

Grabbing the Goods - Ontario's New Property Seizure Law

By Albert S. Frank, LL.B.

Laws for seizing the property of criminals or alleged criminals have an ancient and infamous reputation as a government fund-raising method.

Roman emperors used to seize the property of traitors, leading many to suspect that wealth, not treason, was often the real reason the "traitors" were targeted. In a later age the state seized the property of persons convicted - with the help of torture-induced confessions - of witchcraft. In recent years the United States has become notorious for its property-seizure legislation, under which the property of suspects can be seized well in advance of any conviction - making it hard or impossible to finance a legal defence - and might not be returned even after an acquittal.

Now Ontario has brought in property-seizure legislation, the ***Remedies for Organized Crime and Other Unlawful Activities Act, 2001.***

Purpose

According to section 1 of the ***Act***, its purpose is to provide civil remedies that will assist in:

- (a) compensating persons who suffer pecuniary or non-pecuniary losses as a result of unlawful activities;

- (b) preventing persons who engage in unlawful activities and others from keeping property that was acquired as a result of unlawful activities;
- (c) preventing property from being used to engage in certain unlawful activities; and
- (d) preventing injury to the public that may result from conspiracies to engage in unlawful activities.

Starting the Process

The Attorney General has the initiative.

Under section 3 of the **Act** it is the Attorney General who starts the legal proceedings for an Order forfeiting property to the Ontario government on the basis that the property is the proceeds of unlawful activity. During such proceedings - or even before starting the proceedings - the Attorney General may move under section 4 for an Order to preserve the property pending a final decision in the case. If the Attorney General moves without giving notice to the other side - a secret motion, in effect - then the Order could only be for 10 days, with a possible 10-day extension.

Sections 8 and 9 are the parallel sections for cases where the claim is that property is an "instrument of unlawful activity."

Sections 13 and 14 are the parallel sections in the part of the **Act** dealing with "Conspiracies That Injure the Public." Under section 13 the Attorney General may commence proceedings

for an injunction requiring the person sued to do or not do anything specified in the Court's Order, or for the payment of damages to the Ontario government for any injury to the public resulting from unlawful activity. The Attorney General may move under section 14 for an Order for the purpose of preventing or reducing the risk of injury to the public.

Other Persons

Under section 3(3) if a person can prove that he or she or it is "a legitimate owner of the property" the Court, "except where it would clearly not be in the interests of justice, shall make such order as it considers necessary to protect the legitimate owner's interest in the property." Section 8(3) is a similar provision that applies where property is an instrument of unlawful activity but a person proves that he, she or it "is a responsible owner."

The "Conspiracies That Injure the Public" provisions are apparently not intended to hinder or compete with persons with particular claims against the person(s) the Attorney General is suing. Section 13(5) provides that no Order shall be made for the payment of damages to the Ontario government if:

- (a) another person gives the court written notice that the other person claims a right to those damages and has commenced or intends to commence a separate proceeding seeking payment, by a defendant to the proceeding under this section, of those damages; and
- (b) the court is satisfied that the claim referred to in clause (a) is not frivolous or vexatious.

Burden of Proof

Under section 16 of the **Act** findings of fact shall be made on the balance of probabilities. In other words, is the fact likelier than not to be true? This legislation has been criticised in legislative debate on the basis that the stricter "proof beyond a reasonable doubt" burden should be required.

Under section 17, for purposes of the **Act** proof that a person has been convicted, found guilty, or found not criminally responsible on account of mental disorder "is proof that the person committed the offence." But even if the person was never charged, was not convicted, or was in fact acquitted, it is still possible to find that the offence was committed and obtain an Order under the **Act**.

Conclusion

It is too soon to say whether the **Act** will turn out to be more of a help or a threat to the honest general public.

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