

THE ASSET TRACING
AND RECOVERY
REVIEW

FIFTH EDITION

Editor
Robert Hunter

THE LAWREVIEWS

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The Asset Tracing and Recovery Review

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CANADA

*John J Pirie, Matthew J Latella, David Gadsden and Michael Nowina*¹

I OVERVIEW

The Canadian legal system provides a range of options for victims of fraudulent conduct. The causes of action and remedies available to victims arise under statute, at common law and in equity. They include personal and proprietary claims, the latter of which may involve tracing.

Canadian courts will assist foreign courts and arbitral tribunals if victims of fraud choose to pursue their claims in other jurisdictions. Once a foreign judgment or award is rendered, Canadian courts will rarely refuse an application to enforce. It may also be possible to freeze a defendant's assets in Canada pending recognition and enforcement proceedings.²

Canada is a federal state comprising 10 provinces and three territories, and lawmaking power is divided among the federal and provincial governments. In any dispute, one or more of several bodies of substantive and procedural law may apply to a particular issue, including the tracing of assets. With the exception of Quebec, all of the provinces have legal systems based on English common law.³

II LEGAL RIGHTS AND REMEDIES

i Civil and criminal remedies

Claims against the person who committed the fraud or breach of duty

Criminal proceedings

The broad wording in the general fraud offence at Section 380(1) of the Criminal Code of Canada (Criminal Code)⁴ enables the police to investigate and Crown counsel to prosecute allegations of fraud of any kind. The hallmarks of criminal fraud are dishonesty by the perpetrator and deprivation to the victim.⁵ The general fraud offence is augmented by numerous provisions tailored to deal with specific fraud-related activities under the Criminal Code, as well as under other statutes. In addition to penal sanctions, restitution or disgorgement can be sought.

1 John J Pirie, Matthew J Latella, David Gadsden and Michael Nowina are partners at Baker McKenzie.

2 For a more detailed review of topics discussed in this chapter, see www.canadianfraudlaw.com.

3 The laws of the province of Quebec are based on the Napoleonic Code, and thus may differ significantly. An analysis of Quebec law is beyond the scope of this chapter.

4 Criminal Code, RSC 1985, c C-46, Section 380.

5 *R v Olan*, [1978] 2 SCR 1175.

Civil remedies

There are a multitude of civil claims that can be brought by a victim of fraudulent conduct including:

- a* fraud: where dishonest conduct leads to deprivation to the victim, a claim under the broad umbrella of civil fraud may be available;
- b* fraudulent misrepresentation and the tort of deceit: often referred to by the courts interchangeably, with the core components being a false statement, whether made knowingly, recklessly⁶ or with wilful blindness,⁷ and reliance on the truth of the statement by the person to whom it is made;⁸
- c* breach of fiduciary duty: certain relationships, such as those of corporate officers or directors, will give rise to specific obligations because the relationship is one characterised as fiduciary, and fraudulent conduct will invariably constitute a breach of a fiduciary's duty;
- d* unjust enrichment: where monies are received resulting in an enrichment and corresponding deprivation without a juristic reason, claims for unjust enrichment may be brought; and
- e* conversion: this claim may be brought where property rights in chattels have wrongly been interfered with by another person.

Claims against persons who assisted in committing the fraud or breach of duty

Criminal proceedings

Persons who assisted in committing the fraud or breach of duty may also be criminally prosecuted under the Criminal Code for aiding or abetting.⁹ This requires that the assisting person, whether by act or omission, knew that the fraudulent party intended to commit fraud.

Civil remedies

Knowing assistance

The leading case in Canada is the Supreme Court of Canada's decision in *Air Canada v. M&L Travel Ltd.*,¹⁰ which involved a breach of trust by a company operating as a travel agency that inappropriately transferred monies from a trust account to the company's general operating account. In addition to suing the company, a claim for knowing assistance was brought against the directors for causing the company to breach its trust obligations.

The elements of the tort of knowing assistance are:

- a* there must be a fiduciary duty or trust;
- b* the fiduciary or trustee must have breached that duty fraudulently and dishonestly;
- c* the third party must have had actual knowledge of both the fiduciary relationship or trust and the fraudulent and dishonest conduct; and

6 A representation is made recklessly when it is made with complete disregard for its truth or falsity.

7 *R v. Briscoe*, [2010] 1 SCR 411. The doctrine of wilful blindness imputes knowledge to a person where his or her suspicions have been aroused to the point where he or she sees the need for further inquiries, but deliberately chooses not to make those inquiries.

8 *Robson (Trustee of) v. Robson*, [2010] OJ No. 3640 (ON SC), aff'd [2011] OJ No. 3244 (Ont CA); *Gregory v. Jolly*, [2001] OJ No. 2313 (Ont CA), aff'd [2001] SCCA No. 460.

9 Criminal Code, Section 21, and see *R v. Hibbert*, [1995] 2 SCR 973.

10 [1993] 3 SCR 787.

d the third party must have participated in or assisted the fraudulent and dishonest conduct.¹¹

The ‘knowledge’ required by the third party may be actual knowledge, recklessness or wilful blindness. Constructive knowledge alone, however, is insufficient to give rise to liability.¹²

In addition to damages, equitable remedies can be granted against third parties who knowingly assisted or received funds from a fraudulent breach of trust or fiduciary duty.

Claims against directors or officers

The directors and officers of a corporation owe a duty to ‘exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances’.¹³ In the context of fraud by a corporation, directors and officers may be liable for personal tortious conduct.¹⁴

In addition, where corporate directors or officers act improperly, claims may also be brought under the statutory remedy of an oppression claim.¹⁵ To succeed, the claimant must demonstrate that the directors have acted in an oppressive manner, or have been unfairly prejudicial to or unfairly disregarded the interests of stakeholders.

While damages are the typical remedy for claims against directors and officers, oppression remedy legislation affords the courts broad discretion to fashion creative remedies, such as setting aside transactions or restraining the impugned conduct.

Conversion

Conversion is a voluntary act by one person inconsistent with the ownership rights of another. Conversion is distinguishable from criminal theft because conversion requires no proof of dishonesty. Conversion is also distinguishable from unjust enrichment in that there must be proof of the intentional inference with the property of another.

Claims against third parties who may receive or help transmit the proceeds of fraud

Criminal proceedings

There are a number of Criminal Code offences that are applicable to third parties who receive or help transmit the proceeds of a fraud: possession of property obtained by crime;¹⁶ trafficking in property obtained by crime;¹⁷ and possession of property obtained by crime for the purposes of trafficking.¹⁸ Generally, for liability to attach to the third party, he or she must have had knowledge that all or part of the property was obtained by crime.¹⁹

11 *Harris v. Leikin Group Inc*, 2011 ONCA 790.

12 M&L Travel Ltd, footnote 10 (see *Barnes v. Addy* (1874), LR 9 Ch App 244 (LC & LJ)). For example, see *Dynasty Furniture Manufacturing Ltd v. Toronto Dominion Bank*, 2010 ONSC 436, aff’d 2010 ONCA 514.

13 See, for example, Canada Business Corporations Act, RSC 1985, c C-44, Section 122.

14 *Montreal Trust Co of Canada v. ScotiaMcLeod Inc* (1995), 26 OR (3d) 481 (ONCA).

15 See, for example, Canada Business Corporations Act, RSC 1985, c C-44, Section 241, and the (Ontario) Business Corporations Act, RSO 1990, c B.16, Section 248.

16 Criminal Code, Section 354.

17 *Ibid.*, Section 355.2.

18 *Ibid.*, Section 355.4.

19 *R v. L’Heureux*, [1985] 2 SCR 159.

Civil remedies

Knowing receipt

Conceptually related to knowing assistance, the constituent elements are a trust or fiduciary relationship; the third party receiving property from the trust or fiduciary relationship in his or her own personal capacity; and the third party having actual or constructive knowledge that the property was transferred in breach of trust or fiduciary duty. Liability does not extend beyond the property that the third party knows (or is deemed to know) has been received in breach of trust or fiduciary duty.²⁰

Statutory remedies

Pursuant to Section 437(2) of the *Bank Act*,²¹ it is possible to freeze deposits at a Canadian bank. The statutory requirements to obtain a freeze are as follows: the funds must be traced to the deposit account; the wrongdoer and the Canadian bank must both be defendants to an originating process; and the bank must have been served with notice of the originating process. This can be a powerful remedy where the bank account information of the wrongdoer is known.²²

Equitable remedies and tracing

There are a variety of remedies that can be imposed, including an equitable charge over the property, an accounting of profits and a constructive trust.

An equitable charge may be applicable depending on the nature of the fraudulent conduct. In one case where a bank's registered land mortgage was found to be invalid as a result of a fraud by one of the co-owners of the property, the court, relying on the principle of equitable subrogation, imposed an equitable charge because the bank had been induced to advance funds to repay a valid mortgage.²³

To support the remedy of a constructive trust for unjust enrichment, there must be a finding of an enrichment and that the contribution of the claimant to the property in question must be substantial and direct to warrant the imposition of a constructive trust.²⁴ As a remedy for wrongful conduct, a constructive trust may also be imposed where:

- a* the wrongdoer was under an equitable obligation;
- b* the property in question must have derived from activities of the wrongdoer in breach of the equitable obligation;
- c* the victim shows a legitimate reason for seeking the remedy; and
- d* there must be no factors (such as rights of third parties) that would render the constructive trust unjust.²⁵

20 *Citadel General Assurance Co v. Lloyds Bank Canada*, [1997] 3 SCR 805.

21 SC 1991, c 46.

22 In *Royal Bank v. Rastogi*, 2011 ONCA 47, Ontario's highest appellate court decided that 437(2) did not inhibit the court's powers to make orders directing payment of those funds. Without obtaining an injunction, the court held in this case that the plaintiff bank had no right to freeze accounts belonging to one of its customers by simply initiating a lawsuit against its customer and ordered the release of the funds when the plaintiff bank failed to establish any legal entitlement to the funds.

23 *O'Brien v. Royal Bank*, 2008 CarswellOnt 910 (Ont Sup Ct).

24 *Peter v. Beblow*, [1993] 1 SCR 980.

25 *Soulos v. Korkontzilas*, [1997] 2 SCR 217.

Canadian courts may use tracing orders as a method of determining what assets rightfully belong to the victim of fraud. Tracing orders are available to help victims of fraud identify recoverable assets when they have become mixed with other property or funds.

ii Defences to fraud claims

Exclusion or waiver clauses purporting to provide immunity from the consequences of fraudulent conduct are not enforceable on the principle that ‘fraud unravels all’. Similarly, a defence based on the suggestion that a victim with better due diligence would not have suffered a loss will not succeed where fraud is shown.

Limitation periods provide a potentially viable defence to claims. Statutes enacted by each province govern limitation periods in Canada and most range from two to six years. These limitation periods will apply to common law claims but their application to equitable claims varies across Canada. Limitation periods begin to run when the fraudulent activity is discovered, but most provinces have enacted final or ‘ultimate’ limitation periods that run for 10 to 20 years from the date that the cause of action arises, regardless of when it was discovered.

III SEIZURE AND EVIDENCE

i Securing assets and proceeds

The Mareva injunction

The *Mareva* injunction is an extraordinary remedy created by the courts of England to address the fact that the general rule prohibiting execution before judgment meant assets could be unavailable to satisfy any eventual judgment. Dubbed one of ‘the law’s two nuclear weapons’,²⁶ it was confirmed to form part of the common law of Canada in a 1985 decision of the Supreme Court of Canada, *Aetna Financial Services v. Feigelman*.²⁷ However, *Aetna* did not establish a rigid test for the new remedy. Rather, it established certain broad parameters, without imposing an inflexible prescription. The Court summarised the ‘gist of the *Mareva* action’ as follows: the right to freeze exigible assets within the jurisdiction, regardless of where the defendant resides; there must be a cause of action between the plaintiff and defendant, which is justiciable before the courts of that jurisdiction; and there is a genuine risk of disappearance of assets, either inside or outside the jurisdiction.²⁸

In recent years, as *Marevas* have been sought in more varied scenarios, many involving fraud, the requirements for a *Mareva* injunction have been relaxed somewhat. A recent Ontario Superior Court decision held that the risk of dissipation can be inferred in cases where the inference arises from circumstances of the alleged fraud, taken in the context of all of the surrounding circumstances.²⁹ Such circumstances include evidence suggestive of the defendant’s fraudulent criminal activity or a pattern of prior fraudulent conduct.³⁰ However,

26 *Bank Mellat v. Nikipour*, [1985] FSR 87.

27 [1985] 1 SCR 2.

28 *Ibid.* at Paragraph 26. Note: unlike the ‘shady mariner’ scenarios that gave rise to the creation of the remedy in the United Kingdom, the Supreme Court was not called upon to engage in an analysis of fraud or dissipation by way of the removal of assets from Canada.

29 *Sibley & Associates LP v. Ross*, 2011 ONSC 2951 (SCJ) at Paragraph 63.

30 *Ibid.*, at Paragraph 64.

the requirement to have evidence of dissipation would not be automatically addressed, simply because the plaintiff established a strong *prima facie* case in fraud, and the inference would also be available when a strong *prima facie* case is established for other causes of action.

The Supreme Court in *Aetna* seemed to favour the ‘strong *prima facie* case’ requirement adopted by the Ontario Court of Appeal a few years prior,³¹ while also noting that the Ontario approach was ‘somewhat narrower’ than the ‘good arguable case’ standard from the UK jurisprudence.³² The balance of convenience must also favour the issuance of the order. This branch of the analysis involves a detailed consideration by the court of the competing interests at play: principally, the plaintiff’s interest in avoiding a dry judgment and the defendant’s interest in not having assets detained prior to judgment. Of course, the variables cannot be viewed as watertight compartments: if a plaintiff has an extremely strong case on the merits, the risk that the defendant will have its assets detained unnecessarily is correspondingly diminished; hence, the balance of convenience is more likely to favour the plaintiff.

In British Columbia, courts have adopted a flexible approach, employing a two-step test for a *Mareva* injunction, so as to not render the judge ‘a prisoner of a formula’,³³ but to allow courts to do justice as between the parties in any given case.³⁴ The British Columbia Court of Appeal has also recognised that almost every *Mareva* injunction is likely to inconvenience another party in some way, and has emphasised that ‘the overarching consideration in each case is the balance of justice and convenience’.³⁵

One aspect of the test that remains constant, and is of vital importance, is the requirement to provide an undertaking to indemnify the respondent and any third party who might be adversely affected by the order for any damages suffered as a result of the injunction. Depending upon the party seeking the injunction and its assets, or lack thereof, in the jurisdiction, it might be necessary to fortify the undertaking by way of posting security.

Mareva injunctions are typically, but not always,³⁶ sought on an *ex parte* basis. As with any *ex parte* relief, it is crucial that full, frank and fair disclosure be made to the *ex parte* judge of all material facts, particularly those that would tend to support the position of the party against whom the injunction is sought. Such disclosure should include sufficient detail to allow the *ex parte* judge to determine the correct value of the underlying claim and, accordingly, of the assets to be frozen.

Model *Mareva* orders³⁷ have been developed in particular jurisdictions, serving as a guide when determining the appropriate parameters for this extraordinary relief. In some

31 *Chitel v. Rothbart*, 1987 CarswellOnt 458 (CA).

32 *Aetna*, footnote 25, Paragraphs 29–30. *Aetna* surveyed multiple jurisdictions’ case law on *Marevas*, but refrained from articulating a strict formula, perhaps because the entire discussion was considered obiter, given that it did not directly apply to the interprovincial asset transfer at issue in that case.

33 A term borrowed from an injunction case decided by the current Chief Justice of Canada Beverly McLachlin, while she was a member of the BC Court of Appeal in *British Columbia (Attorney General) v. Wale* (1986), 9 BCLR (2d) 333 (CA), at 346 (aff’d at [1991] 1 SCR 62).

34 *Silver Standard Resources Inc v. Joint Stock Co Geolog* (1998), 59 BCLR (3d) 196 at Paragraph 19. See also *Tracy v. Instalcons Financial Solutions Centres (BC) Ltd*, 2007 BCCA 481. This test was first articulated in the 1994 decision of the BC Supreme Court, *Mooney v. Orr* (1994), 100 BCLR (2d) 335.

35 *Silver Standard*, *Ibid.*, at Paragraph 20; see also *Tracy*, *Ibid.*, at Paragraph 41.

36 *Innovative Marketing Inc v. D’Souza et al*, 2007 CarswellOnt 1131.

37 For example, Ontario’s model order can be found at www.ontariocourts.ca/scj/files/forms/com/mareva-order-EN.doc.

provinces, such as Ontario, the *ex parte* order has a specific shelf life (10 days)³⁸ within which it must be renewed on an *inter partes* basis. *Mareva* injunctions can be framed so as to freeze assets solely in a particular jurisdiction within Canada or on a broader, even worldwide, basis.³⁹ In Ontario, a recent decision provided for a worldwide *Mareva* injunction where the defendant had no assets in the jurisdiction.⁴⁰ A compelling factor in granting the injunction was evidence based on information from Hong Kong lawyers, that the Canadian order would assist in securing a freezing order in Hong Kong.

Finally, while *Mareva* injunctions are typically sought pre-judgment, there is authority for granting a post-judgment *Mareva*,⁴¹ which can be useful in securing assets in circumstances where a judgment debtor may seek to deplete, move or otherwise deal with assets, pending the outcome of an appeal.

Other remedies

There are other remedies that can be of assistance in securing assets and proceeds prior to judgment, in a fraud claim, in addition to the *Mareva* injunction. These include certificates of pending litigation (designed to provide notice of a claim against real property to prevent its sale or encumbrance) and orders under specific provincial rules of civil procedure (e.g., Ontario's Rule 44 for the preservation of personal property and Rule 45 for the preservation of a specific fund). However, none provide as broad, flexible and potent a remedy as the *Mareva* injunction.

ii Obtaining evidence

Anton Piller orders (AP orders)

The other of 'the law's two nuclear weapons' is the *Anton Piller* order.⁴² While *Mareva* injunctions are aimed at preserving assets that might otherwise be placed beyond the reach of a plaintiff or the court, AP orders are aimed at preserving evidence that might otherwise be removed or destroyed. The AP order allows a plaintiff or his or her solicitors 'to enter the defendant's premises so as to inspect papers, provided the defendant gives permission'. Since the defendant is ordered to give such 'permission', and the AP order is obtained on an *ex parte* basis, it has long been considered that the remedy 'may seem to be a search warrant in disguise'.⁴³

The Supreme Court of Canada has established a four-part test for granting an AP order:

- a the plaintiff must demonstrate a strong *prima facie* case;
- b the damage to the plaintiff of the defendant's alleged misconduct, potential or actual, must be very serious;

38 Ontario Rules of Civil Procedure, RRO 1990, Regulation 194, Rule 40.02(1) (Ontario Rules).

39 Innovative Marketing, footnote 34.

40 *SFC Litigation Trust (Trustee of) v. Chan*, 2017 ONSC 1815. This decision may signal a step towards a more flexible approach to granting *Mareva* orders in Ontario.

41 *First Majestic Silver Corp v. Davila*, 2013 BCSC 1209.

42 Model AP orders have been developed in certain Canadian provinces, providing a useful consistency in the manner in which Canadian courts are to balance the competing interests at play in such situations, which are, as case law has demonstrated, fraught with challenges. For example, Ontario's model order can be found at www.ontariocourts.ca/scj/files/forms/com/anton-piller-order-EN.doc.

43 *Anton Piller KG v. Manufacturing Process Ltd.*, [1976] Ch 55, per Lord Denning MR.

- c there must be convincing evidence that the defendant has in its possession incriminating documents or things;
- d it must be shown that there is a real possibility that the defendant may destroy such material before the discovery process can do its work.⁴⁴

AP orders can be a powerful anti-fraud tool, sometimes used in conjunction with *Mareva* injunctions to halt fraudsters in their tracks. However, with the great power of these remedies comes both great responsibility and a certain fragility. Judicial discomfort with the draconian nature of AP orders continues in modern Canadian jurisprudence.⁴⁵ Given the scope for potential unfairness to parties against whom AP orders are made, particularly regarding the seizure of privileged or otherwise confidential material, the remedy for abuse of the power can be the dissolution of the order, damages and, in some cases, the disqualification of counsel for the party who obtained the order.⁴⁶

Norwich Pharmacal orders

In some cases in which a fraud is suspected but key evidence that may confirm or bolster such a cause of action lies with one or more third parties, Canadian courts can make a *Norwich Pharmacal* order⁴⁷ requiring the third party to produce information, after considering five factors:

- a whether the applicant has provided sufficient evidence to raise a valid, *bona fide* or reasonable claim;
- b whether the applicant has established a relationship with the third party from whom the information is sought such that it establishes that the third party is somehow involved in the acts complained of;
- c whether the third party is the only practicable source of the information available;
- d whether the third party can be indemnified for costs to which the third party may be exposed because of the disclosure; and
- e whether the interests of justice favour obtaining of the disclosure.⁴⁸

Norwich Pharmacal orders are typically served on financial institutions and internet service providers, and can serve to assist in both proving a fraud was committed and in recovering assets obtained by fraud, including by determining the location of a defendant or a defendant's assets (or both). In *Voltage Pictures LLC v. John Doe*, the Federal Court of Appeal ruled

44 *Celanese Canada Inc v. Murray Demolition Corp.*, [2006] 2 SCR 189 at Paragraph 35.

45 *MD Physician Services Inc v. Jonathan Financial Inc.*, 2011 ONSC 2715.

46 In the 2006 case, *Celanese* (see footnote 41), the Supreme Court of Canada removed counsel of record for a plaintiff found to have crossed such lines. In *Celanese*, disclosure of solicitor–client confidences took place after the search was completed, as a result of what the Supreme Court characterised as ‘a combination of carelessness, overzealousness, a lack of appreciation of the potential dangers of an *Anton Piller* Order and a failure to focus on its limited purpose, namely the preservation of relevant evidence’ (emphasis in original).

47 Derived from the UK case *Norwich Pharmacal Co v. Customs And Excise Commissioners*, [1974] AC 133 (HL); adopted in *GEA Group AG v. Ventra Group Co.*, 2009 CarswellOnt 4854 at Paragraph 85 (CA); additional reasons at 2009 CarswellOnt 7755 (CA).

48 *GEA Group*, *Ibid.*, at Paragraph 51.

that internet service providers were to bear the brunt of the costs associated with collecting, storing and disclosing customer information relating to breaches of copyright, pursuant to a legislative regime that allows for disclosure requests, similar to *Norwich Pharmacal* orders.⁴⁹

IV FRAUD IN SPECIFIC CONTEXTS

i Banking and money laundering

Commercial credit and loan fraud

Following the global financial crisis, banks operating in Canada experienced an increase in incidents of misrepresentation made to induce or maintain commercial loans. Canadian courts have been open to finding liability against borrowers and their principals in these cases, with liability typically resting on claims for fraudulent misrepresentation or deceit, negligent misrepresentation, breach of fiduciary duty and claims for breach of the statutory duty of care owed by directors to the borrowing corporation and creditors.⁵⁰

From a damages standpoint, in an action based on misrepresentation, the bank is entitled to be put in the same position it would have been in had the representation not been made. The court is entitled to infer that in the event that the fraud or misrepresentation induced the bank to enter into the loan, the bank would not have otherwise entered into the loan at all.⁵¹

Bank liability flowing from fraudulent customer conduct

Banks operating in Canada have seen an increase in claims made by third parties, in particular claims by investors alleging that the bank was negligent in failing to spot or act upon red flags of a customer's fraud. These claims, which include class proceedings, are typically framed in negligence, and assisting breach of trust.

While Canadian courts have historically been reluctant to impose a duty on banks to inquire into customer activities, recent case law suggests that a bank's internal oversight procedures and its response to unusual account activity will now be the subject of more rigorous analysis, with potentially less weight being accorded to the traditional 'proximity' defences.⁵²

Money laundering

Banks, including authorised foreign banks, are designated reporting entities under the Federal Proceeds of Crime (Money Laundering) and Terrorist Financing Act (PCMLTFA).⁵³ Banks

49 *Voltage Pictures LLC v. John Doe*, 2017 FCA 97.

50 See, for example, the trial decisions in *Turbo Logistics Canada Inc v. HSBC Bank Canada*, 2013 ONSC 7128, aff'd 2016 ONCA 222, and *HSBC Bank Canada v. Dillon Holdings Ltd et al*, 2005 CarswellOnt 2322 (ONSC).

51 *Fiorillo v. Krispy Kreme Doughnuts Inc* (2009), 98 OR (3d) 103 (ONSC).

52 See, for example, *Pardham v. Bank of Montreal*, 2012 ONSC 2229, leave to appeal to ONSC (Div Ct) refused, 2013 ONSC 355, and *Nelles v. Royal Bank of Canada*, 2011 QCCS 2796 (CS Qué Montréal 500-06-000500-104).

53 SC 2000, c 17 [PCMLTFA].

must also have procedures that are in compliance with the Financial Action Task Force's (FATF) anti-money laundering and combating the financing of terrorism (AML/CFT) recommendations.⁵⁴

The Financial Transactions and Reports Analysis Centre of Canada is responsible for ensuring compliance by banks with the PCMLTFA and its regulations. Banks are also subject to Guideline B-8 'Deterring and Detecting Money-Laundering and Terrorist Financing'⁵⁵ issued by the Office of the Superintendent of Financial Institutions Canada (OSFI).

As a result of the requirements of the PCMLTFA, its regulations and the OSFI Guideline, banks must implement AML/CFT controls that include the following elements:

- a board and senior management oversight, including reporting to senior management;
- b an appropriate individual responsible for implementation of the programme;
- c an assessment of inherent money laundering and terrorist financing risks;
- d written AML/CFT procedures that are kept up to date;
- e a written, and ongoing training programme;
- f self-assessment of controls; and
- g an effectiveness test.

ii Insolvency

Victims of fraud by an insolvent individual or entity can face a range of challenges. An insolvent individual may be judgment-proof, while an insolvent entity may enter bankruptcy protection, complicating the asset-recovery process.

Receivership will often be a viable remedy where fraud involving an entity is suspected. It may be appropriate to have a receiver appointed to collect incoming revenue and manage the affairs of the business in the interests of creditors. Receiverships can be instrumental in transferring control of the available assets to the receiver while an investigation is conducted, and in preventing the debtor from diverting assets in the interim.⁵⁶

Receiverships have been used in a number of recent securities fraud cases. Once the receiver has reconciled available funds, unless the allocation proves unworkable, the remaining balance is to be distributed to investors on the basis of the lowest intermediate balance rule.⁵⁷

It is also possible, and useful where fraud is suspected, to seek the appointment of a receiver, at least initially, for the limited purpose of gaining access to the books and records of a company.⁵⁸ Typically, this form of receivership order will not authorise a receiver to operate the business. In referring to this type of receivership, the Ontario courts have adopted the phrase 'investigative receivership'. The Court of Appeal for Ontario affirmed that an

54 In 2007 and 2008, the federal government of Canada implemented significant changes to the PCMLTFA and its regulations to ensure that the legislative framework was in line with international standards. Additional amendments to the identification and reporting requirements in the PCMLTFA were announced in 2016 to take full effect on 17 June 2017.

55 Superintendent of Financial Institutions Canada, Guideline B-8, 'Deterring and Detecting Money Laundering and Terrorist Financing' (December 2008), online: Office of the Superintendent of Financial Institutions, www.osfi-bsif.gc.ca/Eng/fi-if/rg-ro/gdn-ort/gl-ld/Pages/B8_GIAS.aspx.

56 A receiver can be appointed over a debtor's property by contractual right, or by court appointment. The most common statutes used in Canada to secure a court-ordered receivership are the federal Bankruptcy and Insolvency Act (BIA), the provincial Courts of Justice Acts and the provincial Securities Acts.

57 *Boughner v. Greyhawk Equity Partners Limited Partnership*, 2013 ONCA 26; *Easy Loan Corp v. Wiseman*, 2017 ABCA 58.

58 *Degroote v. DC Entertainment Corp et al.*, 2013 ONSC 7101, and *Schembri v. Way*, 2010 ONSC 5176.

investigative receivership can be useful in certain circumstances, but cautioned that these receivership orders must be carefully tailored so the authority given to the receiver will aid in the recovery process, but not be so broad as to permit a receiver to ignore the basic rights of parties and others.⁵⁹

Where an entity that appears to have been used for a fraud is rendered bankrupt, a trustee in bankruptcy has extensive powers to investigate the entity and to require its principals to provide information about the company's dealings.⁶⁰ Among other powers, the trustee has the ability to examine the bankrupt and 'any person reasonably thought to have knowledge of the affairs of the bankrupt'.⁶¹ Creditors and other interested persons also have the ability to apply for an order directing examination of the bankrupt and related persons, and directing the production of relevant documents.⁶² These are powerful tools that can provide victims of a fraud with insight into the scheme and the flow of funds.

With respect to fraudulent conveyances or preferences, in Canada there are federal and provincial statutory provisions to protect creditors from transactions designed to put assets beyond their reach on the eve of insolvency. One common provision used to set aside such transactions is contained in the BIA, which permits non-arm's-length transactions to be attacked if they occurred within 12 months of bankruptcy.⁶³ Arm's-length transactions can be attacked under the BIA if they occurred within three months of bankruptcy.⁶⁴ A further useful provision of the BIA is found in Section 96, by which a creditor can move to set aside transfers to related parties at undervalue.⁶⁵

Bankruptcy will not release the bankrupt from any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity, nor will it discharge any debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation.⁶⁶

iii Arbitration

Canadian courts have shown a willingness to consider applications to set aside arbitral awards on grounds of fraud, particularly with respect to domestic arbitration awards.⁶⁷ A number of the provincial arbitration statutes expressly permit a party to apply to the court to set aside an award on the basis that the award was obtained by fraud.⁶⁸

Internationally, all Canadian provinces have adopted the UNCITRAL Model Law on International Commercial Arbitration⁶⁹ (Model Law) and the New York Convention

59 *Akagi v. Synergy Group (2000) Inc*, 2015 ONCA 368.

60 See, for example, Section 164(1)–(3) of the BIA, RSC 1985, c B-3.

61 *Ibid.*, Section 163(1).

62 *Ibid.*, Section 163(2).

63 *Ibid.*, Section 95(1)(b).

64 *Ibid.*, Section 95(1)(a).

65 Under Section 96 of the BIA, in certain circumstances a creditor may be permitted to set aside a transfer at undervalue if it occurred within the five-year period preceding bankruptcy.

66 BIA, Section 178(1)(d)–(f).

67 *Canadian Centre for Ethics in Sport v. Russell*, [2007] OJ No. 2334 (ONSC).

68 In Ontario, for example, see Section 46(1)(9) of the Arbitration Act, SO 1991, c 17.

69 UNCITRAL Model Law on International Commercial Arbitration, UN Doc A/40/17, Annex I, adopted by the United Nations Commission on International Trade on 21 June 1985, with amendments as adopted

on the Recognition and Enforcement of Foreign Arbitral Awards⁷⁰ through their respective provincial statutes.⁷¹ Article 34 of the Model Law provides for the presumptive validity of international awards by establishing the exclusive criteria for having an arbitral award set aside by local courts at the place of arbitration. Using the same criteria, Article 36 establishes the criteria for when a court can refuse to enforce a foreign arbitral award, including that the recognition or enforcement of the award would be contrary to the public policy of the state. The Model Law does not refer expressly to fraud, but its history makes clear that fraud was intended to be permitted as a ground for annulment on the basis of public policy.⁷²

In addition, a recent decision of the British Columbia Court of Appeal shows that in the right circumstances, the Court is now open to granting a *Mareva* injunction to aid in enforcement of an international arbitral award.⁷³

iv Effect of fraud on evidentiary rules and legal privilege

Neither solicitor-client privilege or litigation privilege will protect communications shown to be *prima facie* in furtherance of a future crime or fraud. It is immaterial whether the lawyer is an ‘unwitting dupe’ or a ‘knowing participant’ in the illegal activity.⁷⁴ There have been cases where the court ordered production of the files of the lawyer for a defendant who had acted in a transaction alleged to have been fraudulent. That said, before finding an exception to privilege, the Supreme Court of Canada has emphasised the importance of the conduct being carried out with the knowledge and advice of counsel.⁷⁵ The Court cited, by example, the need to maintain privilege over communications in which a lawyer counsels against illegal projects.

in 2006, online: United Nations Commission on International Trade Law, www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf. Note: Ontario is the only province so far to have adopted the 2006 amendments.

70 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, 330 UNTS 3, 21 UST 2517, TIAS No. 6997, online: United Nations Treaty Collection, treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XXII/XXII-1.en.pdf.

71 See, for example, International Commercial Arbitration Act, RSA 2000, c I-5 and International Commercial Arbitration Act 2017, SO 2017, c 2, Sched 5. Quebec modified provisions of its Civil Code and Code of Civil Procedure that relate to arbitration in general: an Act to Amend the Civil Code and the Code of Civil Procedure in Respect of Arbitration, SQ 1986, c 73.

72 Gary Born, *International Commercial Arbitration* (Kluwer Law International, 2009) at pp. 2632–35. See also *Re Corporacion Transnacional de Inversiones, SA de CV v. STET Int'l*, [1999] OJ No 3573 (ONSC), aff'd [2000] OJ No 3408 (CA), leave to appeal to SCC refused, [2001] 1 SCR xi, where a party moved to set aside an international award (unsuccessfully). In denying the application, the Court confirmed that fraud can be a basis for setting aside an international award on public policy grounds. The standard to set aside or refuse to enforce an award based on fraud is high. An award will likely not be annulled if the applicant had an opportunity to rebut its opponents' claims at the arbitration hearing. The applicant must show deliberate fraud, or evidence so strong that the fraud would reasonably be expected to be decisive at the hearing.

73 *Sociedade-de-Fomento Industrial Private Ltd v. Pakistan Steel Mills Corp (Private) Ltd*, 2014 CarswellBC 1499 (BCCA). Pakistan Steel Mills application for leave to appeal this decision to the Supreme Court of Canada was dismissed with costs on 18 December 2014.

74 *R v. Campbell*, [1999] 1 SCR 565 at Paragraph 55 [Campbell].

75 *Ibid.*, at Paragraph 58.

V INTERNATIONAL ASPECTS

i Conflict of law and choice of law in fraud claims

In Canada, the court will look at whether there is a sufficiently strong connection between the forum and the parties or the matter in determining whether it has jurisdiction over a matter with international components (i.e., *jurisdiction simpliciter*). Three grounds are considered in making this assessment: the presence of the defendant in the forum; consent of the parties to the jurisdiction of the court; and assumption of jurisdiction based on the existence of a real and substantial connection.

Presence-based jurisdiction

Several Canadian provinces have adopted a model law regarding jurisdictional matters⁷⁶ that stipulate that the residence of a personal defendant in the forum is considered a sufficient basis for a court's finding of jurisdiction.⁷⁷ However, an assertion of jurisdiction may face challenges where it is based solely on the plaintiff's residence.⁷⁸

Foreign corporations may be served in any of the common law provinces or territories if service of the originating process can be made upon the corporation in accordance with the local rules of practice.⁷⁹ Extra-provincial corporations that carry on business in the jurisdiction but do not maintain a place of business for doing so are generally required to have a registered office or business address, or an agent for service.⁸⁰

Consent-based jurisdiction

Where the parties so consent, the court's jurisdiction is deemed vested by agreement of the parties, and Canadian courts have been prepared to give effect to such agreements unless 'strong cause for not doing so is shown'.⁸¹ Further, if the defendant attorns to the jurisdiction of the court (that is, fails to challenge jurisdiction and responds to the merits), he or she will be considered to have submitted to the jurisdiction of the court to determine the dispute.⁸²

76 For example, British Columbia Court Jurisdiction and Proceedings Transfer Act, SBC 2003, c 28 (CJPTA BC).

77 *Ibid.*, at Part 2 — Territorial Competence of Courts of British Columbia, Section 3; Nova Scotia Court Jurisdiction and Proceedings Transfer Act, Part I — Territorial Competence of Courts of Nova Scotia, SNS 2003 (2nd Sess.), c 2, Section 4 (CJPTA NS); Saskatchewan Court Jurisdiction and Proceedings Transfer Act, Part II — Territorial Competence of Courts of Saskatchewan, SS 1997, c C-41.1, Section 4 (CJPTA SK).

78 *Iskander and Sons, Inc v. Haghighat et al*, 2007 BCSC 753.

79 Alberta Rules of Court, Alta Reg 124/2010, Rule 11; CJPTA BC, Sections 7–9; CJPTA NS, Sections 8–10; CJPTA SK, Sections 6–8; Ontario Rules, Rule 16.02(1)(c).

80 *Wilson v. Hull*, [1995] 128 DLR (4th) 403 (Alta CA): in deciding whether a foreign corporation is carrying on business in the jurisdiction, the court will consider factors such as whether the defendant is engaged in some serious business activity; whether the defendant devotes time, labour, skill or effort in the jurisdiction; whether the activity carried on in the jurisdiction is of some importance or significance to the business endeavour of the defendant; and whether there is some continuity or consistency to the business activity as distinct from an isolated transaction or series of transactions.

81 *ZI Pompey Industrie v. ECU-Line NV*, [2003] 1 SCR 450 at Paragraph 19.

82 CJPTA BC, Section 3; CJPTA NS, Section 4; CJPTA SK, Section 4.

Assumed jurisdiction

The Supreme Court of Canada has affirmed the ‘real and substantial’ test as the appropriate common law rule for the assumption of jurisdiction. In doing so, the Court identified a set of non-exhaustive presumptive factors to be considered in determining whether the assumption of jurisdiction is appropriate for tort claims:⁸³

- a* the defendant is domiciled or resident in the province;
- b* the defendant carries on business in the province;
- c* the tort was committed in the province; and
- d* a contract connected with the dispute was made in the province.⁸⁴

Where the plaintiff successfully establishes the presence of any of these connecting factors, a rebuttable presumption of jurisdiction arises.

Forum non conveniens

In addition to determining whether it has jurisdiction simpliciter, the Supreme Court of Canada has affirmed that the exercise of jurisdiction also requires adherence to principles of order and fairness.⁸⁵ That is, at a second stage of analysis, Canadian courts also consider whether they should exercise jurisdiction – *forum conveniens*.⁸⁶

Canadian common law courts will exercise discretion to grant a stay of proceedings on the ground of *forum non conveniens* where it is satisfied that there is a clearly more appropriate forum in which the case may be tried more suitably in the interests of all the parties and the ends of justice.⁸⁷

ii Collection of evidence in support of proceedings abroad

Canada is not a signatory to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters. As such, parties seeking to compel evidence located in Canada for use in a foreign proceeding must do so by obtaining and enforcing ‘letters of request’, also known as ‘letters rogatory’. While letters rogatory can be enforced through various bilateral conventions that provide for the taking of evidence on a reciprocal basis in connection with civil and commercial matters,⁸⁸ the more common practice is to seek enforcement by way of federal⁸⁹ or provincial evidence legislation.⁹⁰

Canadian courts balance two broad considerations for such requests: the impact of the proposed order on Canadian sovereignty and whether justice requires that the taking of

83 Courts have also considered the presumptive factors for the assumption of jurisdiction in the context of contractual disputes. See, e.g., *Lapointe Rosenstein Marchand Melançon LLP v. Cassels Brock & Blackwell LLP*, 2016 SCC 30.

84 *Club Resorts Ltd v. Van Breda*, [2012] 1 SCR 572 at Paragraph 90.

85 *Morguard Investments Ltd v. De Savoye*, [1990] 3 SCR 1077; *Hunt v. T&N plc*, [1993] 4 SCR 289.

86 *Oakley v. Barry*, [1998] 158 DLR (4th) 679 (NSCA) at Paragraph 55. The concept of fairness in determining jurisdiction simpliciter should be considered from the point of view of both the plaintiff and the defendant.

87 *Amchem Products Incorporated v. British Columbia (Workers' Compensation Board)*, [1993]. 1 SCR 897.

88 See, for example Norway, CTS 1935 No. 15; Poland, CTS 1935 No. 18; Portugal, CTS 1935 No. 17; Spain, CTS 1935 No. 12; and Sweden, CTS 1935 No. 13.

89 Canada Evidence Act, RSC 1985, c C-5.

90 For example, in Ontario, the Evidence Act, RSO 1990, c E.23.

commission evidence be ordered. In line with the principle of comity of nations, Canadian courts will give a foreign request for assistance full force and effect unless it is contrary to public policy or otherwise prejudicial to the sovereignty or the citizens of the jurisdiction.⁹¹

iii Seizure of assets or proceeds of fraud in support of the victim of fraud

Criminal

Under the Mutual Legal Assistance in Criminal Matters Act (MLACMA),⁹² a foreign state may request the enforcement of an order for the restraint or seizure of property situated in Canada providing certain preconditions are met, including that:

- a* the request is made by a treaty partner, by a state or entity designated in the Schedule to the MLACMA, or by a state or entity with which Canada has entered into an administrative arrangement;
- b* the request includes a copy of the restraint or seizure order issued by a court of criminal jurisdiction in the requesting state;
- c* the person to whom the property relates is charged with a criminal offence in the requesting state; and
- d* the foreign offence with which the person is charged would be an indictable offence under Canadian law had the conduct been committed in Canada.

A foreign state may request the enforcement of an order for the forfeiture or confiscation of criminal proceeds or property on similar grounds, but the person to whom the property relates must be convicted of a criminal offence in the requesting state (with no possible further appeals of conviction).⁹³

The Minister of Justice of Canada (Minister) must refuse the requests of a foreign state if any of the preconditions are not met. Even where all preconditions have been satisfied, the Minister has the discretion to refuse such requests for various other reasons, including where it is in the public interest to do so. In addition, if the requirements of the MLACMA cannot be satisfied, a foreign state may submit a request for restraint, seizure, forfeiture or confiscation of assets to the Royal Canadian Mounted Police.

Civil

Civil asset forfeiture laws in Canada confer on Canadian provinces the authority to seize and obtain title to property used for or derived from the commission of an unlawful act, even where the illicit activity may not otherwise be readily actionable as a criminal offence. Civil forfeiture enables the victims of crime to recover illegally acquired assets from an individual or an entity through a direct action against their property without the requirement of a prior criminal conviction of the forfeiting party.

Civil forfeiture is initiated when a law enforcement agency or the designated agency under the applicable legislation commences proceedings against the property in question on

91 *Ontario Public Service Employees Union Pension Trust Fund (Trustees of) v. Clark*, [2006] 270 DLR (4th) 429 (CA) at 434–435.

92 RSC 1985, c 30 (4th Supp), Section 9.3.

93 *Ibid.*, Section 9.4.

behalf of the respective province's Attorney General.⁹⁴ Proceedings are initiated *in rem* against the property itself, and thus can be commenced without joining the owners or possessors of the property as defendants.

iv Enforcement of judgments granted abroad in relation to fraud claims

Canadian courts will recognise a foreign judgment where they are satisfied that the foreign court properly claimed jurisdiction over the subject matter of the litigation pursuant to the 'real and substantial connection' test articulated above; the judgment must be for a definite and ascertainable sum; and the judgment must be final and conclusive.⁹⁵

Further, the fact that a judgment may be the subject of an appeal to a higher court will make it no less final,⁹⁶ but a Canadian court may stay local execution pending the outcome of the foreign appeal.⁹⁷

Foreign judgments in Canada may also be recognised by statute through registration under reciprocal enforcement legislation.⁹⁸

v Fraud as a defence to enforcement of judgments granted abroad

Even where a foreign judgment otherwise meets the requirements for recognition and enforcement in Canada, it may still be impeached and denied on the basis that it was obtained by fraud. A foreign judgment is presumed valid, and a court will not generally relitigate the merits of the claim. The burden of proof, therefore, lies on the party seeking to impeach the judgment to demonstrate that it was obtained by fraud of one of two types: fraud going to the jurisdiction of the foreign court, which can always be raised, or fraud going to the merits of a foreign judgment, which can only be challenged for fraud where the allegations are new and not the subject of prior adjudication. As held by the Supreme Court of Canada in the 2003 case of *Beals v. Saldanha*: 'Where material facts not previously discoverable arise that potentially challenge the evidence that was before the foreign court, the domestic court can decline recognition of the judgment.'⁹⁹

VI CURRENT DEVELOPMENTS

In *Google Inc v. Equustek Solutions Inc*,¹⁰⁰ the Supreme Court of Canada upheld an order requiring Google to block certain websites from its worldwide search results. The order was made to enforce an earlier order prohibiting the sale of counterfeit products by defendants operating an online business, who refused to comply with the Court's orders. Google was not

94 See, for example, British Columbia Ministry of Justice, 'Civil Forfeiture in British Columbia', online: Ministry of Justice, <http://www2.gov.bc.ca/gov/content/safety/crime-prevention/civil-forfeiture-office/civil-forfeiture>.

95 *Four Embarcadero Center Venture v. Mr Greenjeans Corp* (HCJ) (1988), 64 OR (2d) 746 (ON SC), aff'd (1988), 65 OR (2d) 160 (ONCA).

96 *Arrowmaster Inc v. Unique Forming Ltd* (1993) 17 OR (3d) 407 (ON SC) and *Continental Casualty Co v. Symons*, 2015 ONSC 6394.

97 *Dslangdale Two LLC v. Daisyteck (Canada) Inc*, 2004 CanLII 48686 (ON SC).

98 See, for example, Canada–United Kingdom Civil and Commercial Judgments Convention Act, RSC 1985, c C-30.

99 [2003] 3 SCR 416 at Paragraph 51.

100 2017 SCC 34.

a party to the underlying action, but the Supreme Court affirmed that a non-party could be made subject to an interlocutory injunction. On behalf of the majority, Justice Abella held that the extraterritorial order was necessary to prevent irreparable harm to the plaintiff, which was being facilitated by the search engine. The Court left open the possibility for Google to apply to vary the order if it can show that complying with the injunction would violate the laws in another jurisdiction.

In January 2017, the Ontario Court of Appeal released *Independence Plaza 1 Associates, LLC v. Figliolini*,¹⁰¹ in which they ruled that the enforcement of a foreign judgment will be subject to Ontario's two-year statutory limitation period, which will not begin to run until all opportunities for appeal have been exhausted.

101 2017 ONCA 44.



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