions. While the purpose of the latter provisions is to punish an offender for committing a particular offence, the objective of forfeiture is rather to deprive the offender and the criminal organization of the proceeds of their crime and to deter them from committing crimes in the future. The severity and broad scope of the provisions suggest that Parliament is seeking to avert crime by showing that the proceeds of crime themselves, or the equivalent thereof, may be forfeited.[31]

The Code and the Controlled Drugs and Substances Act (CDSA) have a number of forfeiture provisions that operate in cascading fashion. Consider this relatively simple of case of a convicted drug dealer:

- The defendant was convicted on three counts related to trafficking drugs (marijuana and fentanyl).[32]
- Police had intercepted a package of drugs destined for the defendant.
- His apartment was then searched under a warrant and amongst other things police seized $60,550 in cash.
- As the matter proceeded to trial, the court authorized the defendant's lawyer to access $49,790.63 for legal fees.[33]
- The prosecutor sought forfeiture of the remaining $10,759.37.
- The convictions pertained to directly to drugs that were intercepted (the accused didn't get the opportunity to sell them on), so the court could not directly link the cash to the offence for which the defendant was convicted.[34] Had they related to the offence, the criminal court could have forfeited the property on a civil standard of proof.
- However, the court was permitted to forfeit the cash if, on a criminal standard of proof, the property was otherwise a proceed of crime.[35] In this case, the crown had not led adequate evidence but the defendant had admitted, in his own testimony, that $45,000 of the cash pertained to his drug dealing.
- The Code also permits the court to order a fine in lieu of forfeiture where property is not available for forfeiture. The court made such an order (for roughly $35,000) noting that a release for legal fees did not

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[31] *R. v. Lavigne*, [2006] 1 SCR 392.

[32] *R. v. Olvedi*, 2018 ONSC 6330.

[33] Code s. 462.34.

[34] Code s. 462.37(1).

[35] Code s. 462.37(2).

relieve the defendant of his obligations.[36] As will be discussed below, if the additional money is willfully not paid by the defendant, he will face a longer criminal sentence (in this case an additional 12 months).[37]

- **Possession of Proceeds of Crime: the Offence**

While not directly related to criminal forfeiture, the Code provides an offence for defendants who have in their:

> 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.[38]

This provision is often applied to the possession of stolen property[39] as well as proceeds.[40]

- **The Offence of Laundering the Proceeds of Crime**

Again, not specifically a forfeiture matter, the Code sets out a money laundering offence. The key elements of the offence are:

- That the accused dealt with property or the proceeds of property;
- That the property was obtained by crime;
- That the accused knew or believed that the property was obtained by crime; and,
- That the accused intended to conceal or convert the property.[41]

Obviously, there are immense levels of detail to unpack to more fully understand the provisions (indeed the possession offence noted in the previous section is more commonly used because there are fewer legal elements to prove and the penalty is identical). Dealing with the property includes an accused who "uses, transfers the possession of, sends or delivers to any person or place, transports, transmits, alters, disposes of or otherwise deals with, in any manner and by any means."[42] In *R. v. Tejani* the court observed that Parliament intended to "cast a wide net" to prohibit the laundering of the proceeds of crime.[43] In *R. v. Daoust*,[44] the Québec Court of Appeal stated that the purpose of the money laundering provision in the *Code* was to prevent offenders from placing their proceeds of crime beyond reach of the Courts and the police. The scope of property obtained by crime includes an international dimension based on dual criminality: if a crime occurred outside of Canada (but

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[36] R. v. Rafilovich, 2017 ONCA 634 appealed to the SCC: Yulik Rafilovich v. Her Majesty the Queen, 2018 CanLII 61051 (SCC).

[37] Code s. 462.37(3) and (4).

[38] Code s. 354: Part XII.2 used to have a stand-alone possession of proceeds of crime offence. However, it was repealed by Parliament as the definition in 354 of the Code captured the same offence.

[39] For example, R. v. Kenegarajah, 2018 ONCA 121 (leave to appeal to SCC denied May 2019-38399).

[40] A defendant was sentenced for cocaine dealing and possession of proceeds of crime; the total sentence for one defendant was 10 years, with a concurrent sentence of one year for possessing $60,000 in cash. *R. v. Ursino and Dracea*, 2019 ONSC 1171.

[41] The Code, s. 462.31. Bill C-97, if passed, would add an element of recklessness. *R. v. Barna*, 2018 ONCA 1034 see also *United States of America v. Dynar*, [1997] 2 SCR 462; *Maranda v. Richer*, [2003] 3 SCR 193; *R. v. Daoust*, [2004] 1 SCR 217.

[42] Code s. 462.31 (1).

[43] (1999), 138 C.C.C. (3d) 366 (Ont. C.A.), leave to appeal dismissed, [1999] S.C.C.A. No. 509, Laskin J.at para 233. See also *R. v. Drakes* [2006] O.J. No. 129 (Sup.Ct.) at para. 223.

[44] [2002] J.Q. No. 447 (C.A.), aff'd [2004] 1 S.C.R. 217 (S.C.C.).

would have been a crime if committed in Canada) a charge could be laid in respect of the proceeds laundered in Canada. An accused who was willfully blind to the origin of property can be found to have committed an offence.[45]

- **International Assistance**

Canadian law enables mutual legal assistance requests where a treaty exists with another country (bilateral or multilateral) or where requests are based in conventions (like the UN Convention against Corruption) or emanate from bodies like the International Criminal Court.[46] Under the Mutual Legal Assistance in Criminal Matters Act[47] ("MLACM") a government who holds a treaty with Canada and has obtained their own order to restrain or seize assets in Canada can seek Canadian assistance in enforcing those orders. The jurisdiction must proceed through a written request and the Canadian Attorney General must be satisfied that the person has been charged with an offence in that country which would be an indictable offence in Canada. There is a similar process where an order of forfeiture has been obtained in the foreign jurisdiction and the assets are in Canada, but the Attorney General is given a number of grounds on which to refuse to enforce the order:

> The Minister shall refuse the request if he or she
>
> (a) has reasonable grounds to believe that the request has been made for the purpose of punishing a person by reason of their race, sex, sexual orientation, religion, nationality, ethnic origin, language, color, age, mental or physical disability or political opinion;
>
> (b) is of the opinion that enforcement of the order would prejudice an ongoing proceeding or investigation;
>
> (c) is of the opinion that enforcement of the order would impose an excessive burden on the resources of federal, provincial or territorial authorities;
>
> (d) is of the opinion that enforcement of the order might prejudice Canada's security, national interest or sovereignty; or
>
> (e) is of the opinion that refusal of the request is in the public interest.[48]

For countries that do not have treaties with Canada, short-term administrative arrangements can be entered into. Law enforcement can respond to a non-treaty request for voluntary assistance, a step that can build a relationship for future cooperation. That said, such an arrangement will have limitations; for example, the MLACM won't apply. For civil asset forfeiture, each provincial jurisdiction has the legal authority to enter into direct arrangements with offshore jurisdictions; that said, there currently isn't any authority to enforce an offshore civil forfeiture order and the relevant authority would need to initiate a proceeding against the proceeds or instruments in their jurisdiction.[49]

In a recent MLACM case, the courts froze a $9.2 million bank account after American authorities sought assistance to enforce a substitute assets order. The defendant argued that substituted assets didn't meet Canadian criminal law definitions (PoC or ORP) and argued that American authorities ought to just bring a civil action. The Crown argued that as the defendant hadn't claimed ownership (the account was held in the name of an alias), the defendant ought not to have standing to challenge the order. The Courts rejected all of these arguments, noting that Canada had international obligations to meet, which required courts to liberally interpret provisions in the context of transnational law and in a manner consistent with Canada's enabling legislation, the MLACM. The order restraining the account was upheld.[50]

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[45] *R. v. Barna*, 2018 ONCA 1034.

[46] See the Canadian Department of Justice guidance at *https://www.justice.gc.ca/eng/cj-jp/emla-eej/mlatocan-ejaucan.html*

[47] RSC 1985, c 30 (4th Supp).

[48] Ibid, section 9.4(2).

[49] See Simser, J in William H. Byrnes & Robert J. Munro, (eds) *Money Laundering, Asset Forfeiture and Recovery and Compliance—A Global Guide Topic 13 Cross Border Civil Recovery of Tainted Property* (Matthew Bender 2019).

[50] *Canada (Attorney General) v. Georgiou*, 2018 ONCA 320 leave to appeal denied *George Georgiou v. Attorney General of Canada*, 2018 CanLII 82225

- **Post-Conviction Forfeiture**

The Code allows the court to order the forfeiture of proceeds of crime or ORP following conviction[51] for any offence capable of being prosecuted by indictment. Only the Attorney General may apply for forfeiture. Where the court is satisfied on a balance of probabilities (more likely than not) that the property relates to a proven offence, forfeiture is mandatory. Where the court is not satisfied that a sufficient nexus exists between a property and a specific conviction, the court may consider forfeiture where it determines, beyond a reasonable doubt (criminal standard of proof) that the property is a proceed of crime or offence-related property. Following a conviction for certain serious drug and criminal organization offences[52] under the PoC regime, the sentencing court can order presumptive forfeiture of the worldwide assets of an offender. The court must first determine that for a period of up to 10 years the offender had engaged in a pattern of criminal activity for material benefit or that the offender's income cannot reasonably account for the value of their property holdings.[53] The net-worth analysis discussed in 5.5 below, regarding tax cases, would be highly relevant in this circumstance.

- **Fine In Lieu**

Sanctions exist where an offender has placed proceeds of crime beyond the reach of a sentencing court. If the court determines that a forfeiture order should be made but the property can't be made subject to an order, then the court may presumptively order a fine in an amount equal to the value of that property or part of that property. That fine can be ordered when the property cannot be located (following an exercise of due diligence), has been transferred to a third party, has been moved outside of Canada, has been substantially diminished in value or has been commingled in a way that cannot be untangled.[54] The court must impose a term of imprisonment where the offender willfully defaults on payment; the scale of punishment that depends on the value of the unforfeitable property (this scale ranges from up to 6 months for fines less than $10,000 to between 5 and 10 years for fines of $1 million or more).[55] While a court has a discretion to not impose a fine in lieu of forfeiture, the discretion must be exercised judiciously, and in accordance with the purpose of Part. XII.2 of the Code: to ensure that crime does not pay.[56] The ability of the accused to pay the fine is not a factor to be considered by the court when imposing a fine in lieu, but ability to pay is taken into account in determining the time limit by which the fine must be paid.[57] Related procedural provisions exist. Prior to forfeiture, notice must be given to anyone with a potentially valid interest in property and they can seek an order protecting their interest.[58] The court has the power to set aside

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[51] Code, s. 462.37(1) applies to convictions or discharges under s. 730, that is where there is a finding of guilt and the court decides that the accused should be discharged, absolutely or conditionally, where it is in their best interests and not contrary to the public interest.

[52] Trafficking, importing or producing drugs under any of ss. 5, 6 or 7 of the CDSA (note: in 2018 a number of amendments were made respecting marihuana); criminal organization offences include ss. 467.11, 467.111, 467.12 and 467.13 under the Code as well as serious offences committed for the benefit of, at the direction of or in association with a criminal organization; criminal organization is defined at s. 467.1(1).

[53] Code s.462.37 (2.01).

[54] Code s. 462.37(3). The Supreme Court of Canada has granted leave in *R. v. Rafilovich*, 2017 ONCA 634 which may add to the jurisprudence around fine in lieu.

[55] Code s. 462.37(4).

[56] R. v. Lavigne, [2006] 1 SCR 392.

[57] *Ibid*.

[58] Code ss.462.41 and 462.42. Under s. 462.43, the court can dispose of residual interests after valid claims have been determined.

improper conveyances.[59] The court can make a forfeiture order even for property outside of Canada.[60] The court can draw an inference of illegally obtained wealth where an offender's assets after the commission of an offence exceeds the value of assets held prior.[61]

- **Forfeiture Without Conviction**

Where an accused has died or absconded, after proceedings respecting a designated offence have commenced, the court can forfeit property that is, on a criminal standard of proof (beyond a reasonable doubt) a proceed of crime.[62] The offence-related forfeiture regimes under the Code and the CDSA also have mirroring provisions.[63] Several provinces have enacted non-conviction based forfeiture (civil asset forfeiture) laws whereby the civil courts can freeze, seize and forfeit property on a civil standard of proof.

- **Code Section 490**

Section 490 of the Code provides a comprehensive regime to provide judicial oversight for the preserving and disposing of property seized by police, either under their common law search powers or under a search warrant.[64]

Section 490 allows for items seized by the police to be forfeited to the Crown if there is no known person who is a lawful owner or a person lawfully entitled to possess.[65] In at least one province, usual rules of evidence apply to section 490 proceedings: hearsay is not admissible unless proved through a hearsay exception.[66] The standard for justifying forfeiture is proof beyond a reasonable doubt and the person from whom the thing was seized will be presumed to have lawful possession. The Crown is free to call evidence to rebut that presumption in instances where it applies.[67]

- **Offence Related Property**

Canada has two ORP regimes for the seizure, restraint, judicial oversight and forfeiture: one for broad criminal offences committed under the Code ("Code ORP") and another for drug offences under the Controlled Drugs and Substances Act ("CDSA ORP"). These regimes mirror each other with one notable exception: the proportionality analysis to determine if forfeiture is disproportionate applies to all Code ORP whereas it only applies to real property in respect of CDSA ORP.[68] ORP provisions address the use of property in crime, known in other jurisdictions as instrumentalities. Some uses are simple and direct: a house used to produce methamphetamine. Some uses are more indirect: the vehicle used on a one-off basis to transport that methamphetamine. Most forfeiture laws, civil and criminal, provide a statutory proportionality test to direct the court in their deliberations around forfeiture. A general 'proportionality' test applies to all property caught by a Code ORP proceeding, whereas the proportionality test for CDSA ORP applies only to real property (real estate). The purpose of the proportionality test is to allow the court to tailor the type and amount of property to be forfeited based on the

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[59] Code s. 462.4.

[60] Code s. 462.37(2.1).

[61] And where there is no unrelated lawful income to explain the disparity: the Code s. 462.39.

[62] Code s. 462.38.

[63] For example, the Code s. 490.2.

[64] Code s. 487, see also 489.1. See also R. v. Raponi, [2004] 3 SCR 35.

[65] Code s. 490(9).

[66] *R v West*, (2005), 77 O.R. (3d) 185 (C.A.) at para. 28.

[67] *R. v. Mac* (1995), 97 C.C.C. (3d) 115 at paras. 15, 17.

[68] The Sentencing Judge must consider additional factors it the property is a dwelling-house.

statutory enumerated factors.[69] With respect to ORP that is a dwelling-house, the court must also consider the impact of forfeiture on immediate family members.

The purpose of the ORP forfeiture provisions are at least three-fold:

G. To be punitive by depriving the offender of ORP;

H. To be a deterrent, by increasing the cost of committing crime (up to the value of the ORP subject to forfeiture); and

I. To prevent future crime, by taking away the tools for committing the crime.[70]

Where an offender is convicted of a predicate offence,[71] and the Crown establishes on a civil standard (more likely than not) that the offence was committed in relation to the ORP sought for forfeiture, forfeiture is mandatory (subject to any proportionality test that applies and any applications for relief from forfeiture made by innocent third parties). Discretionary forfeiture is available when property is not ORP in relation to a predicate offence of which the offender was convicted, offence or offences convicted of, where the crown establishes the property is ORP beyond a reasonable doubt.[72]

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[69] R. v. Pammett, 2015 ONCA 14; see also Canada (Attorney General) v Dew, 2016 MBCA 95; R. v. Craig, 2009 SCC 23 (CanLII), [2009] 1 S.C.R. 762; R. v. Nguyen, 2009 SCC 25 (CanLII), [2009] 1 S.C.R. 826; and R. v. Ouellette, 2009 SCC 24 (CanLII), [2009] 1 S.C.R. 818.

[70] *R. v. Gisby* (2000), 148 C.C.C. (3d) 549 (Alta.CA), at paras. 19-21 adopted by R. v. Craig, [2009] 1 SCR 762.

[71] Predicates are generally offences prosecuted by indictment under the Code and designated substance offences under the CDSA.

[72] See for example the Code, s. 490.2 and the CDSA, s. 17.

III. Challenges to Forfeiture: Defense Tactics and Third-Party Claims

Generally speaking, there are a number of ways that offenders can challenge forfeiture. They can attack the forfeiture application factually, asking the court to rule that the property is not a proceed or ORP. Similarly, the offender can argue that the forfeiture application doesn't relate to the charges where the offender has been found guilty. If successful with this latter argument the court then may have to consider whether the Crown has met a higher standard of proof: is the property PoC or ORP on a "beyond a reasonable doubt" standard? An offender can challenge any or all stages of a forfeiture proceeding, from the validity of the warrants through to alleged *Charter of Rights* violations by law enforcement. Regardless of any finding respecting the offender, third parties who appear innocent of any complicity or collusion may intercede and lodge a claim with the court to exempt their property interests from forfeiture.[73]

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[73] See for example, *R. v. Fenn*, 2013 ONCJ 206 and *R. v. Saikaley* 2013 ONSC 4349.

IV. Preserving property for Forfeiture: Law Enforcement Tools

For POC and ORP, two law enforcement tools, warrants (the Code calls them special search warrants) and restraint orders provide investigators with ability to restrain and prevent dissipation of assets prior to a conviction and forfeiture. Search warrants for potentially forfeitable property have pre-conditions: investigators must convince a judge that they have reasonable grounds to believe that a property was obtained through the commission of a designated offence or is ORP.[74] A search warrant can be executed anywhere in Canada but must be obtained from a judge who has jurisdiction in the location where the property is located (or be 'backed' by a judge in the jurisdiction where the search warrant is executed). An application will be made by the Attorney General, usually on an *ex parte* basis and will be supported by an affidavit. The affidavit will be prepared and sworn by an investigator and should provide full disclosure of the relevant facts: the affiant must establish there are reasonable grounds to believe that an order of forfeiture may be made against property inside or outside Canada and the designated offence alleged to be committed occurred within the province in which the judge has jurisdiction. In the case of PoC the affiant must relate the property to a designated offence.[75] In the case of Code or CDSA ORP, the affiant must establish that any property, inside or outside Canada, was the means by which, or used in any manner, or was intended to be used, to commit, a predicate offence.[76] With judicial approval, a search of a building, receptacle or place can be undertaken.

Restraint orders allow the court to preserve various assets, including intangible property, funds held on account, real estate and assets in a variety of ways.[77] The Crown application for a restraint order must be accompanied by an affidavit setting out the property to be restrained and establishing the criminal activity related to the property. The restraint order restricts a person's rights to deal, transfer or dispose of property pending the conclusion of the criminal proceedings. The court is allowed to make a POC restraint order subject to certain exceptions, in particular in order to make provision for reasonable living expenses and reasonable legal expenses or to enable a person to carry on a trade, business, profession or occupation. No such provision exists for ORP other than offence-related property which is seized as money or in the form of bank notes.[78] The court has wide powers to make an order as it believes appropriate for the purpose of ensuring the restraint order is effective. Failure to comply with a restraint order can be treated as a contempt of court or as a chargeable offence.[79]

As a prerequisite for the issuance of a search warrant or restraint order to preserve alleged proceeds of crime, a judge may require the Attorney General to enter into an undertaking to pay any damages or costs that could arise from issuance and execution of the order. This undertaking accompanies the application for the warrant or order and

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[74] Code s. 462.32.

[75] The same test applies for issuance of a Special Search Warrant under section 462.31 of the *Criminal Code*.

[76] An indictable offence in the case of Code ORP; a designated substance offence in the case of CDSA ORP.

[77] Code s. 462.33.

[78] Code ss. 462.34(4) and 462.331.

[79] Code ss. 462.33(11) and 490.8(9).

must be approved by a senior official within the Department of Justice or a provincial Attorney General as the case may be.[80] There is no equivalent undertaking for ORP.

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[80] Code s. 462.33. The Seized Property Management Directorate (SPMD) is a federal government agency mandated to take responsibility for managing assets that are seized and/or restrained by federal law enforcement: *Seized Property Management Act*, S.C. 1993 c. 37. This may be expanded in the future to pick up provincial law enforcement.

V. Evading Forfeiture: Money Laundering Techniques

What is money laundering?

> Money laundering is a technique used by criminals to disguise the origin of their ill-gotten gains by converting lucre into an apparently cleansed source of money beyond the reach of both law enforcement and underworld rivals.[81]

Countries around the world have implemented anti-money laundering (AML) regimes, regulatory barriers designed to impede and discourage money laundering as well as to create information gateways, often through financial intelligence units (FIUs), designed to aid law enforcement. These next sections of this paper survey some of the money laundering techniques employed to avoid criminal asset forfeiture in Canada. There is still much to be done. Lawyers are weakly regulated from an AML perspective.[82] There have been early efforts to create transparency for beneficial ownership of real estate, but there is much to be done.[83]

- **Shell Companies**

Corporate transparency is a challenging issue. A private company or trust can be used to hide the beneficial ownership interests in a laundered asset. Canada, unlike the United Kingdom, does not have a beneficial ownership registry. Federal corporate law reforms are under consideration but 91% of private entities are incorporated across the ten provinces and three territories and the daunting task of national legislative cooperation is required to address the issue.[84] The risk-based AML regulatory system requires intermediaries like financial institutions, securities dealers and the like to collect beneficial ownership information for trusts and private companies; they are required by law to know their customer.[85] A public transparent registry of beneficial owners would make those interests public, but it will take time to achieve noticeable transparency.

- **Asset Tracing**

Criminal activity is often conducted for profit. Money is laundered to challenge law enforcement's ability to trace and seize the lucre. Criminals can access the global marketplace, transferring funds across the world almost

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[81] Kroeker, R; Simser, J *Canadian Anti-Money Laundering Law: Gaming Sector* (Toronto: Thompson Reuters, 2017) at p. 2.

[82] As a result of a judicial ruling, AML for lawyers is not regulated by FINTRAC, but rather by self-regulating organizations like the Law Society of Ontario: Canada (Attorney General) v. Federation of Law Societies of Canada, 2015 SCC 7, [2015] 1 S.C.R. 401.

[83] In Ontario, there are filing requirements under section 5.0.1 of the Land Transfer Tax Act, RSO 1990, c L.6; in British Columbia, the requirements can be found under the Information Collection Regulation, BC Reg 166/2018 made under the Property Transfer Tax Act, RSBC 1996, c 378.

[84] Department of Finance (February 7, 2018) Reviewing Canada's Anti-Money Laundering and Anti-Terrorist Financing Regime *https://www.fin.gc.ca/activty/consult/amlatfr-rpcfat-eng.asp* Recent amendments proposed in Bill C-97 at Bill C-97 (First Reading) on April 8, 2019 would, if passed, clarify how the corporate registers could be accessed under the Canada Business Corporations Act R.S.C., 1985, c. C-44.

[85] *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, SC 2000, c 17.

instantaneously. The number and variety of ways to hide and disguise funds makes it difficult for investigators to locate them. International collaboration amongst policing agencies is required, but difficult to achieve.

This is a fight: "unfortunately, when societies fight losing battles some groups and individuals do very well."[86] Profit from major organized crime is often moved offshore and typically is invested in bank accounts, properties, businesses and luxury items. Similarly, proceeds of crime assets are similarly moved and with an ease and speed that is not matched by law enforcement efforts to trace and recover them. Tracing assets is challenging given the various ways criminals can use the international financial system to distance themselves from the proceeds of their criminal activity. Internet banking has secrecy in the swift and efficient movement of funds globally. Cryptocurrencies bring their own challenges. Fewer international trade barriers and financial rules allow for an easier flow of goods and funds across borders.

- **TBML: Trade-Based Money Laundering**

Enabled by international commerce, trade-based money laundering, TBML, is one of the most sophisticated and prominent practices in disguising the movement of the proceeds of crime. TBML is the process of attempting to disguise the origins of proceeds of crime by moving value through the use of trade transactions or services.[87] In practice, TBML can involve multiple schemes accomplished through the misrepresentation and falsification of documents, including:

- Over and under invoicing of goods and services;
- Multiple invoicing of goods and services;
- Over and under shipments of goods and services;
- Falsely described goods and services; or
- Phantom Shipments.

- **Correspondent Banking**

On the international stage, correspondent banking has further enabled money laundering. A correspondent bank refers to a mutual/reciprocal relationship between a financial institution situated in one country to provide services on behalf of a financial institution in a foreign country. If a European or Asian bank has a significant stream of US dollar denominated transactions, the most effective way to hedge currency risk is to maintain a correspondent bank (typically in New York). The correspondent or receiving bank has no direct contact or relationship with the customer and is reliant on the sending bank to conduct due diligence to confirm the customer's identity and establish the source of funds. This creates an ideal setting for money laundering, given the global variability in due diligence; some countries have weaker money laundering laws and/or lax enforcement resulting in the application of weak AML.[88] American authorities have laws whereby an American correspondent bank's accounts can be the subject of forfeiture, leaving the bank itself to recover against the criminal.[89] That power works given that banks maintain US-denominate accounts in the USA to fully hedge currency fluctuation risk. Canada does not have an equivalent fiat currency and thus does not have similar legislation.

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[86] Moises Naim, *Illicit: How Smugglers, Traffickers and Copycats Are Hijacking the Global Economy*, (New York: First Anchor Book Edition, October 2005) at p. 156.

[87] Financial Action Task Force (FATF), Trade-Based Money Laundering, June 23, 2006.

[88] Consider, for example Deutsche Bank, an institution implicated in a scandal where money was moved around in jurisdictions like Latvia and Moldova to facilitate $80 billion in money laundering: Deutsche Bank faces action over $20bn Russian money-laundering scheme at *https://www.theguardian.com/business/2019/apr/17/deutsche-bank-faces-action-over-20bn-russian-money-laundering-scheme*.

[89] See for example *United States v. $70,990,605*, (2015), *305 F.R.D. 20 (D.D.C.)*.

- **Forensic Accounting Responses: Net-Worth Assessments**

A net-worth accounting analysis, along with other types of accounting analysis, such as source and use of funds analyses, can be a very effective tool to demonstrate that an offender has accumulated wealth or is living beyond their legitimate means, based on an offender's declared income. Placed in the larger context of an offender's criminality, the court can be invited to draw an inference that asset accumulation beyond an offender's means is PoC. Tax records, which are discussed above, are critical to this analysis. A net-worth assessment enables law enforcement to attach criminal liability to both fraud and tax fraud, both of which being indictable offences that can trigger criminal asset forfeiture.

VI. Conclusions

A 250-page report, entitled *Dirty Money*, chronicled money laundering activities in Canada's west coast casinos.[90] A year later, a report issued by the US State Department (March 2019), identified Canada as a 'major money laundering country' where organized crime and gangs could exploit weak domestic law enforcement.[91] This is not the first criticism of Canada's laws in this respect. Criminal asset forfeiture was developed not only in response to multilateral enactments, like the Vienna Convention, but also to criticisms levied in evaluations by, amongst others, the Financial Action Task Force (FATF).[92] Serious premeditated crime is predominantly acquisitive. Law enforcement efforts have to focus on the motivation, the profit. Criminal asset forfeiture measures means that someone dealing drugs or committing fraud not only faces the prospect of jail, they also face the prospect of losing their wealth.[93] Those measures are supplemented by other tools, including civil asset forfeiture and regulatory barriers, like Canada's AML system. This paper has outlined the criminal law tools that are available to law enforcement. They are robust and have powerful potential. For example, law enforcement and the courts don't have to chase substituted assets, they can seek a fine in lieu of forfeiture; evading criminal asset forfeiture can lead to serious jail time; criminals are motivated to "find" and return assets hidden away. The challenge for law enforcement in Canada really lies in resourcing. Having ideal tools without the personnel, training and resources to deploy them is a problem. A problem that lies at the root of criticisms of Canada.

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[90] Dr. Peter German Dirty Money a report prepared for the Attorney general of British Columbia, March 2018: *https://news.gov.bc.ca/files/Gaming_Final_Report.pdf*.

[91] United States Department of State, Bureau of International Narcotics and Law Enforcement Affairs *International Narcotics Control Strategy Report Volume II Money Laundering* (March 2019) see: *https://www.state.gov/j/inl/*.

[92] Financial Action Task Force (2012), *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation* at: *http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf* (last viewed July 30, 2015).

[93] Rider, B *Recovering the Proceeds of Corruption* (2007), 10 J Money Laundering Control 5; Simser, J *Money Laundering: Emerging Threats and Trends* (2013), 16 J Money Laundering Control 41.