

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

BETWEEN:

EMMANUEL VILLAGE RESIDENCE INC.

Applicant / Moving Party

- and -

ATTORNEY GENERAL OF ONTARIO

Applicant / Responding Party

- and -

1250 WEBER STREET EAST, KITCHENER, ONTARIO,
OR THE PROCEEDS OF THE SALE THEREOF (*IN REM*)

Respondent

MEMORANDUM OF LAW

**Overview of civil asset forfeiture, the *Civil Remedies Act* and its purposes:
Ensuring that crime doesn't pay and compensating the victims of crime**

Civil Asset Forfeiture

1. Civil asset forfeiture law, sometimes referred to as non-conviction based forfeiture, is the legal mechanism whereby a Court is asked to address the origin or progeny and/or use of specific property.

Anti-Money Laundering Techniques: Civil Asset Forfeiture, J. Simser, 2nd Annual Symposium on Money Laundering, Osgoode Hall Law School, at p. 2, Book of Authorities of the Attorney General of Ontario ("Authorities"), Tab 1

2. The method of civil forfeiture law depends on the type of property involved. For proceeds of unlawful activity, the Court is asked to address whether property directly or indirectly, in whole or in part, has its provenance in crime, or other unlawful activity.

Civil Remedies Act, 2001, S.O. 2001, Chapter 28 ("*Civil Remedies Act*"), ss. 2 and 3(1), Schedule "B", Tab 1

Civil Asset Forfeiture in Canada, Simser & McKeachie, Canada Law Book, 2014, at p. 1-2, Authorities, Tab 2

3. If title to property lies in unlawful activity, and the Attorney General proves this on a civil standard, then the Court is empowered to extinguish the title interest. Property law does not like a void in title. The potential void in title can be addressed in two ways: 1) By forfeiting the property to the Attorney General in right of the Province of Ontario ("AGO"); or 2) if there is a legitimate owner, by returning it to the legitimate owner. Forfeiture ensures that there is no void by a transfer of the title to the province.

Civil Asset Forfeiture in Canada, Simser & McKeachie, *ibid*, at p. 1-2, Authorities, Tab 2

4. While forfeiture can have a punitive effect it is not punishment as the wrongdoer does not now and never did have genuine title to unlawful proceeds.

Murphy v GM PB PC Ltd., [1999] 1 I.E.H.C. 5 (H.C. Ireland) at para 110, Authorities, Tab 3

United States v Ursery 518 U.S. 267 (1996) at 298 (*per* Stevens J. dissenting, not on this point), Authorities, Tab 4

5. The policy rationale for civil forfeiture is two-fold: 1) to ensure that crime does not pay; and 2) to ensure that individuals involved in unlawful activities are not accorded the rights and privileges normally attendant to civil property.

Civil Asset Forfeiture in Canada, *ibid.*, at p. 1-2, Authorities, Tab 2

The Civil Remedies Act

6. The *Civil Remedies Act* (“CRA” or “the Act”), enacted in 2001, is the main legislation for civil forfeiture in the province of Ontario.^[1] The CRA was enacted to prevent persons from benefitting from unlawful activities, from using property to engage in such conduct and most importantly to compensate the victims of crime. As stated by the Supreme Court of Canada in *Chatterjee* “The CRA was enacted to deter crime and compensate victims.”

Chatterjee v. Ontario (Attorney General), 2009 SCC 19, at para. 3, Authorities, Tab 5

7. This public policy rationale for civil forfeiture is reflected in s. 1 of the Act, which sets out the purposes of the legislation as follows:

- (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**, including vehicles as defined in Part III.1, **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. [Emphasis added]

^[1] The CRIA office also has responsibility to seek forfeiture of proceeds of literary work that fall under the *Prohibiting Profiting from Recounting of Crimes Act, 2002*, also known as the *Literary Proceeds Act*. To date, CRIA has not commenced a proceeding under this Act.

Civil Remedies Act, *ibid*, s. 1, Schedule "B", Tab 1

8. To effect its purposes, the *CRA* provides a statutory regime under which the AGO may initiate proceedings in the Superior Court to preserve and forfeit proceeds and instruments of unlawful activity. Proceedings are *in rem* or against the thing and not *in personam* against the person. In effect, the AGO sues the property.

Civil Remedies Act, *ibid*, s. 15.6(1), Schedule "B", Tab 1

9. In cases of fraud, upon proof on a civil standard that the property is tainted by crime or other unlawful activity the court shall disgorge the proceeds from the party benefiting from unlawful activity (forfeit to the AGO), and redistribute the proceeds back to victims of the unlawful activity:

In essence, therefore, **the CRA creates a property-based authority to seize money and other things shown on a balance of probabilities to be tainted by crime and thereafter to allocate the proceeds to compensating victims of and remedying the societal effects of criminality.** The practical (and intended) effect is also to take the profit out of crime and to deter its present and would-be perpetrators. [Emphases added]

Chatterjee v. Ontario (Attorney General), 2009 SCC 19, at para. 23, Authorities, Tab 5

Civil Asset Forfeiture in Canada, *ibid.*, at pp. 1-2, Authorities, Tab 2

Power to Preserve under the *CRA*

10. Sections 4(2) and 9(2) of the *CRA* provide that, except where it would clearly not be in the interests of justice, the court shall make an order for the preservation of any property that is the subject of a proceeding under the *CRA* if the court is

satisfied that there are **reasonable grounds to believe** that the property is proceeds or an instrument of unlawful activity.

11. Preservation orders are interlocutory in nature and are intended to prevent the dissipation or further unlawful use of any property that is the subject of a proceeding under the *CRA*, to ensure its availability for potential forfeiture. Whether the property in question constitutes the "proceeds" or an "instrument" of "unlawful activity" is decided on a balance of probabilities, but need not be determined at the preservation stage. That awaits the outcome of the AGO's application for a forfeiture order.
12. A preservation order is the creature of statute and is not subject to the rules of a *Mareva* injunction.

Sole Exception to Preservation of Proceeds of Unlawful Activity: 'CNIJ'

13. Sections 4(2) and 9(2) of the *CRA* grant the courts a narrow discretion to refuse preservation in circumstances where the property is believed on reasonable grounds to be a proceed or an instrument of unlawful activity. The sole exception to the granting of preservation is where to do so would clearly not be in the interests of justice.
14. The Ontario Court of Appeal considered the meaning of the "clearly not in the interests of justice" exception in the context of a forfeiture application. For the unanimous court, Doherty J.A., explained that the exception is narrowly

construed and relief from forfeiture is very much the exception. The court went on to say that relief should only be granted where the party seeking it clearly makes the case that forfeiture would lead to an unequitable and unjust result and that forfeiture would be manifestly harsh or draconian.

Ontario (Attorney General) v 1140 Aubin Road, Windsor and 3142 Halpin Road, Windsor (In Rem), 2011 ONCA 363, (“*Aubin Road*”), Authorities, Tab 6

15. Doherty J.A. recognized in *Aubin Road* that it is not possible to list all the factors that could properly be considered by the court in evaluating the interests of justice in a particular case. However, the following factors were identified as relevant:

- (1) the closeness of the connection between the property and the illegal activity;
- (2) the reasonableness of the conduct of the party whose property is the subject of the forfeiture application as it relates to the unlawful activity;
- (3) the interplay between the purposes of the CRA and the exercise of the discretion to relieve against forfeiture; and
- (4) the value of the property owner's interest in the property compared to the value of the property that is tainted by the unlawful activity.

Ontario (Attorney General) v 1140 Aubin Road, Windsor and 3142 Halpin Road, Windsor (In Rem), *ibid*, at paras 97-99, 104 and 107, Authorities, Tab 6

16. In *Ontario (Attorney General) v \$51,000 in Canadian Currency (In Rem)*, it was held that the “clearly not in the interests of justice” exception at the preservation stage is to be even more narrowly applied relying on the fact that “At the preservation stage the court is only being asked to protect the property pending a determination of the case on the merits.”

Ontario (Attorney General) v \$51,000 in Canadian Currency (In Rem), 2012 ONSC 4958, at para 38, Authorities, Tab 7

17. This narrower application has been followed in subsequent court decisions.

Ontario (Attorney General) v 626 Strand Ave. (In Rem), 2013 ONSC 3094, Authorities, Tab 8

Ontario (Attorney General) v \$4,067,685.10 in Canadian Currency (In Rem), 2014 ONSC 2537, Authorities, Tab 9

18. A preservation order merely freezes the property creating no interest in the property and is subject to appeal and variance. This is further support for the position that the exception should be even more narrowly construed.

19. The party seeking to bring itself within the exception to preservation must clearly make the case that preservation would lead to an unequitable and unjust result, and that preservation would be manifestly harsh or draconian.

Permissible Payments Out of Preserved Property: Discretionary payment for reasonable legal expenses incurred by a person who claims an interest in the property upon proof of no other means

20. Sections 5 and 10 of the *CRA* expressly provide when the legal expenses of a person claiming an interest in property that is the subject of a *CRA* proceeding may be paid out of the property. Sections 5 and 10 permit **the only** access to property preserved as the proceeds of unlawful activity. Section 5 reads:

5(1) Subject to the regulations made under this Act, a person who claims an interest in property that is subject to an interlocutory order made under section 4 may make a motion to the Superior Court of Justice for an order directing that reasonable legal expenses incurred by the person be paid out of the property.

5(2) The court may make an order under subsection (1) only if it finds that,

(a) the moving party has, in the motion,

(i) disclosed all interests in property held by the moving party, and

(ii) disclosed all other interests in property that, in the opinion of the court, other persons associated with the moving party should reasonably be expected to contribute to the payment of the legal expenses;

(b) the interests in property referred to in clause (a) that are not subject to the interlocutory order made under section 4 are not sufficient to cover the legal expenses sought in the motion.

21. Section 10 mirrors the provisions in section 5 but allows access to instruments of unlawful activity to pay reasonable legal expenses.
22. Pursuant to the legislation, the party bringing the motion must establish they have no other means to pay their legal expenses. That is, the court must be satisfied that the person does not have other property interests that could be used to pay legal expenses; that the person has disclosed all of their interests in property; and that disclosure has been made of all property interests of anyone who may reasonably be expected to help pay the legal costs.

Civil Remedies Act, *ibid*, s. 5(2), Schedule "B", Tab 1

23. The moving party bears the onus and must make full, frank, clear and concise disclosure.

Ontario (Attorney General) v Jinarern, [2005] OJ No 6008, Authorities, Tab 10
Ontario (Attorney General) v Le, [2007] OJ No 4426 (DV CT), Authorities, Tab 11
Ontario (Attorney General) v \$51,000 in Canadian Currency (In Rem), 2012 ONSC 4958, at para 38, Authorities, Tab 7

24. Orders for payment under ss. 5 and 10 of the *CRA* only apply to reasonable legal expenses incurred in a *CRA* proceeding for the purpose of establishing the person's claim to an interest in property. No legal expenses are to be paid for other proceedings to which the claimant might be subject.

Civil Remedies Act, Ontario Regulation 91/02, General s. 1, Schedule "B", Tab 2

25. Orders for payment of reasonable legal expenses made under ss. 5 or 10 are subject to monetary limits prescribed by the regulations, namely the lesser of 15 per cent of the value of the property and the amount which would be paid for legal services under a legal aid certificate in connection with a civil matter.

Civil Remedies Act, Ontario Regulation 91/02, General, s. 3, Schedule "B", Tab 2

26. The purpose of the limit is to ensure that the court is able to balance the need for reasonable legal fees with the purpose of the legislation (to compensate victims of the unlawful activity). To use the proceeds to pay legal fees dissipates the funds available for victim compensation.

27. The court will not necessarily review the reasonableness of legal expenses, but will hold claimants to the statutory cap.

Ontario (Attorney General) v \$104,877 in US Currency (In Rem), 2014 ONSC 5688, Authorities, Tab 12

28. The *CRA* is even more restrictive than the *Criminal Code* in permitting access to preserved proceeds of unlawful activity. Unlike proceeds of crime seized or restrained under Part XII.2 of the *Criminal Code*, there is no provision under the

CRA that permits access to preserved proceeds of unlawful activity for the purposes of meeting reasonable living and/or business expenses.

Ontario (Attorney General) v 2000 Mercedes Benz (In Rem), 2012 ONSC 3182, Authorities, Tab 13

Payment of ordinary creditors from proceeds of unlawful activity defeats the purpose of civil forfeiture and the CRA: it makes crime pay

29. In *British Columbia (Director of Civil Forfeiture) v. Nguyen*, the court heard two competing civil proceedings for the disposition of seized currency: 1) a motion by a trustee in bankruptcy for an order that the seized currency be paid out of court to the trustee for distribution pursuant to *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 ("*BIA*"); and 2) a motion by the Director of Civil Forfeiture pursuant to British Columbia's *Civil Forfeiture Act* ("*CFA*") for an order that the seized money be forfeited to the government as proceeds of unlawful activity.

British Columbia (Director of Civil Forfeiture) v Nguyen, 2009 BCSC 185, Authorities, Tab14

30. In that case, the party seeking the funds was insolvent. On April 10, 2006, the insolvent made an assignment to a trustee in bankruptcy for the benefit of his creditors under the *BIA*. B.C.'s Director of Civil Forfeiture moved for forfeiture pursuant to the *CFA*. The trustee claimed that the \$242,505 US Dollars had vested with the estate and was not available for forfeiture. The court found that the trustee's position was based on a possessory claim. It was held that **the insolvent had no property interest in the seized money**, and accordingly, he could not assign such right to his trustee. As the trustee stood in the position of

the insolvent after April 10, 2006 to explain, excuse or deny the insolvent's illicit possession, and to identify a legitimate owner, there was no operational conflict between *BIA* and *CFA*. The money was forfeited and the trustee's claim was dismissed.

31. In *British Columbia (Director of Civil Forfeiture) v. Nguyen* the court also used the doctrine of *ex turpi causa non oritur action* to say that the courts would not help someone whose claim is tainted by criminality or moral turpitude.
32. In the context of criminal forfeiture of proceeds of crime, Fish J.A., as he then was, of the Quebec Court of Appeal, held that ordinary creditors do not have a valid interest under s. 462.42(1) of the Criminal Code, permitting relief from forfeiture of proceeds of crime:

I see no reason why ordinary creditors should stand in a privileged position where the particular asset against which they seek to satisfy their claim is proceeds of crime in respect of which their creditor has been convicted of an enterprise crime offence.

25 On the contrary, Parliament has expressly provided for forfeiture of that property to the Crown as a means of ensuring that offenders derive no profit from their crimes. Reducing their general indebtedness out of the fruits of their crime has precisely the opposite effect. It makes the crime pay -- a result that is fundamentally incompatible with the manifest object of the legislation.

26 Courts have been empowered under the legislation to exempt from the effects of forfeiture those who have an "interest in the property" -- in the French text, "un droit sur le bien".

27 There are strong policy reasons, where legislation contemplates the confiscation or forfeiture of property to Her Majesty, for protecting those who have a legally-enforceable interest in a particular property from the effects of its transmission to the Crown. The most obvious examples include those with an interest arising from an assignment, debenture, hypothec, trust, pledge or charge. [footnote omitted]

28 I do not believe that Parliament, in s. 462.42 of the Criminal Code, extended equivalent protection to the ordinary creditors of an enterprise crime offender. The language used does not convey to me a legislative intent to permit the extinction of an offender's ordinary debts out of the fruits of the offender's crime. The required notices and permitted applications would otherwise refer to creditors of the offender, rather than to persons who appear or claim to have an interest in the property declared forfeit.

33. Further, for the purposes of a proceeding under the CRA, a person cannot claim to have an interest in property, if, under the law of Canada or Ontario, it is unlawful for the person to possess the property.

Civil Remedies Act, s. 18, Schedule "B", Tab 1

34. Under s. 354(1) of the *Criminal Code* it is unlawful to possess proceeds of crime. In addition, under s. 462.31(1) of the Code, it is an offence to launder the proceeds of crime with intent to conceal or convert proceeds of crime.
35. Under the CRA, proof that a person was convicted in respect of an offence is proof that the person committed the offence.

Civil Remedies Act, s. 17(1), Schedule "B", Tab 1

Challenging a Preservation Order

36. A request to vary a preservation order must be made by way of motion to the court; the moving party bears the onus of proof on that motion.

Ontario (Attorney General) v Condominium Units 1210 and 1310 at 8 Scollard Street, Toronto (In Rem), 2011 ONSC 3067, Authorities, Tab 15

37. Motions to set aside or vary an order of the court may only be granted in the manner and for the reasons set out in Rules 37.14 and 59.06 of the Rules of Civil Procedure. Rule 37.14 states:

A party or other person who,

- (a) is affected by an order obtained on motion without notice;
- (b) fails to appear on a motion through accident, mistake or insufficient notice; or
- (c) is affected by an order of a registrar,

may move to set aside or vary the order, by a notice of motion that is served forthwith after the order comes to the person's attention and names the first available hearing date that is at least three days after service of the notice of motion.

Rule 59.06 states:


- (1) An order that contains an error arising from an accidental slip or omission or requires amendment in any particular on which the court did not adjudicate may be amended on a motion in the proceeding.
- (2) A party who seeks to,
 - (a) have an order set aside or varied on the ground of fraud or of facts arising or discovered after it was made;
 - (b) suspend the operation of an order;
 - (c) carry an order into operation; or
 - (d) obtain other relief than that originally awarded,may make a motion in the proceeding for the relief claimed.

Rules of Civil Procedure, R.R.O 1990, Reg. 194, as amended, Rules 37.14 and 59.06(1), Schedule "B", Tab 3

38. A claimant who wishes to contest a preservation motion may do so on the original hearing date by complying with the Rules of Civil Procedure.

All of which is respectfully submitted,

Dated: September 1, 2016



Jennifer Malabar, LSUC# 49358M



Gary Valiquette, LSUC# 34925M

Counsel for the Applicant / Responding Party,
The Attorney General of Ontario

Civil Remedies for Illicit Activities Office (CRIA)
Ministry of the Attorney General
Civil Law Division

Schedule "A" – List of Texts and Cases

1. *Anti-Money Laundering Techniques: Civil Asset Forfeiture*, J. Simser, 2nd Annual Symposium on Money Laundering, Osgoode Hall Law School, at p. 2
2. *Civil Asset Forfeiture in Canada*, Simser & McKeachie, Canada Law Book, 2014, at p.1-2
3. *Murphy v GM PB PC Ltd.*, [1999] 1 I.E.H.C. 5 (H.C. Ireland)
4. *United States v Ursery* 518 U.S. 267 (1996)
5. *Chatterjee v. Ontario (Attorney General)*, 2009 SCC 19
6. *Ontario (Attorney General) v 1140 Aubin Road, Windsor and 3142 Halpin Road, Windsor (In Rem)*, 2011 ONCA 363
7. *Ontario (Attorney General) v \$51,000 in Canadian Currency (In Rem)*, 2012 ONSC 4958
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9. *Ontario (Attorney General) v \$4,067,685.10 in Canadian Currency (In Rem)*, 2014 ONSC 2537
10. *Ontario (Attorney General) v Jinarern*, [2005] OJ No 6008
11. *Ontario (Attorney General) v Le*, [2007] OJ No 4426 (DV CT)
12. *Ontario (Attorney General) v \$104,877 in US Currency (In Rem)*, 2014 ONSC 5688
13. *Ontario (Attorney General) v 2000 Mercedes Benz (In Rem)*, 2012 ONSC 3182
14. *British Columbia (Director of Civil Forfeiture) v Nguyen*, 2009 BCSC 185
15. *Ontario (Attorney General) v Condominium Units 1210 and 1310 at 8 Scollard Street, Toronto (In Rem)*, 2011 ONSC 3067

Schedule "B"

1. *Civil Remedies Act, 2001*, S.O. 2001, Chapter 28
2. *Civil Remedies Act*, Ontario Regulation 91/02, General
3. Rules of Civil Procedure, R.R.O 1990, Reg. 194, as amended, Rules 37.14 and 59.06(1)

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**MEMORANDUM OF LAW
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