**Asset Recovery in Anti-Corruption: A Canadian Perspective**

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**Abstract**

*This paper presents the legal scheme that is applicable to ‘asset recoveries’ in Canada. To fully equip the readers with the necessary tools to understand the legal scheme applicable to ‘asset recoveries’ in Canada, the concepts of ‘corruption’ - as it is understood in Canadian criminal law - as well as the concept of ‘asset recovery’ are defined beforehand. A few prominent Canadian cases involving corruption are also discussed.*

**Keywords:** *asset recovery, corruption, Canada*.

1. **Introduction**

Canada is a relevant and interesting case study with respect to the issue of corruption and, so, by the same token, is its asset recovery legal scheme because:[[1]](#footnote-1)

Canada is generally regarded as one of the world’s leading democracies. This is believed to be the case because Canada has developed systems and rules to help strengthen and protect democratic values and democratic institutions. … Despite its generally strong reputation for protecting its democratic institutions and values, however, Canada has also lived through a few challenges”

One of the most famous examples of such challenges pertaining to corruption in Canadian modern history, mostly because it received a wide media coverage, may well be the ‘Sponsorship Scandal’:[[2]](#footnote-2)

Following the results of the 1995 referendum on Quebec sovereignty, the federal Cabinet created the Sponsorship Program …, which was designed to counteract the sovereignty movement and increase the visibility of the federal government in Quebec … [a] journalist … wrote a series of articles on the Program. [He] focussed primarily on several problematic activities relating to the Program’s administration. His most significant allegations targeted the misuse and misdirection of public funds. … Following a scathing report from the Auditor General, a Royal Commission … was struck to investigate what had become known colloquially as the ‘Sponsorship Scandal’.

Another more recent and relevant jurisprudential example is the case involving, in 2017, the interim mayor of Montreal who was convicted, among other things, of accepting payments from real estate developers and engineering firms in return for favours and political influence while he was the mayor of a central borough in Montreal.[[3]](#footnote-3)

Thus, “[t]he insistence on the exemplarity of those in power is far from obsolete. It finds a singular echo in the ... campaigns against corruption and moralization of political life.”[[4]](#footnote-4)

Tromme points out, “Asset forfeiture laws are powerful tools provided to law enforcement agencies in their quest to tackle crime and corruption byseizing ill-gotten assets.”[[5]](#footnote-5) We will examine those tools after having first explained corruption as it is understood in Canada.

1. **What Does ‘Corruption’ Mean in Canada?**

Interestingly, Gibbons points out, “It is often assumed, at least implicitly, that political corruption needs no definition since it has a common usage which is acceptable to everyone [but] this is far from the truth [because] the word ‘corruption’ has had a number of different meanings in the history of the English language.”[[6]](#footnote-6) He further suggests, “[The] central core [of these definitions] defines corruption as deviation in behaviour from some norm which is held to be operative within the political system.”[[7]](#footnote-7) To rely on and use a more specific and workable definition of corruption in this paper, even if it must be acknowledged that “corruption is notoriously difficult to define”[[8]](#footnote-8), let us mention “[t]he definition of ‘corruption’ [that is] commonly used by anti‑corruption organisations [which] is: ‘the abuse of entrusted authority for illicit gain’ ... it can take many shapes [and] can happen at the elite level … or at a lower level” of the state organization.[[9]](#footnote-9) Lisciandra specifies that the meaning of corruption may also be “narrowed to consider [it] as an act of misuse of public power for private profit against the common good. Sensu stricto, bribery is considered the only actual form of corruption. It consists of promising, offering, or giving, as well as soliciting or accepting a corrupt exchange between some utility … and the actions of individuals … in charge of legal or public duty.”[[10]](#footnote-10) This type of corruption, i.e. “among public officials and private persons [,] is the most widespread. The simplest form of corruption in that area is bribing of public officials.”[[11]](#footnote-11)

 In Canada, bribery, “the only actual form of corruption”, is provided by section 121 of the *Criminal Code*, which was “enacted for the important goal of preserving the integrity of government.”[[12]](#footnote-12) Section 121(1)(*c*) covers the cases where “an official or employee of the government, directly or indirectly demands, accepts or offers or agrees to accept from a person who has dealings with the government a commission, reward, advantage or benefit of any kind for themselves or another person, unless they have the consent in writing of the head of the branch of government that employs them or of which they are an official.”[[13]](#footnote-13) As interpreted by the Supreme Court of Canada in *R. v. Hinchey*, section 121(1)(*c*) is “not interested in regulating the ordinary dealings which go on between Canadians and the government, but is truly concerned with persons who at the time of the commission of the offence had specific or ongoing business dealings with the government and that the gift was such that it could have an effect on those dealings.”[[14]](#footnote-14)

 Because ordinary dealings with the government may involve a sole individual, a corporation or both, a few words should be said briefly about the attribution of criminal liability in Canada. What is essential to know, for our purposes, is that for corporations in Canada, according to the deciding judge in *R. c. Pétroles Global*, “the criminal liability of legal entities [is] no longer established according to the ‘directing mind’ theory, but rather ‘senior officers’, which is a substantial change in the common law”.[[15]](#footnote-15) ‘Senior officers’ can create criminal liability for a corporation. The ‘directing mind’ theory or the doctrine of corporate identification was adopted in Canada by the Supreme Court of Canada in the decision *Canadian Dredge & Dock Co. v. The Queen*[[16]](#footnote-16)in 1985: “the doctrine arose from the need to resolve the issue of whether, and in what circumstances, a corporation could be subject to criminal liability for a *mens rea* offence (an offence requiring a guilty mind).”[[17]](#footnote-17) To add a layer of complexity, it must be recalled, however, that the doctrine of corporate identification is still valid and applicable in Canada.[[18]](#footnote-18) In an attempt to reconcile both approaches, it is fair (and cautious) to submit that the attribution of criminal liability is extended *de facto* to more than just the ‘directing mind’ of a corporation, but it now also extends, with the enactment of section 22.2 of the *Criminal Code*, to ‘senior officers’. In short, an individual or a corporation[[19]](#footnote-19) may, in Canadian criminal law, be criminally charged and found guilty of a corruption offence, for example.

 The Supreme Court of Canada also observes in *R. v. Hinchey* that section 121(1)(*c*) of the *Criminal Code* is “one of the myriad ways in which the government seeks to achieve this purpose [i.e. of preserving the integrity of government].  For example, a glance at the surrounding *Criminal Code* [sections] 119 to 125 reveals different methods by which the law attempts to deter conduct by persons dealing with or employed by government.”[[20]](#footnote-20) To review summarily a few of these sections, “The wording of s. 121(1)(*a*)(ii) is quite clear.  It is also comprehensive.  It is designed to prevent government officials from undertaking, for consideration, to act on another person’s behalf in conducting business with the government.”[[21]](#footnote-21) Section 121(1)(*b*) is focused on the prohibition of a benefit being given to a government official in the course of business dealings between an accused and the government. In *R. v. Carson*, the Supreme Court of Canada stated, “Like s. 121(1)(*c*), s. 121(1)(*d*) aims to preserve both government integrity and the appearance of government integrity”.[[22]](#footnote-22) Section 122 prohibits corruption of public officials in positions of trust.

Criminal offences pertaining to corruption are also provided in the *Corruption of Foreign Public Officials Act* (hereinafter ‘CFPOA’)[[23]](#footnote-23).[[24]](#footnote-24) For example, in *R. v. Karigar*[[25]](#footnote-25), the accused was convicted of offering a bribe to a foreign public official pursuant to s. 3(1)(*b*). Under the *Freezing Assets of Corrupt Foreign Officials Act*[[26]](#footnote-26), the Government of Canada may issue orders or regulations that freeze the assets or restraint property of a foreign state’s former leaders and senior officials under certain specific preconditions.

In sum, the *Criminal Code* and the CFPOA are the primary pieces of legislation governing bribery in Canada. In this paper, our attention will be focused on the *Criminal Code*.

 However, “the criminal law [in Canada] is not the only method utilized [to address corruption]; a variety of other statutes contain provisions which deal with corrupt or fraudulent practices, while there are also conflict of interest and ethical guidelines to regulate behaviour.”[[27]](#footnote-27) The Values and Ethics Code for the Public Sector[[28]](#footnote-28), the government document titled *Accountable Government - A Guide for Ministers and Ministers of State*[[29]](#footnote-29), the *Conflict of Interest Act*[[30]](#footnote-30), the *Lobbying Act*[[31]](#footnote-31), the *Public Servants Disclosure Protection Act*[[32]](#footnote-32) and the *Conflict of Interest Code for Members of the House of Commons*[[33]](#footnote-33)are legal instruments adopted in Canada to fight against conflicts of interests within the public service specifically.[[34]](#footnote-34) As a side note, Canada is also an international leader in the field of the study and the management of conflicts of interests.[[35]](#footnote-35)

 In a nutshell, most of the offences that relate to bribery in Canada are listed below.

* Under the *Criminal Code*:
	+ bribery of judicial officers (section 119);
	+ bribery of officers (section 120);
	+ frauds on the government (section 121);
	+ breach of trust by a public officer (section 122);
	+ municipal corruption (section 123);
	+ selling or purchasing office (section 124);
	+ influencing or negotiating appointments or dealing in offices (section 125);
	+ fraud (section 380);
		- It is an offence for anyone to defraud the public or any person, of any property, money, valuable security, or service, by deceit, falsehood, or other fraudulent means. The Supreme Court of Canada[[36]](#footnote-36) has determined that “other fraudulent means” is broad, and covers almost any form of dishonesty. Therefore, the general Criminal Code provisions on fraud could apply in the context of bribery.
	+ Secret Commissions (section 426): A bribe for the purpose of this section is defined as a reward, advantage, or benefit of any kind.
* Under the *CFPOA*:
	+ bribing a foreign public official (section 3);
	+ falsifying accounts for the purpose of bribing or concealing the bribing of a foreign public official (section 4);
* Under the *Conflicts of Interest Act*:
	+ gifts and other advantages (section 11);
	+ travel on non-commercial chartered or private aircraft (section 12);
	+ contracts with public sector entities or private entities contracting with public sector entities (section 13);
	+ contracting with a spouse, common-law partner, child, sibling or parent (section 14);
	+ various employment-related prohibited activities (section 15);
	+ fundraising that places the public office holder in a conflict of interest (section 16).
1. **How ‘Asset Recovery’ Works in Canada?**

Asset recovery is defined as the legal process through which “law enforcement and prosecutors [...]identify and trace the assets, linking them to the criminals and criminal activity and allowing for the seizure and confiscation of the criminal proceeds and the prosecution of the perpetrator.”[[37]](#footnote-37)

Brun J., Gray L., Scott C. & Stephenson K. M. explains generally, “two distinct mechanisms have been developed to control and preserve assets that may be subject to confiscation: seizure and restraint. *Seizure* involves taking physical possession of the targeted asset. ... *Restraint* orders are a form of mandatory injunction issued by a judge or a court that restrains any person from dealing with or disposing of the assets named in the order, pending the determination of confiscation proceedings.”[[38]](#footnote-38)

1. **International Law**

In international law, ‘asset recovery’ is covered by the *United Nations Convention against Corruption* (hereinafter ‘UNCAC’).[[39]](#footnote-39) A specific legislation implemented this international convention in Canadian domestic law.[[40]](#footnote-40) This “Convention includes substantive provisions laying down specific measures and mechanisms for cooperation with a view to facilitating the repatriation of assets derived from offences covered bythe UNCACto their country of origin.”[[41]](#footnote-41) For example, Article 53 provides for ‘measure for direct recovery of property’, i.e. “to recover and return stolen assets to their jurisdiction of origin”[[42]](#footnote-42), while Article 31 addresses ‘freezing, seizure and confiscation’ of such assets.

1. **Canadian Law**

 At the domestic level, Gerry Ferguson, when he testified before the Standing Committee on Foreign Affairs and International Development, explains: “money laundering is really the lifeblood of corruption. It allows corruption, this grand corruption, to flourish. It seems to me that of maybe 10 things that are essential to grappling with corruption, one of those is that we have to try to choke out the personal profit and gain that arises out of this grand corruption. One of several important ways of doing so is creating this effective and efficient money-laundering and asset recovery law.”[[43]](#footnote-43) Therefore, it will come as no surprise to the readers that the general legal scheme that applies in Canada to seize and forfeit assets in money laundering cases, for example, will also generally applies to cases involving corruption offences, especially in the context where “[c]orruption frequently involves the commission of several criminal offenses.”[[44]](#footnote-44)

**i. Proceeds of Crime**

The Criminal Code’s broad definition of the proceeds of crime pursuant to section 462.3(1) includes *any* benefit or advantage that is derived from the commission of a *designated offence*, whether indirectly or directly. More specifically, as indicated in *Sellathurai v. Canada (Minister of Public Safety and Emergency Preparedness)*:[[45]](#footnote-45) “The definition of ‘proceeds of crime’ provides an expansive, although not unlimited, scope as to what may be considered a criminally acquired asset. The *designated indictable offences which may give rise to proceeds of crime* *include* a number of the more serious offences under the *Criminal Code* and other federal statutes, such as ... *bribery*”. The determination of “whether there are reasonable grounds to suspect that seized funds are ‘proceeds of crime’ within the meaning of [the latter section] of the *Criminal Code* can be approached ... by breaking the analysis into two parts. ... the analysis involves a consideration of whether there is a reasonable suspicion that the seized funds are associated with criminality, and that such criminality is a designated indictable offence. ... the second part of this approach is the more difficult of the two. Evidence linking the seized funds to criminality in general is likely to be available. However, evidence indicating a linkage between the seized funds and a particular designated indictable offence is less likely to be available.”[[46]](#footnote-46) That being said, section 462.39 of the *Criminal Code* also allows the court to infer that a property was obtained or derived from the commission of a designated offence for the purposes of forfeiture if specific requirements are met.

If an offender is convicted of bribery and the prosecution can prove on a *balance of probabilities* that the property is proceeds of crime and that the offender committed bribery (the designated offence) in relation to that property, then the forfeiture of the property must be ordered by the court pursuant to section 462.37(1) of the *Criminal Code*.

Subsidiarily, if the offender is convicted of a designated offence, but the court is not convinced that the offender committed the designated offence in relation to the *specific* property, the court retains discretion to make a forfeiture order if it is convinced *beyond a reasonable doubt*[[47]](#footnote-47) that the property is nonetheless the proceeds of *some* crime pursuant to section 462.37(2) of the *Criminal Code*.

**ii. Interim Measures**

As for interim measures, i.e. measures taken *before a case is decided on its merits*, section 462.32 of the *Criminal Code* allows the judge to grant a warrant to search, seize and detain property if the judge is satisfied that there are reasonable grounds that the property *could* be subject to a criminal forfeiture order. In addition, section 462.33 of the *Criminal Code* allows the judge to grant a restraining order prohibiting any person from disposing or dealing with the property except as authorised by the order.[[48]](#footnote-48) The judge must also be satisfied that there are reasonable grounds that the property could be subject to a criminal forfeiture order. The interim measures are obviously put in place to prevent that the evidence may be disposed of by an accused. In any event, it remains true and valuable to know that “merely transferring property to a third party does not precluding the making of a forfeiture order.”[[49]](#footnote-49)

**iii. Offence-related property**

Hubbard, Murphy, O’Donnell and DeFreitas write, “Like its counterpart in subsection 462.37(1) of the *Code* that permits forfeiture of proceeds of crime *after conviction*, section 490.1 permits forfeiture of offence-related property on proof of a *balance of probabilities*, when a direct connection is made between the offence-related property and the offence for which a conviction is entered”[[50]](#footnote-50) The Ontario Court of Appeal states in *R. v. Trac*, “‘Offence-related property’ has a different and potentially *broader meaning* than does ‘proceeds of crime’. Proceeds of crime as defined in s. 462.3(1) refers to property ‘obtained or derived directly or indirectly’ from the commission of an indictable offence. Property is only the proceeds of crime if it is at least indirectly the product of crime. ‘Offence-related property’ reaches property used in any manner in connection with the commission of an indictable offence.  The section is aimed at *the means, devices or instrumentalities* used to commit offences.”[[51]](#footnote-51)

**Conclusion**

Corruption of any kind, big or small, is a serious issue that cannot be taken lightly by any country. Canada is not exempt from having to deal with this problem. However, the legal instruments put in place to fight against corruption, and to ensure that it does not benefit those who are involved in it, as well as the steady efforts made by law enforcement agencies and the prosecution may help citizens to believe in a better future in that regard. As the Vietnamese proverb wisely says, Cái khó ló cái khôn (adversity is the mother of wisdom). Thus, the adversity caused by the existence of corruption should make one wiser, and should support the use, and also from time to time the creation of innovative solutions, compliant with the existing legal rules, to tackle this problem.

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17. ##  *Livent Inc. v. Deloitte & Touche*, 2016 ONCA 11, para. 85. This decision of the Ontario Court of Appeal was appealed before the Supreme Court of Canada (see below), but not on this point.

 [↑](#footnote-ref-17)
18. For example, see the decision of the Supreme Court of Canada in *Deloitte & Touche v. Livent Inc. (Receiver of)*, [2017] 2 S.C.R. 855, para. 104: “this Court’s decision in *Canadian Dredge*remains the authoritative test for the application of the corporate identification doctrine”. See also Lafrance S. (2019) ‘Trách nhiệm hình sự của doanh nghiệp tại Canada’ [Corporate criminal liability in Canada] in PGS.TS. Nguyễn Ngọc Chí (Chủ biên) *Thủ tục truy cứu trách nhiệm hình sự đối với pháp nhân thương mại và những vấn đề đặt ra khi thi hành Bộ luật Tố tụng hình sự (hiện hành) (Sách chuyên khảo)* [Procedures for criminal prosecution against commercial legal entities and issues raised when implementing the Criminal Procedure Code (current) (Monograph)], Nhà xuất bản Chính trị quốc gia Sư thật [National Political Publishing House], p. 391: “có vẻ như hiện nay lý thuyết đồng nhất hóa vẫn còn được nhiều Tòa án ở Canada áp dụng khi truy cứu trách nhiệm hình sự pháp nhân.” [It seems that nowadays the identification theory is still being applied by many Canadian courts when prosecuting criminal liability.] [translated from Vietnamese by Sébastien Lafrance] [↑](#footnote-ref-18)
19. ##  See, e.g., *R. c. SNC-Lavalin international inc.*, 2019 QCCQ 7778, where the corporation SNC-Lavalin was, after a preliminary hearing was held, committed to stand trial pursuant to s. 3(1)b) of the *Corruption of Foreign Public Officials Act*, S.C. 1998, c. 34.

 [↑](#footnote-ref-19)
20. ##  *R. v. Hinchey*, *supra*, para. 13.

 [↑](#footnote-ref-20)
21. *R. v. Cogger*, [1997] 2 S.C.R. 845, para. 16. [↑](#footnote-ref-21)
22. *R. v. Carson*, [2018] 1 S.C.R. 269, paras 1 & 38. [↑](#footnote-ref-22)
23. S.C. 1998, c. 34. [↑](#footnote-ref-23)
24. For more information about this Act, see, e.g., Harrington J. (2018), *Addressing the Corruption of Foreign Public Officials: Developments and Challenges within the Canadian Legal Lands*, The Canadian Yearbook of International Law, 56. [↑](#footnote-ref-24)
25. ##  *R. v. Karigar,* 2014 ONSC 3093.

 [↑](#footnote-ref-25)
26. ##  S.C. 2011, c. 10.

 [↑](#footnote-ref-26)
27. ##  *R. v. Hinchey*, *supra*, para. 13.

 [↑](#footnote-ref-27)
28. Ottawa: Treasury Board of Canada, 2003. Retrieved from <https://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=25049> [↑](#footnote-ref-28)
29. Retrieved from <http://publications.gc.ca/collections/collection_2011/bcp-pco/CP1-3-2011-eng.pdf>. [↑](#footnote-ref-29)
30. S.C. 2006, c. 9, s. 2. [↑](#footnote-ref-30)
31. ##  R.S.C. 1985, c. 44 (4th Supp).

 [↑](#footnote-ref-31)
32. ##  S.C. 2005, c. 46.

 [↑](#footnote-ref-32)
33. Standing Orders of the House of Commons - Consolidated version as of December 11, 2019, ‘Conflict of Interest Code for Members of the House of Commons’. Retrieved from

<https://www.noscommunes.ca/About/StandingOrders/appa1-e.htm>. [↑](#footnote-ref-33)
34. Lafrance S. (2020), ‘The Rules Applicable to Conflicts of Interests for Canadian State Representatives’, *Vietnam Journal of Legal Sciences*,2(2) (forthcoming– December 2020). [↑](#footnote-ref-34)
35. Dion, M. (2018), Conflict of Interest and Ethics Commissioner, *L’évolution de l’approche fédérale en matière d’éthique: événements déterminants, bilan et perspectives* [The evolution of the federal approach to ethics, decisive events, results and perspectives], McLaughlin College, York University, Toronto, Ontario, Canada, p. 11. [↑](#footnote-ref-35)
36. ##  *R. v. Riesberry*, [2015] 3 S.C.R. 1167; *R. v. Théroux*, [1993] 2 S.C.R. 5; *R. v. Zlatic*, [1993] 2 S.C.R. 29; *R. v. Olan et al.*, [1978] 2 S.C.R. 1175.

 [↑](#footnote-ref-36)
37. Basel Institute on Governance, International Centre for Asset Recovery, Development Assistance, Asset Recovery and Money Laundering; Making the Connection 6 (2011). [↑](#footnote-ref-37)
38. Brun J., Gray L., Scott C. & Stephenson K. M. (2011), *Asset Recovery Handbook: A Guide for Practitioners*, Stolen Asset Recovery Initiative – The World Bank/UNODC, *supra*, p. 76-77. [↑](#footnote-ref-38)
39. *UN General Assembly United Nations Convention Against Corruption*, 31 October 2003, A/58/422. [↑](#footnote-ref-39)
40. ##  *An Act to amend the Criminal Code in order to implement the United Nations Convention against Corruption*, S.C. 2007, c. 13.

 [↑](#footnote-ref-40)
41. Sandage, J. (2015), *supra*, p. 19. [↑](#footnote-ref-41)
42. Leasure, P. (2016), ‘Asset recovery in corruption cases: Comparative analysis identifies serious flaws in US tracing procedure’, *Journal of Money Laundering Control*, 19(1), p. 6. [↑](#footnote-ref-42)
43. Standing Committee on Foreign Affairs and International Development, Number 039, 1st Session, 42nd Parliament, Monday, December 5, 2016 (1535). [↑](#footnote-ref-43)
44. Brun J., Gray L., Scott C. & Stephenson K. M. (2011), *supra*, p. 34. [↑](#footnote-ref-44)
45. [2009] 2 FCR 576, para. 115 (italics added). [↑](#footnote-ref-45)
46. Ibid, paras 117-118. [↑](#footnote-ref-46)
47. *R. v. Rhee*, [2001] 3 S.C.R. 364, at para. 51 (LeBel J., dissenting, but not on this point): “the standard of proof beyond a reasonable doubt is distinct from, and a higher standard than, proof on a balance of probabilities.” [↑](#footnote-ref-47)
48. See *Quebec (Attorney General) v. Laroche*, [2002] 3 S.C.R. 708, at para. 32. [↑](#footnote-ref-48)
49. *R. v. Rosenblum*, 1998 CanLII 4920 (BC CA). [↑](#footnote-ref-49)
50. Hubbard R., Murphy D., O’Donnell F. & DeFreitas P. (2004), *Money Laundering & Proceeds of crime*, Irwin Law Inc., p. 182. [↑](#footnote-ref-50)
51. *R. v. Trac*, 2013 ONCA 246, paras 79-80 (italics added). [↑](#footnote-ref-51)