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International Fraud & Asset Tracing 2022

Canada: Law & Practice
and
Canada: Trends & Developments

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CANADA

Law and Practice

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1. FRAUD CLAIMS

1.1 General Characteristics of Fraud Claims

In Canada, various criminal and civil remedies are available for victims of fraud. The claims arise under statute, at common law and in equity and include personal and proprietary claims which may result in asset tracing. Canadian courts also assist in enforcing foreign judgments or awards where the judgment is from a court of competent jurisdiction, is final and is not for a penalty, taxes, a fine or enforcement of a foreign public law.

Fraud under the Criminal Code

In the criminal context, a criminal fraud offence must be proven beyond a reasonable doubt. Under the federal Criminal Code, the general fraud offence permits the police to investigate and the Crown counsel to prosecute allegations of fraud of any kind (Section 380) and in relation to private sector parties or public officials. Canadian courts have interpreted the criminal fraud offence broadly. This Section encompasses conduct that is objectively dishonest and results in deprivation or risk of deprivation to the victim. Criminal intent is a required element to establish liability. Besides the general offence of fraud, the Criminal Code, as well as other statutes, stipulate more specific fraud-related activities as offences, such as falsifying employment records (Section 398), disposal of property to defraud creditors (Section 392), fraudulent sale of real property (Section 387) and insider trading (Section 382.1(1)). Sanctions include incarceration, restitutionary payments to the victim or disgorgement of the proceeds of the offence.

Bribery and Anti-Corruption

The Criminal Code includes provisions related to fraud on the government, including the giving or receipt of any benefit and bribery of Canadian public officials (Sections 119-125) and secret commissions (Section 426). Canada has also extended its scope to cover such criminal actions when conducted outside its boundaries. Pursuant to its obligations under the Convention on the Organisation for Economic Co-operation and Development, Canada enacted the federal Corruption of Foreign Public Officials Act (CFPOA) to criminalise bribery of foreign public officials. In addition, Québec is the only province in Canada with its own anti-corruption legislation (the Anti-Corruption Act). The purpose of this legislation is to strengthen actions to prevent and fight corruption in the public sector, including in contractual matters. To achieve that, it established the office of the Anti-Corruption Commissioner as well as a procedure to facilitate the disclosure of wrongdoings.

Criminal Conspiracy and Misappropriation

The offence of conspiracy under the Criminal Code makes it an offence for everyone who conspires with anyone to commit an indictable offence (Section 465(1)(c)).

Misappropriation of property and money are crimes under the Criminal Code (Sections 330, 331 and 332). A person may be convicted of theft, notwithstanding that anything that is alleged to have been stolen was stolen by the representatives of an organisation from the organisation (Section 328(e)). Moreover, a person who is a trustee can be convicted of a criminal breach of trust if the person abuses their position as a trustee and commits an unauthorized act (Section 336), for example, distribution of trust assets to entities not entitled to receive them under the trust documents. Finally, a person who for a fraudulent purpose, takes, obtains, removes or conceals anything can be convicted of fraudulent concealment (Section 341).

Fraud under Civil Law

In the civil context, the fraud-based causes of action must be proven on the standard of the balance of probabilities. There are numerous

fraud-based causes of action, and corresponding remedies available to civil claimants. Claims of civil fraud are often based on a fraudulent misrepresentation, which is also referred to as the tort of deceit in common law provinces. Fraudulent misrepresentation occurs where a false statement is made, knowingly or recklessly, with the intent that it be relied upon and where the victim relies on that false statement.

A fraudulent act can also give rise to breaches of trust, fiduciary duty or a duty of care where the act is carried out by directors or officers of a company, or other persons in positions of trust. Victims can seek an accounting of and disgorgement of corresponding gains by the defendant, and also plead unjust enrichment where the wrongdoer has benefited and caused a corresponding deprivation to the plaintiff without a juristic reason.

A conversion claim and, possibly, a claim for an interest in certain assets or real property, may be available where a wrongdoer fraudulently interferes with a party's personal or real property rights. A claimant may also assert a fraudulent conveyance or preference when a defendant, with the intent to defeat creditors or other such parties, or facing contemplated claims, conveys assets or real property in order to insulate them from judgment.

Aside from the criminal offence for conspiracy referred to above, a claimant may also proceed with a civil action on the basis of conspiracy to defraud. The elements of this tort include an agreement between two or more parties to act, using either lawful or unlawful means, for the predominant purpose of causing injury to the claimant, with the result of the claimant suffering actual damage.

1.2 Causes of Action after Receipt of a Bribe

The Criminal Code makes it an offence to accept secret commissions (Section 426). The three actus reus elements of the offence include:

- the existence of an agency relationship;
- the accepting by an agent of a benefit as consideration for doing or forbearing to do any act in relation to the affairs of the agent's principal; and
- the source, amount and nature of the benefit.

The mens rea requirement for each of the actus reus must also be established, ie, the accused person:

- must be aware of the agency relationship;
- must knowingly accept the benefit as consideration for an act to be undertaken in relation to the affairs of the principal; and
- must be aware of the extent of the disclosure to the principal or lack thereof.

Under Section 426, "agent" includes an employee. The text of the offence refers to the person "corruptly" giving the commission to induce an agent. This is the "secret" element of the offence where a commission is received without the knowledge of the principal or the employer.

A claimant whose agent has received a bribe can sue the agent in a civil proceeding for damages caused by the agent's actions.

Where officers or directors breach their duty to act in the company's best interest by, for example, accepting payment for favouritism, the company could sue them for breach of fiduciary duty, breach of trust or breach of confidence. Depending on the context, this could also be construed as conversion of company property (or detinue), breach of contract, breach of duty of good faith, deceit or conspiracy and interference

with economic interests. In these circumstances, the company could sue the officers or directors for breaches of their obligations.

In addition to civil remedies, the claimant may, where the agent is an employee, terminate their employment.

Provinces and territories also have their own rules for a claimant to sue their agent, which vary depending on the relationships with the agent. For example, in Québec, where there is fraud against a company, an interested person, such as a shareholder, may, in the name of the company, institute a derivative action against the founders, directors, other senior officers or members of the company who have participated in the alleged act or derived personal profit. Moreover, when the agent is the mandatary of the claimant (ie, a person who has been mandated by the company to represent it to do certain acts), where the mandatary uses for their benefit any information they obtain or any property they are charged with receiving or administering, the claimant can sue the mandatary for the damage suffered. In the case of information, the mandatory can be sued for an amount equal to the enrichment they obtain or, in the case of property, appropriate rent or the interest on the sums used. A mandatary can also be held personally liable to a third party for acts that exceed his or her mandate. Finally, the claimant can, if they suffer damage, repudiate the acts of the person appointed by the mandatary as their substitute where the substitution was made without the claimant's authorisation or where the claimant's interest or the circumstances did not warrant the substitution.

1.3 Claims against Parties Who Assist or Facilitate Fraudulent Acts

Facilitation of Fraud under Criminal Law

Section 121(1)(d) of the Criminal Code prohibits selling of influence in connection with any matter of business relating to the government. The existence of an actual connection with government business must be established.

A party who aids or abets the commission of a fraudulent act can be charged as a party to the act committed by another person (Criminal Code, Section 21) or be charged with conspiracy to commit the fraudulent act (Criminal Code, Section 465(1)(c)). This requires that the assisting party knew, whether by act or omission, the intention to commit fraud by the other party.

Counselling another person to commit an offence, such as an intermediary or a party enlisting an intermediary, is an offence (Criminal Code, Sections 22 and 464). It is also an offence to be in possession of any property, thing or proceeds of any property or thing obtained directly or indirectly by crime (Criminal Code, Section 354) and to launder the proceeds of crime (Criminal Code, Section 462.31). This requires that the assisting party knew that the property was obtained by crime.

Facilitation of Fraud under Civil Law

Under civil law, the plaintiff can use allegations of knowing receipt and knowing assistance to trace and seek remedies down the chain of the fraud, to parties other than the fraudster. These remedies are based on constructive trusts, equitable remedies through which defalcated funds can be recovered.

Certain complaints may be made against a party receiving trust property. The tort of knowing receipt happens when strangers to the trust receive or apply trust property for their own use and benefit. This tort requires that the trust property is received in the recipient's personal capacity. Constructive knowledge about the breach of trust is a sufficient basis for imposing liability under "knowing receipt" cases.

For the tort of knowing assistance in breach of fiduciary duty, or "accessory liability", the constituent elements include the following:

- a fiduciary duty between the fraudster and the victim;
- the fiduciary duty must have breached that duty fraudulently and dishonestly;
- the stranger to the fiduciary relationship must have had actual knowledge of both the fiduciary relationship and the fiduciary's fraudulent and dishonest conduct; and
- the stranger must have participated in or assisted the fiduciary's fraudulent and dishonest conduct.

1.4 Limitation Periods

Under Canada's criminal law, the general offence of fraud under Section 380 of the Criminal Code is a hybrid offence (ie, a fraud over CAD5,000 is an indictable offence, but a fraud under CAD5,000 can be prosecuted either by way of summary conviction or by an indictable offence). In Canada, there is no statute of limitations for indictable offences. For summary offences, the proceedings must be instituted within six months of the offence (Criminal Code, Section 786(2)).

For civil claims, limitation periods vary from province to province. Provincial statutes govern the limitation periods and range from two to six years. For example, Alberta and Ontario both have a general two-year limitation period. Limitation periods start when the claimant discovers, or could have reasonably discovered, the claim. In Ontario, the claimant is presumed to have discovered the claim on the day the fraudulent activity takes place. In Québec, a civil claim must be brought within three years. Where the damages appear gradually, the period runs from the day the damages appear for the first time. Regardless of the claim's discovery, most provinces have enacted "ultimate" limitation periods that run from 10 to 20 years from the date the cause of action arises. In Ontario, the ultimate limitation period does not run during the time the wrongdoer wilfully conceals from the person with the claim the fact that damage has occurred, or wilfully misleads the person as to the appropriateness of a proceeding.

The equitable doctrine of fraudulent concealment tolls the applicable limitation period until the claimant is reasonably able to discover the claim. It exists to ensure that a limitation period does not operate as an instrument of injustice. The doctrine is applicable where the parties have a special relationship, the wrongdoer's conduct amounts to an unconscionable act and the wrongdoer conceals the claimant's right of action. Recent court commentary suggests that the requirement to establish the existence of a special relationship has been relaxed.

In practice, limitations periods with civil fraud cases are notable because, by their nature, many frauds are difficult to detect, making the date of discovery of particular significance. It is prudent for parties who have cause to believe a fraud has been committed to conduct all necessary investigations, to avoid a later argument that they did not act with the same vigilance as a reasonable person would have acted in identifying the subject conduct or loss in the circumstances.

1.5 Proprietary Claims against Property

The federal Criminal Code contains provisions for the Attorney General to seize or forfeit property that is bought with the proceeds of crime. The owner of property that has been seized, restrained or confiscated can apply to the Court for restitution (Criminal Code, Sections 462.333, 462.34(4), 462.42, 490 (7) and 490 (10).

In respect of civil remedies, victims of fraud may seek tracing orders from the court to identify recoverable assets which have been mixed with other funds. A court may entitle success-

ful claimants to a restitutionary claim upon lost assets. This allows victims to trace the assets to third parties and maintain a right to any increase in value that the property has sustained.

Victims of fraud also have available equitable remedies, such as a constructive trust over property which represents converted proceeds. The victim has an equitable right over the property which persists unless the goods are sold to a bona fide purchaser for value without notice. If the fraudster goes bankrupt, any property impressed with a constructive trust does not form part of the bankrupt's estate.

1.6 Rules of Pre-action Conduct

Some provinces in Canada allow parties to proceed with an injunction before the institution of proceedings. For example, in Ontario, Rule 40.01 of the Rules of Civil Procedure permits a party to bring a motion for injunctive relief (including a Mareva injunction to freeze a defendant's assets) pending an intended proceeding. These motions can, under the right circumstances, be brought without notice to the defendant. A claimant can, therefore, seek an injunction to protect its interests if it undertakes to issue a claim and commence an action shortly after the determination of the injunction. The court will, however, inquire as to whether the merits of the claim and in the injunction are sufficiently clear without the claim. The claimant cannot delay in commencing the action after the hearing of the injunction.

Similarly, in Québec law, a party may ask for an interlocutory injunction before the filing of the proceedings if the latter cannot be filed in a timely manner. In an urgent case, the court may grant a provisional injunction, even before service of the interlocutory injunction to the other party. A provisional injunction cannot be granted for a period exceeding ten days without the parties' consent (Civil Code of Procedure, Section 510).

1.7 Prevention of Defendants Dissipating or Secreting Assets

Victims of fraud have a number of options to stop a defendant from dissipating their assets pre-judgment. Many of these options are designed as urgent tools for the court to protect the status quo, pending a final decision on the merits. Urgent mandatory or prohibitory injunctive relief can be sought to compel or prevent certain interim steps from being taken that might serve the purpose of rendering a defendant judgment-proof or dispose of the subject matter of the litigation. A claimant can also move to appoint a monitor or receiver to manage the business operations, revenue and assets, to avoid ongoing harm to the business and prejudice to the claimant's alleged interest.

With respect to claimed interests in property, a certificate of pending litigation can be sought ex parte, to register a notice on title to real property and prevent its disposition involving unsuspecting third parties.

The most typical court tool to prevent the dissipation of assets pre-judgment is a Mareva injunction, or freezing order. A claimant can seek a Mareva injunction on an interim basis to stop the defendant from dissipating their assets before the disposition of the case. Victims could also request a writ of seizure from the court, an interim pre-judgment attachment order or seize and preserve assets of an absconding debtor under certain legislation or preservation orders. Typically, the Mareva orders are limited to assets within the jurisdictions of the court. However, "worldwide" Mareva injunctions are becoming increasingly common due to the freer movement of funds throughout the global economy, and the need to show greater flexibility and extend the court's reach. Such worldwide injunctions can cover assets outside the jurisdiction of the court. As such, when granted, this order will have the effect of restraining a defendant from dealing or

transferring assets, wherever those assets are located, notwithstanding enforcement and local legal issues that may arise in the foreign jurisdiction where the assets are situated.

Mareva Injunctions

A Mareva injunction is an in personam remedy as opposed to an in rem remedy, ie, this remedy compels the defendant to act in a particular way and does not give the applicant a proprietary interest over the defendant's assets. The courts have held that, in order to assert the in personam jurisdiction, the subject assets need not be in Ontario to demonstrate a risk of dissipation and have granted a "worldwide" Mareva.

The courts consider a Mareva injunction an extraordinary remedy. It prevents a defendant from disposing of their assets, dealing with them, or removing them from the jurisdiction. The purpose of a Mareva is to ensure that defendants do not make themselves judgment-proof. Mareva injunctions can be brought before, during, or after a trial (in aid of enforcement). A party may also bring a Mareva injunction motion before commencing its litigation, on an undertaking to commence the action shortly after the motion is decided.

A Mareva order is typically ex parte (without notice) and is for a fixed period of time, ordinarily lasting until the defendant has been provided notice and has had an opportunity to prepare responding material to challenge the ex parte order. When the application is made ex parte, the applicant must make full and frank disclosure of all material facts within their knowledge, particularly if it is harmful to the relief sought. After the initial determination, the court hears a with notice motion on whether the ex parte order should be extended or set aside.

In most common law provinces, to obtain a Mareva injunction, the applicant must:

- establish a strong prima facie case;
- show some grounds for believing the defendant has assets within the court's jurisdiction;
- zureshow some grounds for believing there is a risk of the assets being removed or dissipated before is satisfied;
- satisfy the court that it will suffer irreparable harm if the relief is not granted; and
- give an undertaking in damages, supported by a bond or security in certain cases.

In Ontario, courts have indicated that the requirement there be a risk of removal or dissipation can be established by inference and that inference can arise from the circumstances of the fraud itself, taken in the context of all the surrounding circumstances.

The British Columbia courts have adopted a more flexible two-step approach to Mareva injunctions, requiring a strong prima facie case and then a balancing of interests between the parties, having regard to all the relevant factors.

Mareva injunctions do not call for the assets to be physically seized by the court, although there are other court remedies available to do so. Consequently, there are no added fees associated with obtaining such an injunction. However, the requirement that the applicant give an undertaking in damages plays a critical role in establishing a basis for a Mareva injunction to be granted. This is not a mere formality but rather an important undertaking that must have substance and be reliable, to protect the defendant's interests if the freezing order is deemed to have been improperly ordered.

Mareva injunctions can also apply to third parties and, in practice, are frequently applied to banks. The fact that an innocent third party may be materially and adversely affected will not necessarily prevent a court from granting a Mareva order. It is however another consideration for the

courts, and the expected practice is for these third parties to be provided notice whenever possible, when not detrimental to the remedy being sought.

If a party fails to abide by a Mareva order, they may be held in contempt of court and possibly face imprisonment or fines, or have their assets seized.

Mareva injunctions are also available in Québec, however the test applied by Québec courts is slightly different from the common law provinces. In Québec, the Mareva injunction is treated like any other injunction. Thus, the criteria that must be met in order to obtain a Mareva injunction are the same as those for an interlocutory injunction, namely:

- the appearance of right;
- serious and irreparable harm; and
- the balance of convenience.

That being said, a prima facie case of a clear right relieves the claimant from having to demonstrate the balance of convenience test. In addition to these criteria, urgency is required in the case of an injunctive application of an interim nature. In practice, although the criteria to be applied are slightly different in Québec, as in the common law provinces, the Mareva injunction will be granted if there is a real risk that assets will disappear and if there is a reasonable fear that the defendant will seek to thwart the enforcement of a potential judgment by concealing assets, thereby causing irreparable harm to the claimant. In fact, the test for irreparable harm is similar to the "objective fear" test applicable in seizure before judgment cases, the criteria for which are set out in the next section.

Also, in Québec, where the application for a Mareva injunction is made ex parte, the claimant is subject to an obligation of full and frank disclosure, as is the case in the common law provinces.

Finally, in Québec, a Mareva injunction can be admitted to the publication of rights, thus making these rights opposable to third parties. In fact, a right registered on a property is presumed known to any person acquiring or publishing a right in the same property.

Seizure before Judgment

The more commonly used remedy in Québec is a seizure before judgment (Sections 517–518 of the Code of Civil Procedure). There are two types of seizure before judgment.

The first allows the creditor to seize movable property in which the creditor claims to have rights (whether as owner or otherwise) and does not require the prior authorisation of the court, unless the seizure concerns a technological medium or a document stored on such a medium. The creditor needs only to allege under oath the facts demonstrating the creditor's interest in the movable property.

The second type allows a creditor to seize assets when it is feared that the collection of a debt is in jeopardy because of questionable or unfair conduct on the part of the debtor. This type of seizure requires the authorisation of the court, which will only grant it if the claimant demonstrates the questionable or unfair conduct, if there is a valid and existing claim and if there is an objective fear of such jeopardy. A seizure before judgment is carried out under a notice of execution and supported by an affidavit in which the seizor affirms the existence of the claim as well as the facts justifying it and specifying, if applicable, the source of the information relied on. The bailiff serves the notice of execution on the defendant along with the seizor's affidavit at the moment of the seizure. Generally speaking, a third person is given custody of the seized prop-

erty, unless the seizor authorises the bailiff to leave the property in the hands of the defendant.

For all types of seizures before judgment, the creditor must institute a proceeding shortly after the seizure. The creditor will have to pay the costs for the seizure but will be able to claim them as legal costs if the proceeding is successful.

Other Remedies

In some common law provinces, other remedies include seeking an interim pre-judgment attachment order. An attachment order targets specific property that the defendant owns and can take various forms, including garnishment or seizure of assets. In Alberta, a court can exercise its jurisdiction to grant a claimant a pre-judgment attachment order under the Civil Enforcement Act, RSA 2000, c C-15 where: (1) there is a reasonable likelihood that the claim will be established; and (2) there are reasonable grounds for believing that the defendant is dealing with, or is likely to deal with, its exigible property outside of the ordinary course and in a way that would harm the claimant's enforcement (Section 17(2)).

In some jurisdictions, there are provincial statutes that provide remedies for the seizure and preservation of assets against a debtor absconding from the jurisdiction to avoid creditors. The Ontario Absconding Debtors Act, RSO, 1990, c. A.2, is one such example. The "absconding debtor" under this act is a person resident in Ontario who departs from Ontario with intent to defraud the their creditors. The absconding debtor's property may be seized and taken by an order of attachment for the satisfaction of the person's debts.

A victim of fraud may also seek interim preservation orders under Rules of Court to ensure that the defendant does not dispose of disputed property prior to judgment. In Ontario, Rule 45 of the Rules of Civil Procedure permits the court to make an interim order for preservation of any property in question in a proceeding or relevant to an issue in a proceeding, and for that purpose may authorise entry on or into any property. Ordinarily, with motions brought under Rule 45, a party must demonstrate that:

- the assets sought to be preserved constitute the very subject matter of the dispute;
- there is a serious issue to be tried regarding the claim to the asset; and
- the balance of convenience favours granting the relief sought by the moving party.

2. PROCEDURES AND TRIALS

2.1 Disclosure of Defendants' Assets

A claimant can make use of certain publicly available sources which can provide information about a party's assets. Some of these sources include the land property offices which hold records of real property ownership, personal property security registration systems and financial statements filed for public companies, which disclose information about the party's assets information.

Pending a judgment, a claimant may also seek certain court orders, such as a Mareva injunction or Anton Piller order, as a means to obtain financial disclosure from a defendant. A Mareva injunction, as described in more detail in **1.7 Prevention of Defendants Dissipating or Secreting Assets** prevents a party from disposing of or dealing with its assets pending the outcome of the claim or some interim step, as ordered by the court. In the process of seeking such an order, the claimant can seek information with respect to the defendant's assets as part of the examination process. In some jurisdictions, the claimant may seek ancillary orders requiring the

defendant or a third party to disclose information with respect to the subject assets. A party seeking such relief is typically required to provide an undertaking with respect to damages.

A claimant may also look to seek disclosure pre-action, including by way of seeking to compel examinations within an urgent injunction brought before issuing their claim. As described above, this can result in disclosure through the examination process in the motion. Discovery mechanisms against third parties are described in **2.3 Obtaining Disclosure of Documents and Evidence from Third Parties**.

2.2 Preserving Evidence

In Canada, victims of fraud may seek to preserve evidence through an Anton Piller order. An Anton Piller order permits a party to enter the premises of the defendants to seize and preserve evidence. Along with the Mareva, it is one of the most powerful anti-fraud tools available to claimants. There is considerable hesitancy in the Canadian courts in granting this remedy, given the extraordinary power it gives to the claimant and their lawyers, and the risk of its abuse, especially with respect to confidential and privileged records that may be seized.

This ex parte order is in essence a civil search order and is only granted in the clearest of cases. As part of implementing such an order, information about the defendant's assets may come to light.

The moving party has to meet the following test to obtain an Anton Piller order:

- a strong prima facie case;
- the damage to the plaintiff of the defendant's alleged misconduct, potential or actual, must be very serious;
- there is convincing evidence to show that the defendant has in their possession incriminating documents or things; and
- there is a real possibility that the defendant may destroy or otherwise dispose of such material before the discovery process.

Interim preservation orders under the Rules of Court of most Canadian Provinces are also available where it is feared that important evidence may be destroyed, altered or suppressed. For example, as discussed in **1.7 Prevention of Defendants Dissipating or Secreting Assets**, Rule 45 of the Ontario Rules give jurisdiction to the court to make interim preservation orders.

2.3 Obtaining Disclosure of Documents and Evidence from Third Parties

In cases where fraud is suspected, a party can seek disclosure of information about a defendant (usually with respect to its assets) from a third party by way of a Norwich Pharmacal order. This order is used to compel third parties to provide information where the claimant believes it has been wronged and needs the third party's information and/or documents to determine the circumstances of the wrongdoing or the location of funds. This type of order is frequently used to confirm the existence of debtor's bank accounts, trace account transfers or to track the defendant's online actions through internet service providers. Courts have the discretion to impose restrictions on how the information granted by a Norwich order is used.

The moving party must establish the following elements for a court to grant a Norwich order:

- a bona fide claim against the wrongdoer;
- the third party from who discovery is sought must have a connection to the wrong beyond being a witness to it;
- the third party must be the only practicable source of the information needed;

- the third party must be reasonably compensated for expenses arising out of compliance with the discovery order in addition to legal costs; and
- the public interest in favour of disclosure outweighs any legitimate privacy concerns.

In some Canadian jurisdictions, procedural court rules also permit a court to grant production orders from third parties within an existing court proceeding. A party may also seek an order of inspection of documents that are in the possession, control or power of a third party where the court is satisfied that the documents are relevant to a material issue in the action and it would be unfair to require the moving party to proceed to trial without having discovery of the document (see Rule 30.10 (1) of the Ontario Rules).

In Québec, a third party in possession of real evidence may be ordered to present it to the other parties, submit it to an expert or to preserve it until the end of the trial. Similar orders may also be invoked prior to the proceeding commencing. Effectively, in anticipation of litigation, a party apprehending that some necessary evidence might be lost or become difficult to produce, may examine witnesses, or have a thing or property inspected with the consent of the prospective party or the authorisation of the court. If the application is granted, the parties agree on where and when the witnesses will be heard or the property will be inspected. The discovery costs are borne by the applicant. However, if the evidence is subsequently used in a proceeding, the cost of the authorised depositions and expert reports forms part of the legal costs.

2.4 Procedural Orders

Under Canadian law, it is possible for a party to seize or freeze a debtor's assets without notifying the debtor. As described in in **1.7 Prevention of Defendants Dissipating or Secreting Assets**, a claimant can obtain a Mareva injunction that freezes the assets of a party and prevents the party from dealing with them. A Mareva injunction can be made ex parte without giving notice to the defendant. Due to the ex parte nature, the claimant has an additional burden to make full and frank disclosure of all material facts within their knowledge and must fairly raise the evidence against their case.

Anton Piller orders, which are aimed at seizing and preserving evidence that might otherwise be removed or destroyed, must by their nature be made ex parte. To be granted, there must be clear evidence that the defendant has the evidence sought and that there is a serious possibility of destruction of evidence by the defendant if the defendant were to be notified. As is the case with Mareva injunctions, the courts apply a heavy onus on the party applying for such an order to make full and frank disclosure because of the ex parte element.

Like Mareva and Anton Piller orders, Norwich orders can be made without notice to obtain information and documents from third parties before reaching the discovery stage of an action. This remedy is also considered extraordinary and exceptional with a heavy onus for the claimant.

In Québec, a creditor can seize the debtor's (or a third party's) assets and place them under judicial custody prior to judgment, without notifying the debtor. The debtor will only be informed when the bailiff proceeds with the seizure. A creditor can seize the debtor's assets when it is feared that the collection of a debt is in jeopardy because of questionable or unfair conduct on the part of the debtor. This seizure requires the authorisation of the court and the creditor must demonstrate the questionable or unfair conduct on the part of the debtor. The creditor can also seize the movable property in which the creditor claims to have rights (whether as owner or

otherwise). This seizure does not require the prior authorisation of the court unless the seizure concerns a technological medium or a document stored on such a medium. For this type of seizure, the creditor needs only to allege under oath the facts demonstrating the creditor's interest in the movable property. Since this request is made ex parte, the creditor has an obligation of full and frank disclosure. However, for all types of seizures before judgment, the creditor must institute a proceeding shortly after the seizure.

2.5 Criminal Redress

Victims of criminal offences can apply to the sentencing judge pursuant to Section 737.1 of the Criminal Code to obtain restitution for their loss and damages, the amount of which must be readily ascertainable. A restitution order is a discretionary order that forms part of the criminal sentence.

In Canada, criminal prosecution and civil claims are two separate processes. Since they have their own rules of evidence and burden of proof, the hearing of one proceeding does not automatically delay or impede the progression of the other. The two processes can proceed in parallel.

In fact, civil remedies are not suspended due to the fact that the act in question is a criminal offence (Criminal Code, Section 11). In order to obtain a stay of proceedings in a civil claim, until a decision is rendered in a criminal prosecution, the applicant must demonstrate that, without the stay, their fundamental rights to a full answer and defence will be seriously threatened or compromised. A party in a civil proceeding can also seek disclosure of criminal files and use, under certain circumstances, the criminal judgment as proof of facts in the civil claim. The disclosure of police or Crown documents are sought through what are commonly known as Wagg motions. Wagg motions are usually resolved on consent. Practically speaking, due to limited resources, criminal prosecutors are less inclined to pursue commercial fraud between private parties if there is ongoing civil litigation and a prospective civil remedy.

2.6 Judgment without Trial

The Rules of Court in Canadian jurisdictions provide several mechanisms for rendering judgment without trial. One of those mechanisms is a default judgment. If a defendant fails to deliver the necessary pleadings in response to a claim within the prescribed time period, the plaintiff may seek a default judgment against the defendant. The default judgment can be obtained by filing appropriate documents with the court, including proof of service of the claim on the defendant.

Some Canadian jurisdictions also permit a party to obtain a summary judgment without the need for a trial. Any party can seek a summary judgment where there is no merit in the whole or part of the claim or defence. Typically, on summary judgment motions, the courts do not assess credibility or rule on disputed facts. However, in Ontario, the Rules allow a judge to weigh the evidence, assess creditability and draw reasonable inferences from the evidence in certain circumstances. Those circumstances include where there appears to be a genuine issue requiring a trial, but that need for trial can be avoided through the use of these powers.

Other procedural tools to dispose of actions without trial include a motion or application to strike the opposing party's pleadings for disclosing no reasonable cause of action or defence. Similarly, in Québec, a party may ask the court, via an application, to dismiss, to dismiss an application or a defence under certain circumstances, in particular when an application or a defence is unfounded in law even if the facts alleged are true.

2.7 Rules for Pleading Fraud

While there are no professional obligations in Canada specifically pertaining to claims for fraud, there are procedural considerations. First, fraud claims must be specifically pleaded and must contain full particulars about the allegation(s), failing which the other party can move to strike the claims and/or move for summary dismissal. Claimants will be allowed to prove such allegations at trial only if and to the extent that the allegations are raised in the pleadings.

Second, there are significant adverse cost consequences if a claim for fraud is alleged, but ultimately found to have no merit at trial. This is in recognition of the fact that a claim for fraud can cause significant harm to a defendant's reputation when alleged in a public court record.

2.8 Claims against "Unknown" Fraudsters

Where a claimant does not initially know the identity of the fraudster, it can issue a claim against the unknown defendant. The unknown defendant is typically referred to as "John Doe" in the pleadings, which acts as a placeholder until the identity of the fraudster comes to light. The same approach can be taken with unknown corporations which may, for example, be used in shell schemes to hide assets or to move them offshore. In Ontario, it is not necessary to name multiple "John Does" or to precisely guess how many defendants are involved, as long as the claim is drafted in a manner to identify which allegations are made against individuals filling specific roles.

These circumstances can cause practical challenges, however, where claimants have difficulty serving suspected defendants, or where they are attempting to obtain ex parte evidence from third parties on their bank accounts, such as Norwich orders.

2.9 Compelling Witnesses to Give Evidence

Most Canadian jurisdictions compel attendance of witnesses at trial by way of a subpoena. In Ontario and New Brunswick, the subpoena has been replaced with a summons, which is a change in form and not in substance.

Typically, obtaining a subpoena (or summons) is not an onerous process. Some jurisdictions require the subpoena to be court issued which occurs through the registrar or prothonotary's office, while in others, such as British Columbia, parties can serve subpoenas without court approval. A subpoena is generally personally served on the witness for it to be effective and is accompanied by witness fees for the witness' attendance and travel. A witness who fails to attend in accordance with a subpoena can be held in contempt of court and may also be fined or imprisoned. In addition, the court may order the person to pay all or part of the costs caused by their default.

Canadian provinces and territories have statutory mechanisms that address interprovincial subpoenas. The procedure for compelling a witness outside of the jurisdiction is generally more onerous than for a witness within the jurisdiction.

In civil proceedings, it is standard practice for each party to conduct examinations (oral or by way of written questions) to gather evidence and for document disclosure purposes before the conduct of trial.

In Québec, the law provides that certain persons, including the parties (and their representatives, agents, employees) and the victim, may be examined. Any other person not provided for in the law may be examined with their consent and that of the other party, or with the judge's authorisation. The absence of an answer for the written examination can be taken as an admis-

sion with respect to the facts or allegations to which the questions pertain. If the witness refuses to attend an oral examination, the person can be compelled to attend by way of a subpoena.

For a witness that is domiciled in or resident of a foreign state, the court may determine whether the examination is to take place in or outside the jurisdiction and any other matter respecting the holding of the examination. The test for determining the location of an examination is what is just and convenient for both parties. Where the examination is to take place in the foreign state, only the court of the witness's jurisdiction can compel the witness's attendance. The foreign court can assist with compelling the witness by giving effect to a letter of request (or, letters rogatory) issued by an Ontario court, for example.

3. CORPORATE ENTITIES, ULTIMATE BENEFICIAL OWNERS AND SHAREHOLDERS

3.1 Imposing Liability for Fraud on to a Corporate Entity

Generally, fraud related causes of action include an element of knowledge for a wrongdoer to be found liable. In Canada, the law provides for the knowledge of a senior officer to be attributed to a company in order for the company to be held responsible for the fraud.

Under the federal Canadian Criminal Code, corporations can be held criminally liable for fraud (Section 22.2). A corporation can be found to be a party to an offence where its senior officer:

- is a party to the offense while acting in the scope of their authority;
- having the mental state required to be a party to the offense and acting within the scope of their authority, directs the work of other representatives of the organisation so that they commit the offence; or
- fails to take all reasonable measures to stop a representative of the organisation from being a party to the offence.

3.2 Claims against Ultimate Beneficial Owners

Where a senior officer of a company uses the entity as a vehicle for fraud, courts in Canada may 'pierce the corporate veil' and hold the senior officer personally liable. Canadian courts take a cautious approach to piercing the corporate veil. The corporate veil is lifted to do away with the separate legal personality of a corporate entity where it is completely dominated and controlled and being used as a shield for fraudulent or improper conduct by a natural person. The court typically looks for 'indicia of fraud' in deciding whether to pierce the corporate veil in such cases, including non-arm's-length parties being used as registered administrators of shell transferee companies and transfers of title, or rights to assets, for insufficient consideration. This is similar by analogy to a "sham trust" scenario.

Directors and officers of a company used to commit fraud may be found liable for tortious conduct. The directors and officers have fiduciary obligations and owe a duty of care to the company and its shareholders. Most Canadian jurisdictions have legislated the standard for the duty of care which is described as the duty to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. In the context of fraud, the directors and officers may be found to have breached their fiduciary obligations and the duty of care standard, which may give rise to lawsuits by shareholders, creditors or a limited group of other interested parties.

The provincial corporate statutes also provide for oppression claims against directors and officers where they have acted in an oppressive manner or have been unfairly prejudicial to or unfairly disregarded the interests of stakeholders (see **3.3 Shareholders' Claims against Fraudulent Directors**).

Generally, courts award damages as a remedy against directors and officers who are found liable and, if necessary, trace asset transfers. This will often involve a forensic accounting and, ultimately, a disgorgement of profits. The provincial oppression remedy statutory provisions also provide the court broad discretion to grant creative remedies, including setting aside fraudulent transactions and restraining conduct.

3.3 Shareholders' Claims against Fraudulent Directors

In Canada, shareholders commonly rely on the oppression remedy statutory provisions in corporate statutes to bring claims against fraudulent officers and directors. The Canada Business Corporations Act, RSC, c C-44 and all provincial business statutes, except for Québec and Prince Edward Island, provide for this remedy. The oppression remedy grants shareholders a right to challenge oppressive or unfairly prejudicial conduct. This is a broad remedy where the shareholders can even seek removal of the directors and officers. The shareholders can also seek interim injunctive relief where the shareholders must show that there is a serious question to be tried, the shareholders would suffer irreparable harm if the injunction is not granted and the balance of convenience favours granting the remedy.

Under most of the provincial corporate statutes, minority shareholders may also consider bringing a derivative action on behalf of the corporation against the management, directors or majority shareholders. In this manner, they would 'step into the shoes' of the corporation, bringing the lawsuit on its behalf.

The main difference between a derivative action and an oppression claim is that a derivative action is brought on behalf of the company while an oppression claim is brought as a personal claim. Therefore, a derivative claim is appropriate where the fraudulent conduct harms the company, whereas an oppression claim is more appropriate where the harm is unfairly directed at certain shareholders.

Shareholders may also bring a claim of personal damages against directors who fail to exercise duty of care or are in breach of their fiduciary duty as discussed in **3.2 Claims against Ultimate Beneficial Owners**.

4. OVERSEAS PARTIES IN FRAUD CLAIMS

4.1 Joining Overseas Parties to Fraud Claims

Rules of the court in Canadian common law jurisdictions provide for serving parties outside those jurisdictions (including outside Canada) with a proceeding against that party, so long as the underlying claim fits into a list of categories laid out in each provincial statute. These categories generally cover types of claims with a real and substantial connection to the Canadian jurisdiction, such as where:

- a relevant contract was formed in the Canadian jurisdiction;
- a tort was committed in the Canadian jurisdiction; or
- the subject property or assets are held in the Canadian jurisdiction.

Even where one of these categories does not clearly apply, a party may serve an originating

process outside the jurisdiction with leave of the court.

In Ontario, the procedures for service vary depending on whether the document is to be served in a "contracting state" or not. "Contracting state" means a state that is a signatory to the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the "Convention").

Similarly, Québec rules provide for serving parties outside Canada either by following the Convention or, for states not party to the Convention, notification is made either: following general civil procedure service rules in Québec or in accordance with the law in force in the place where the notification is made. The court, on request, may also authorise a different method of notification if the circumstances require it.

Québec authorities will have jurisdiction regarding personal pecuniary right of action under certain specific circumstances, such as:

- a fault was committed in Québec, injury was suffered in Québec or one of the contractual obligations was to be performed in Québec;
- the parties have by agreement submitted the dispute to Québec authorities; or
- the defendant has submitted to the jurisdiction.

5. ENFORCEMENT

5.1 Methods of Enforcement

From a criminal perspective, a victim of a fraud can file a complaint to police agencies. The complaint needs to be filed in the proper jurisdiction. In some provinces the Royal Canadian Mounted Police (RCMP) are the ones investigating Criminal Code offences while in other provinces it might be the Ontario Provincial Police (OPP), the Sûreté du Québec (SQ) or the municipal police. The investigators could trace the proceeds of the crime for the benefit of the victim to get restitution.

In civil proceedings, in addition to the orders listed in **1.7 Prevention of Defendants Dissipating or Secreting Assets** and **2.4 Procedural Orders**, there are also the traditional motions for injunction and damages which can lead to seizure of the assets. A judgment creditor can also seek to examine (in aid of execution) the judgment debtor, and in some cases third parties, in relation to non-payment of the judgment. The creditor may also enforce the judgment by garnishment of debts payable to the debtor by third parties, including garnishing wages, bank accounts or other streams of income.

Provinces and territories have their own rules regarding the forced execution of judgments but, generally, a creditor who wishes to force execution of a judgment gives execution instructions to a bailiff to seize the debtor's property or income. A judgment creditor may seize any of the debtor's movable property that is in the debtor's possession or that is held by the creditor or a third person. However, some property cannot be seized, such as the work equipment necessary for the exercise of the debtor's professional activity (with some exceptions) and a debtor's movable property that furnishes the debtor's principal residence and is needed for the life of the family (up to a certain amount).

6. PRIVILEGES

6.1 Invoking the Privilege against Self-incrimination

In Canada, a person is not incompetent to give evidence by reason of an interest or crime and no witness (except the accused in a criminal proceeding) shall be excused from answering any

question on the ground that the answer to the question may incriminate or establish the witness's liability in a civil proceeding. However, a witness who testifies in any proceeding is protected against incriminating statements being used to incriminate the witness in another proceeding, except in a prosecution for perjury or for the giving of contradictory evidence (Canadian Charter of Rights and Freedoms, Section 13; Canada Evidence Act, Sections 3 and 5). The statement can be used to attack the credibility of the accused.

In the criminal context, the judge cannot draw an adverse inference when a witness asks for Charter protection.

6.2 Undermining the Privilege over Communications Exempt from Discovery or Disclosure

In Canada, solicitor-client privilege does not protect the communications between counsel and their client that are shown to be prima facie in furtherance of fraud, irrespective of the lawyer's knowledge regarding the illegal activity. This is referred to as the future crimes and fraud exception and must contain three elements:

- the communication relates to proposed future conduct;
- the client must seek to advance conduct which it knows or should know is unlawful; and
- the wrongful conduct contemplated must be clearly wrong. However, when a lawyer counsels against an illegal activity, the courts have concluded that privilege is maintained. The courts have emphasised the necessity of strong evidence of fraud.

There are court cases setting out circumstances were fraudulent conduct allows access to a lawyer's file, despite claims of privilege. For example, courts have ordered production of a lawyer's file relating to their client, a defendant who allegedly acted in a fraudulent transaction.

7. SPECIAL RULES AND LAWS

7.1 Rules for Claiming Punitive or Exemplary Damages

In Canada, punitive or exemplary damages are only awarded where an ordinary damages award would be insufficient to achieve the goals of punishment and deterrence. Even then, only the minimum amount necessary to achieve this purpose will be awarded, and awards are typically small, especially in comparison to those found in the United States, for example. To make a claim for punitive damages, the plaintiff must show that the defendant's conduct was so malicious, oppressive and high handed that it offends the court's sense of decency.

In the provinces of Alberta and Saskatchewan, a plaintiff must specifically plead punitive damages, but this is not a requirement in other Canadian common law jurisdictions. The party claiming punitive damages bears the burden of proof.

In Québec, only specific situations provided for in law give rise to the awarding of punitive damages. For example, where there is an unlawful and intentional interference with a right or freedom under the Charter of Human Rights and Freedoms, such as a bad faith infringement of property rights with malicious intent. Therefore, it is possible that in cases of fraud, punitive damages may be awarded in Québec.

7.2 Laws to Protect "Banking Secrecy"

Canada does not have specific laws to protect "banking secrecy", which prohibit banks from disclosing customer data. The general privacy laws (such as the Personal Information Protection and Electronic Documents Act) and com-

mon law duty of confidentiality provide for the legal framework surrounding disclosure of customer data, along with certain provisions of the federal Bank Act.

Pursuant to Section 487.018 federal Criminal Code, a justice or judge may order a banking institution to produce financial data upon an ex parte application of a peace or public officer. Upon receipt of the order, the financial institution may be asked to prepare and produce:

- either the account number of a person named in the order or the name of a person whose account number is specified in the order;
- the type of account;
- the status of the account; and
- the date on which it was opened or closed.

7.3 Crypto-assets

The wider use of cryptocurrency in everyday markets, and its susceptibility to fraud from anonymous actors, has forced Canadian courts to consider how to apply traditional judicial concepts and remedies to these less tangible digital assets. Although the Canadian courts have not conclusively deemed cryptocurrency to constitute property, they have in effect found that it can in some circumstances be treated as such in order to grant appropriate freezing and recovery remedies. For example, as discussed more fully in the Trends and Developments section, Canadian civil courts have started to apply freezing (Mareva), interim possession and civil search and seizure (Anton Piller) remedies to cryptocurrency. These important developments mark a seismic shift in the Canadian legal system, as it moves to fill a civil justice gap in the exploding digital marketplace.

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McMillan LLP is a leading business law firm serving public, private and not-for-profit clients across key industries in Canada, the United States and internationally through its offices in Vancouver, Calgary, Toronto, Ottawa, Montreal and Hong Kong. The firm represents corporations, other organisations and executives at all stages of criminal, quasi-criminal and regulatory investigations and prosecutions for all types of white-collar offences, including fraud, bribery and corruption, money laundering, cartels and price fixing, insider trading or other securities offences, economic sanctions, export and import controls and tax offences, as well as offences under health and safety, discrimination, immigration, financial services, energy, environmental and other regulatory regimes. The team also manages and defends against search warrants, inspection orders, interviews given under statutory compulsion, wiretapping orders, and other investigative actions, and advises on risk management, regulatory compliance, reputation management and defamation, among other matters.

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Trends and Developments

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Overview

Current trends and developments in international fraud largely relate to the growth in cybercrime, and on the challenges global businesses face in developing effective procedures and tools to address these evolving risks to their real and digital assets. While traditional fraudulent schemes still abound, the increased use of digital marketplaces and exchanges has led to new areas of risk.

The emergence of cryptocurrency, for example, and its increasing acceptance in commercial transactions, not to mention its ease of movement and exchange, has unsurprisingly attracted the attention of fraudsters. Canada's federal and national police service, the Royal Canadian Mounted Police (RCMP), recently stated that cryptocurrency fraud in Canada grew by 400% between 2017 and 2020. The ability to successfully trace and recover such assets presents even greater challenges given the medium of exchange and the cross-border nature of transactions.

To address the growing cryptocurrency fraud, the Canadian Anti-Fraud Centre has published guidelines to help the public avoid being defrauded and to protect virtual assets (Canadian Anti-Fraud Centre Bulletin: Using Cryptocurrency Safely, 29 January 2021). Until 2021, there was very limited Canadian case law on the recovery of digital assets and treatment of cryptocurrency. However, new precedent-setting cases in 2021 and 2022 succeeded in applying conventional judicial enforcement tools to digital assets, to trace, freeze and seize the proceeds of cryptocurrency fraud and overcome prior scepticism on whether the civil courts could and would intercede. It is still early days in this area of law, and businesses using such digital assets must keep a close eye on the quick-moving nature of these schemes, while Canadian judicial remedies close the tracing and enforcement gap.

Cybercrime Generally

The Canadian government and law enforcement view cybercrime as the most common cyber threat that Canadian organisations are likely to encounter. In the digital world of fraud we are seeing rising technical complexity and expansion into new forms of criminal activity.

Canadian law enforcement typically organises cybercrime into two categories:

- technology-as-target crimes, where the criminal activity targets computers and other information technologies directly, such as mischief relating to confidential data (eg, malware threats);
- and technology-as-instrument crimes, where the internet or other information technologies are used as the mechanism to carry out a crime, such as identity theft, money laundering, child exploitation and human or drug trafficking.

These types of cybercrimes look to exploit new and emerging technologies, and test existing cybersecurity defences, looking for any opening to generate illicit gains. Generally speaking, cybercriminals take advantage of gaps not only in company software and hardware, but in human tendencies in the course of their everyday business at work and online. The goal of

these cybercriminals is stealing an individual or company's confidential information through fraud, extortion and monetising it for profit or illicit use. These fraudsters target Canadians but operate and move data and funds offshore, often out of reach of Canadian law enforcement and, practically speaking, even when traceable, beyond effective recovery.

The government of Canada, through the National Cyber Security Strategy, supports the RCMP's National Cybercrime Coordination Unit, which co-ordinates cybercrime investigations in Canada and with international partners, providing both an information source and a national reporting system.

Cryptocurrency Fraud

Digital assets an are increasing target of cybercrime and by design allow for a more unencumbered and less regulated exchange. As a result, they are more susceptible to manipulation and tampering. In Canada, we are seeing cryptocurrencies as an area of increased risk, as regulation struggles to keep up with the demand and usage of these mediums of exchange.

Cryptocurrency is a digital asset that can act as a medium of exchange to buy goods and services, or for investments and trading. It is stored on third party exchanges or in hot (online) or cold (offline) storage wallets. In Canada, cryptocurrencies are not considered legal tender. As such, cryptocurrency is not issued by a government or a central bank and no financial institution is involved in the transactions, making their use on exchanges and other platforms more susceptible to fraud or mismanagement (see, for example, the widely reported Quadriga case).

Cryptocurrency has been used in Ponzi, extortion and fraud schemes and scams around the world. This is mainly because it is easier to move cryptocurrency between different jurisdictions globally, and to restrict its means of access, making it more difficult to determine which court has jurisdiction and how to locate and prosecute the wrongdoer. There is no central authority that maintains cryptocurrency user information, although it can sometimes be sought through cryptocurrency exchanges. There is also an element of anonymity in cryptocurrency transactions that fraudsters can exploit, as there are no names behind wallet addresses.

As a result, victims of fraud usually have to seek help from digital forensic investigators and use software tools to trace the movement of the subject cryptocurrency. This inevitably leads to additional logistics and costs for a victim who wants to sue the fraudster and trace the fund flow. Sometimes the amounts at issue do not validate incurring these additional pursuit costs, adding to the appeal of this form of fraud to criminals. This is in addition to the speed with which it can be transferred, sometimes multiple times using software to break on-chain links between addresses, making it difficult to trace and making the slow process of obtaining orders and enforcing them imperfect.

Transfers of cryptocurrencies are typically irreversible, which makes the recovery even more challenging. When dealing with monetary transactions, financial institutions can utilise mechanisms to reverse some of them (eg, credit card chargebacks). However, similar mechanisms are rarely available in respect of cryptocurrency transactions, at least without some assistance from an exchange.

Canadian Case Law – Early Treatment of Cryptocurrency

One of the first decisions dealing with asset tracing in the cryptocurrency space was a 2018 British Columbia Superior Court decision. In Copytrack Pte Ltd v Wall, the court ordered a tracing remedy for a type of cryptocurrency.

Copytrack Pte Ltd ("Copytrack"), a Singapore-based company, brought an application for summary judgment, and sought a tracing order to recover ethereum (Ether) tokens on the basis of wrongful retention or conversion.

Copytrack offered its tokens ("CPY") for sale to investors as part of an initial coin offering (ICO) campaign. The defendant participated in the ICO and subscribed for 530 CPY tokens (value about CAD780). Copytrack mistakenly transferred a different form of cryptocurrency to the defendant's wallet – about 530 Ether tokens (value CAD495,000). Despite Copytrack's request, the defendant failed to return the Ether tokens and later claimed that he no longer had possession of the tokens as they had been stolen by an unknown third party.

While granting the tracing and recovery remedy, the court did not make a determination in respect of whether cryptocurrency is a "good" for the purposes of the doctrines of conversion and detinue as the evidentiary record was inadequate. However, the court held that it was undisputed that the tokens in that case were Copytrack's property and it would be unjust to deny Copytrack a remedy.

The court did not provide any guidance on the form of tracing or rules to be applied when tracing cryptocurrencies. In this case, Copytrack submitted that the Ether tokens were traceable to five separate wallets. This type of information may not always be available and might pose a challenge in terms of enforcing asset-tracing orders. More recently, two new cases have built upon the Copytrack authority and more clearly demonstrate how cryptocurrency can be frozen (on exchanges) or seized and preserved by a third-party custodian (cold storage wallets), all carried out without notice to the defendant and pre-judgment to protect the interests of all parties in the litigation.

Freezing, Seizure and Preservation Orders for Cryptocurrency

Due to the digital nature of cryptocurrency, victims of fraud may not always have sufficient information to identify the location of the cryptocurrency, such as the wallet details or trading accounts through which it was improperly transferred. If either an exchange or a digital wallet or some other identifying information is available, and a private party wishes to commence a proceeding in civil court, interim without notice injunctive remedies now appear available to close the enforcement gap in cryptocurrency frauds.

First, with respect to cryptocurrency assets on exchanges or otherwise within the control of third parties, Canadian courts have demonstrated a willingness to order freezing (Mareva) orders, without notice to the defendant asset holders. Typically, Mareva injunctions are brought urgently on an ex parte basis to avoid further dissipation or conversion of assets pending the court order. To obtain a Mareva order, the plaintiff must prove, among other things, a strong prima facie case and that there is a serious risk of dissipation of assets. In many cases involving cryptocurrency, it will be harder to prove a strong prima facie case of fraud without an extensive investigation, which may take too long to be effective. A claimant may also have to broaden their investigation on the digital transactions, seeking a Norwich Pharmacal order against involved third parties, such as an exchange or internet service providers, in order to find ways to obtain user details, emails, internet postings and, ultimately, further account details.

Furthermore, the "risk of dissipation" may be harder to demonstrate through evidence or inference, given that the very nature of cryptocurrency – its ease of transfer – is a function of its medium, and not necessarily a sign of something improper in and of itself. The courts have

already been faced with arguments that the use of cryptocurrency is itself suspicious, but that superficial line of argument will only grow more ineffective as the medium of exchange shakes off its stigma.

In 2019, an English court confirmed that proprietary injunctions are available in respect of bitcoin, a form of cryptocurrency. In the 2019 case of AA v Persons Unknown and Others, a Canadian insurance company was the target of a ransomware attack. The English insurer of the Canadian company agreed to pay 109.25 bitcoins (value USD950,000) to the hacker in exchange for decrypting its customer's servers and desktop computers. Subsequent to the payment, the insurer conducted an investigation to trace the bitcoins and was able to obtain an address of a digital asset and cryptocurrency exchange known as Bitfinex, operated by companies in the British Virgin Islands. With that information, the insurer sought a freezing order in respect of the bitcoin held in accounts with the exchange. As a preliminary matter, the English court determined that the insurer had established that bitcoin constituted property. The court held that the injunction test was met: the evidence showed that there was a serious issue to be tried, the balance of convenience favoured the granting of the injunction and damages would not be an adequate remedy.

Fortunately, the Canadian civil courts have now expanded the availability of freezing, seizure and preservation injunctions against cryptocurrency.

In the February 2022 decision of Li v Barb and Others, a class action lawsuit by various businesses in the City of Ottawa successfully obtained a without notice Mareva injunction freezing cryptocurrency in more than 120 different addresses held by organisers of the "freedom convoy", who were in receipt of funds in support of their pandemic protests in Canada's capital (this civil Mareva order followed the Canadian governments freezing of 34 cryptocurrency addresses under the Emergencies Act). The court also directed several financial institutions, platforms and exchanges (including national banks and platforms such as "GoFundMe") to freeze all transactions related to the subject digital wallets. Examinations under oath quickly followed. These enforcement measures were however somewhat limited as unhosted wallets, and peer-to-peer cryptocurrency transfers that avoided third party intermediaries, could not be intercepted by this form of court intervention.

Fortunately, the Canadian civil courts have now also addressed this challenge posed by cryptocurrency frauds that transfer the unlawful proceeds to an unhosted digital wallet, without involving a third-party exchange. In the November 2021 landmark case of Cicada 137 v. Medjedovic, Benjamin Bathgate and Reuben Rothstein, McMillan LLP, successfully obtained the first reported Anton Piller order (civil search and seizure) on cryptocurrency in Canada. The plaintiff brought its without notice injunction to search for and seize evidence at the teenage defendant's residence, including the subject cold storage wallet devices and all passcodes, to preserve the evidence and assets and deliver them to a third party custodian until further disposition by the court. The court granted and extended this injunctive order, providing for extended searches for the digital wallet information, and issued a Warrant for Arrest against the defendant to force his compliance.

The Cicada 137 case is also one of the world's first cases that considers attacks against smart contracts (on a blockchain) and user interactions on decentralized finance (DeFi) trading platforms. The case may become the first cryptocurrency fraud and recovery case to address the controversial ethos of "Code is Law", where attackers assert the defence that if software

code does not prevent an attack, the action and subsequent windfall should be lawful.

Conclusion

In Canada, since our traditional judicial remedies used to trace and freeze funds were not created with cryptocurrency in mind, it is up to the courts to re-work the conventional approach and be flexible in ordering useful remedies that serve the purpose intended, while taking into account the peculiarities of digital tender.

The Canadian courts have proven increasingly willing to grant tracing, freezing, seizure and preservation orders for cryptocurrencies. However, their effectiveness in practice is still evolving and uncertain. It seems inevitable that, to avoid forcing claimants into extra-judicial processes, the courts will have no choice but to continue to adapt their orders and enforcement measures to the reality of cryptocurrencies in the coming years, to avoid greater proliferation of digital currency fraud schemes in Canada.

The Canadian authorities are taking some initial steps to help provide guidance on these commercial risks, including securities regulators. For example, the Canadian Securities Administrators (CSA) and the Investment Industry Regulatory Organization of Canada (IIROC) have issued guidelines (Joint Canadian Securities Administrators and Investment Industry Regulatory Organization of Canada, Notice 21 329: Guidance for Crypto Asset Trading Platforms: Compliance with Regulatory Requirements, 29 March 2021) outlining requirements applying to crypto-asset trading platforms and providing clarification on the ways in which the current securities legislation framework should apply to those platforms. The guidelines do not create new rules but rather explain how the current rules should be applied to the complex models of crypto-asset trading platforms in order to better regulate them and manage the recent explosion of unregistered platforms that have increased risks to the public. These guidelines highlight the obligation for such platforms to register either as an investment dealer or apply for interim registration until their activities are clarified with regulators.

If Canada's courts and regulators are to keep up with the wider use of this digital tender and ensure continued protection of commercial transactions, further guidance from the relevant authorities will need to come quickly and must demonstrate a readiness to change. Without support for meaningful information gathering and enforcement tools that can extend our investigation and recovery beyond Canada's borders, virtual tender will take effective asset tracing even further out of reach.

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