



**Canada's Asset Recovery Tools:**  
**A Practical Guide**

## **Canada's Asset Recovery Tools: A Practical Guide**

### **I. INTRODUCTION**

Consistent with Canada's support for international legal instruments such *United Nations Convention against Corruption* and the *United Nations Convention against Transnational Crime*, Canada is committed to working with the global community to fight serious criminality, including corruption. States must work together to ensure that those who try to use international borders to evade justice and to hide the fruits of their criminality are not permitted to do so. Canada recognizes that robust tools of international cooperation are vital to preserving peace and security at home and abroad including with respect to asset recovery and the sharing of criminal proceeds.

For these tools to be effective however, States must have a clear and concise understanding of the legal and procedural requirements for obtaining the required assistance.

The following provides a practical overview of the process in Canada for seeking the freezing, restraint, seizure, forfeiture/confiscation and sharing of criminal proceeds. In addition, it provides the relevant contact points in Canada to allow for efficient consultation with Requesting States.

For more detailed information on Canada's mutual legal assistance process, States are encouraged to refer to the *G8 Step-by-Step Guide on Mutual Legal Assistance* which may be accessed at: [http://www.coe.int/T/dghl/standardsetting/pc-oc/PCOC\\_documents/8\\_MLA%20step-by-step\\_CN152011\\_CRP.6\\_eV1182196.pdf](http://www.coe.int/T/dghl/standardsetting/pc-oc/PCOC_documents/8_MLA%20step-by-step_CN152011_CRP.6_eV1182196.pdf). The *G8 Step-by-Step Guide on Mutual Legal Assistance* is also available in French and Arabic through the Canadian Central Authority. See contact information below.

### **II. OVERVIEW OF PROCEDURE FOR SEEKING THE FREEZING OF ASSETS OF CORRUPT GOVERNMENT OFFICIALS**

Under the *Freezing Assets of Corrupt Foreign Officials Act* (FACFOA), the Government of Canada may issue orders or regulations that freeze the assets or restrain property<sup>1</sup> of a foreign state's former leaders and senior officials if the following preconditions are met:

1. The foreign state asserts in writing to the Government of Canada that a person has misappropriated property of the foreign state or acquired property inappropriately by virtue of their office or a personal or business relationship.

---

<sup>1</sup> Property is understood to mean any real, personal, movable or immovable property.

2. The written assertion asks the Government of Canada to freeze property of the person.
3. The circumstances associated with the request demonstrate to the Government of Canada's satisfaction that:
  - the person is, in relation to the foreign state, a politically exposed foreign person<sup>2</sup>;
  - there is internal turmoil, or an uncertain political situation, in the foreign state; and
  - the making of the order or regulation is in the interest of international relations.

If these conditions are met, the Government of Canada may issue an order or regulation that lists and designates the person in question as someone with whom Canadians may not engage in the following activities, whether carried out in or outside Canada:

- the dealing, directly or indirectly, in any property, wherever situated, of a listed politically exposed foreign person;
- the entering into or facilitating, directly or indirectly, any financial transaction related to a dealing, directly or indirectly, in any property, wherever situated, of a listed politically exposed foreign person; and
- the provision of any financial services or other related services in respect of any property of a listed politically exposed foreign person.

In addition to restricting and prohibiting dealing with the properties of corrupt foreign officials, their associates and their family members, FACFOA further provides that Canadians and financial entities must disclose to the Royal Canadian Mounted Police

---

<sup>2</sup> For greater certainty, a “politically exposed foreign person” is defined under FACFOA to mean a person who holds or has held one of the following offices or positions in or on behalf of a foreign state and includes any person who, for personal or business reasons, is or was closely associated with such a person, including a family member:

- (a) head of state or head of government;
- (b) member of the executive council of government or member of a legislature;
- (c) deputy minister or equivalent rank;
- (d) ambassador or attaché or counsellor of an ambassador;
- (e) military officer with a rank of general or above;
- (f) president of a state-owned company or a state-owned bank;
- (g) head of a government agency;
- (h) judge;
- (i) leader or president of a political party represented in a legislature; or
- (j) holder of any prescribed office or position.

whether they have property possession or control of property of person who is the subject of an order or regulation. As such, property associated with a politically exposed foreign person can be identified and frozen at the request of the foreign state on an ongoing basis for the duration of the order or the regulation, which is five years with the possibility of renewal.

While FACFOA does authorize the Government to seize property, seizure cannot occur unless the property is identified as a proceed of crime. As described above, however, it is not necessary to establish that the property is a proceed of crime in order for it to be frozen under FACFOA. Rather, the freeze ensures that the property remains in Canada to give the foreign state the time it needs to pursue its investigations and gather evidence to support a formal request for the seizure and forfeiture of such assets. For more detailed information, States are encouraged to review the Act and its regulations at <http://laws-lois.justice.gc.ca/eng/acts/F-31.6/index.html>.

### **III. OVERVIEW OF PROCEDURE FOR SEEKING RESTRAINT, SEIZURE AND FORFEITURE/CONFISCATION FROM CANADA**

A foreign State may seek restraint, seizure and forfeiture/confiscation of criminal proceeds from Canada in one of two circumstances:

1. By making a mutual legal assistance request to Canada seeking the enforcement of a restraint, seizure or forfeiture/confiscation order issued by a court of criminal jurisdiction in the requesting State; or
2. By requesting that Canada pursue a domestic proceeds of crime investigation.

#### ***a. Mutual Legal Assistance Process***

##### **i. Restraint and Seizure under section 9.3 of the Mutual Legal Assistance in Criminal Matters Act**

A foreign State may seek the restraint or seizure of criminal proceeds or offence-related property from Canada if the following preconditions are met:

1. The request is made by (1) a treaty partner; (2) a state or entity designated in the Schedule to Canada's *Mutual Legal Assistance in Criminal Matters Act*, or (3) by a state or entity with which Canada has entered into an administrative arrangement;
2. The request is made in writing to the Minister of Justice of Canada;
3. The request seeks the enforcement of an order for restraint or seizure of property situated in Canada;

4. The request includes a copy of the restraint/seizure order issued by a court of criminal jurisdiction in the requesting State;
5. The person to whom the property relates is charged with a criminal offence in the requesting State; and
6. The foreign offence with which the person is charged would be an indictable offence (i.e. serious offence/felony) under Canadian law had the conduct been committed in Canada (dual criminality requirement).

**ii. Forfeiture/Confiscation under section 9.4 of the Mutual Legal Assistance in Criminal Matters Act**

A foreign State may seek forfeiture/confiscation of criminal proceeds or offence-related property from Canada if the following preconditions are met:

1. The request is made by (1) a treaty partner; (2) a state or entity designated in the Schedule of Canada's *Mutual Legal Assistance in Criminal Matters Act*; or (3) by a state or entity with which Canada has entered into an administrative arrangement;
2. The request is made in writing to the Minister of Justice of Canada;
3. The request seeks the enforcement of a forfeiture order issued by a court of criminal jurisdiction in the requesting State and includes a copy of the order;
4. The person to whom the property relates must be convicted of a criminal offence in the requesting State and no further appeals of the conviction are possible; and
5. The foreign offence on which the person was convicted would be an indictable offence (i.e. serious offence/felony) under Canadian law had the conduct been committed in Canada (dual criminality requirement).

**iii. Grounds of Refusal/Postponement of Request for the Enforcement of Restraint and Seizure Orders**

Minister of Justice of Canada shall refuse a request for the enforcement of a restraint or seizure order if any of the above preconditions are not met. As noted above, dual criminality is a prerequisite to Canada's cooperation in such matters.

Minister of Justice of Canada may refuse a request for the enforcement of a restraint or seizure order if it would be contrary to the public interest, e.g. the property is the subject of a Canadian proceeds investigation or prosecution. (Reference: Canada's mutual assistance treaties).

Minister of Justice of Canada may postpone a request for the enforcement of a restraint or seizure order if it is in the public interest to do so, e.g. immediate execution would interfere with an ongoing Canadian investigation or prosecution. (Reference: Canada's mutual assistance treaties).

#### **iv. Grounds of Refusal of Request for Forfeiture/Confiscation**

The Minister of Justice shall refuse a request to enforce a foreign forfeiture order if the above preconditions are not met (including the double criminality requirement). In addition, the Minister shall refuse a request in the following circumstances:

- There are reasonable grounds to believe that the request is made to punish a person on one or more listed grounds of discrimination, e.g. race, nationality, age, political opinion;
- Enforcement would compromise an ongoing Canadian proceeding or investigation;
- Enforcement would “impose an excessive burden on the resources of federal, provincial or territorial authorities” in Canada;
- Enforcement might prejudice Canada's security, national interest or sovereignty;  
or
- Refusal of request is in the public interest.

#### **v. Nexus Must Exist between the Foreign Offence and the Canadian Property as Proceeds of Crime**

A request to Canada that seeks the enforcement of a restraint, seizure or forfeiture/confiscation order must clearly outline the basis to believe that the Canadian property constitutes the proceeds of the foreign criminal offence or offence-related property.

It is not sufficient to simply state that the property is criminal proceeds or offence-related property. Evidence to substantiate this allegation is needed. For example, the requesting State must provide an outline of the evidence that shows that the funds in a specific Canadian bank account emanates from the corruption offence for which the person was charged or convicted.

#### **vi. Specific Canadian Property/Assets Must be Identified**

The request for assistance and the foreign order of restraint, seizure or forfeiture/confiscation must clearly identify the Canadian property that is believed to constitute criminal proceeds or offence-related property. In other words, the restraint, seizure or forfeiture order must pertain to property that was determined by the court of criminal jurisdiction of the requesting state to be the proceeds of crime or offence-related property.

It is not sufficient to refer to general property or assets situated in Canada, e.g. all bank accounts in the name of the accused or convicted person; all real estate held by the accused or convicted person in Canada.

#### **vii. Canadian Legal Process for Executing Requests for Restraint, Seizure and Forfeiture/Confiscation**

If the Minister of Justice approves the execution of a request, Ministerial Authorization is issued to the Attorney General of Canada to make arrangements to enforce the foreign order.

Counsel for the Attorney General of Canada, on receipt of the Ministerial Authorization, may file the order with the Superior Court in the province in which the property is located.

On being filed, the order is entered as a judgment of that court and may be executed anywhere in Canada.

With respect to requests to enforce forfeiture/confiscation orders, notice must be given to persons who, in the opinion of the Canadian court, have a valid interest in the property to be forfeited before the order may be executed against the Canadian property.

#### **viii. Non conviction based asset forfeiture**

In contrast to criminal asset recovery, non-conviction based (NCB) asset forfeiture, also known as civil forfeiture enables governments and 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 defendant. Due to Canada's constitutional division of powers, however, the Government of Canada cannot respond to a request for NCB asset forfeiture as such requests fall within the jurisdiction of Canada's provinces. As such, should a foreign state seek to recover assets from Canada through NCB asset forfeiture, it must hire private counsel to act on its behalf in the province where the property is located.

### **b. Canadian Proceeds of Crime Investigation**

In cases where the requirements of Canada's *Mutual Legal Assistance in Criminal Matters Act* cannot be met, a request for restraint, seizure or forfeiture/confiscation may be referred to the Royal Canadian Mounted Police (RCMP) to assess whether the foreign request provides a basis to commence a Canadian investigation for possession of proceeds of crime or offence-related property. In these cases, the Canadian police would review the evidence provided by the Requesting State to determine whether there has been a violation of Canada's criminal law and whether Canadian charges should be laid.

If a Canadian investigation was commenced on this basis and property is identified as a proceed of crime by the RCMP, the Attorney General may apply to the courts to obtain an order under Canada's *Criminal Code* to prohibit any person from disposing of, or otherwise dealing with any interest in, the property specified in the order otherwise than in the manner that may be specified in the order. In turn, if it is established by a Canadian court that the property is a proceed of crime and that an offence was committed in relation to that property, the court shall order that the property be forfeited to the Government of Canada to be disposed of as the Attorney General directs or otherwise dealt with in accordance with the law. This way, Canada can separate criminals from their illicit assets by invoking domestic law and return them to their legitimate owners as appropriate.

The RCMP may only consider commencing a Canadian proceeds investigation if:

1. The assets to be restrained/frozen are identified; and
2. There is evidence linking the Canadian assets to an alleged criminal offence in Canada or the foreign state. There must be evidence that the Canadian assets are the proceeds of crime or offence-related property.
3. The time from the commission of the crime and the accumulation of assets coincide.

## **IV. OVERVIEW OF PROCEDURE FOR ASSET SHARING**

In accordance with its domestic law, Canada fully supports the implementation of Chapter V of the *United Nations Convention against Corruption*, which recognizes cooperation and assistance between States Parties as a fundamental principle with regard to the return of assets to its legitimate owners.

In accordance with article 59 of the *United Nations Convention against Corruption*, Canadian law requires that there be a formal asset sharing agreement with a foreign state before any assets can be returned or disposed of to a foreign state. In this respect, section 11 of Canada's legislation, *The Seized Property Management Act*, provides that the Attorney General of Canada, with the approval of the Governor in

Council, may enter into a reciprocal asset sharing agreement with the government of a foreign state in order to return assets to the foreign state. Sections 3 & 4 of the *Forfeited Property Sharing Regulations*, which apply to such agreements, further provide that no sharing under the *Seized Property Management Act* and these *Forfeited Property Sharing Regulations* shall take place with the government of a foreign state unless the government of that foreign state has entered into an agreement pursuant to section 11 of the *Seized Property Management Act*. In turn, the agreement with the government of a foreign state, shall:

- provide that sharing will be between the Government of Canada and the government of that foreign state;
- provide that the sharing of the proceeds of disposition of property in Canada and the sharing of fines in Canada will be in accordance with the Regulations;
- provide that there will be no conditions in respect of the use of any moneys received under the agreement; and
- state the title of the official to whom the amount of any share is to be paid and sent or provide that a central authority will designate to whom the amount of any share is to be paid and sent.

In accordance with article 57(4) of the *United Nations Convention against Corruption*, Canada shares property with the requesting state in manner that recognizes deductions for reasonable expenses incurred in investigations, prosecutions and judicial proceedings leading to the return or disposition of confiscated property. To this end, the *Forfeited Property Sharing Regulations* provide that Canada shall return or dispose of confiscated property using percentage based asset sharing formulae that recognize the value of Canada's contributions towards achieving the return or disposition of the property against the value of the property itself. This is done on a diminishing value basis such that the value of Canada's contribution that may be deducted from the value of the property can be 90% for predominant contributions, 50% for significant contributions and 10% for minimal contributions.

## **V. POINTS OF CONTACT IN CANADA**

### **a. *Contact on Freezing Assets of Corrupt Government Officials***

In Canada, requests to freeze the assets of corrupt government officials must be made to the Canadian Department of Foreign Affairs and International Trade through the following contact point:

**Criminal, Security and Diplomatic Law Division  
Legal Affairs Bureau  
Department of Foreign Affairs and International Trade Canada  
Lester B Pearson, Tower C  
125 Sussex Drive  
Ottawa, ON, K1A 0G2, Canada  
Telephone: + 011 44 613-944-0870  
Fax: + 011 44 613-944-0870  
Email: freeze-gel@international.gc.ca**

### **b. *Contact on Requests for Mutual Legal Assistance***

All requests for mutual legal assistance in criminal matters, including those seeking the restraint, seizure, forfeiture/confiscation and sharing of criminal proceeds are submitted to the Canadian Central Authority, the International Assistance Group at the Department of Justice Canada. The contact information is provided below:

**International Assistance Group  
Litigation Branch, Criminal Law Division  
Department of Justice Canada  
284 Wellington Street, 2nd Floor  
Ottawa, ON, K1A 0H8  
Telephone: + 011 44 613-957-4832  
After hours number: + 011 44 613-851-7891  
Fax: + 011 44 613-957-8412  
Email: cdncentralauthority@justice.gc.ca**

In addition, Canada has a liaison official in Brussels to facilitate the processing of mutual legal assistance requests from countries in Europe, and a liaison official in Paris to assist in the processing of requests to and from France. Their contact information is as follows:

**Counsellor of International Criminal Operations  
Canadian Mission to the European Union  
Avenue de Tervuren 2  
1040 Brussels, Belgium  
Telephone: + 32 (0)2 741 07 71  
Fax: + 32 (0)2 741 06 29**

**Counsellor of International Criminal Operations,  
Canadian Embassy  
Paris, France  
Tel: + 33-(0)1-4443-2308;  
Fax: + 33-(0)1-4443-2995**

**c. Contact on Asset Sharing**

Requests to share forfeited criminal proceeds are made to the Canadian Department of Justice. The contact point is as follows:

**Elaine Krivel, Q.C.  
General Counsel  
Department of Justice Canada  
130 King Street West, # 3400  
Toronto, Ontario M5X 1K6  
Canada  
Tel: 416-973-9648  
Fax: 416-973-4328  
E-mail: [elaine.krivel@justice.gc.ca](mailto:elaine.krivel@justice.gc.ca)**

**VI. References**

For more information about the Canadian laws and legal measures discussed in this guide, you are encouraged to consult the following websites:

- **Department of Justice Canada's Justice Law Website**
  - <http://laws-lois.justice.gc.ca/eng/>
- **Department of Foreign Affairs and International Trade Canada**
  - <http://www.international.gc.ca/sanctions/index.aspx?view=d>