

## **FORFEITURE OF THE PROCEEDS OF CRIME**

**Teri-Ann A. Lawson, Contributor**

Passed in May 2007, the *Proceeds of Crime Act* seeks to address the deficiencies of the *Drug Offences (Forfeiture of Proceeds) Act* and repeals the *Money Laundering Act* to provide a comprehensive forfeiture and anti-money laundering legislation.

This article briefly examines the provisions in relation to the recovery of the proceeds of unlawful conduct in Part VI of the Act. It provides that the enforcing authority, which is either the Asset Recovery Agency (the Agency) or the Director of Public Prosecutions, may apply for a recovery order of property “obtained directly or indirectly by or in return for or in connection with unlawful conduct” (recoverable property).

The Act is aimed at recovering property in civil, as distinct from criminal, proceedings. The focus is the return of property, directly or indirectly, illegally obtained from criminal activities whether or not there has been a criminal conviction of the party who may have committed the offence. This Part of the Act does not focus on the conviction of individuals for criminal liability.

When a recovery order is made by the court, the property vests in the Agency, but the Court may not make such an order where certain circumstances are proven to exist, for example, where a third party obtained the recoverable property in good faith. This therefore protects innocent third parties. Further, applications for recovery orders may only proceed with the court’s permission where there are insolvency proceedings in progress that relate to a company’s property.

The Agency is also prohibited from starting proceedings for a recovery order unless it reasonably believes that the aggregate value of the property is more than \$250,000.00.

Where there are reasonable grounds for suspecting that there is cash exceeding the financial threshold on a person or on a property, the Act permits an authorised officer to conduct searches of the person or property. Where a search uncovers cash, it may be seized and detained initially up to 72 hours. This detention period may be extended by order of a Resident Magistrate for up

to 3 months on a first order. The Resident Magistrate may further extend the detention period for up to 2 years.

Forfeited cash is paid into the Consolidated Fund, along with any accrued interest, unless there is a pending appeal. Note also that a party aggrieved by a forfeiture order may appeal the forfeiture. If no forfeiture order is made in respect of detained cash, the person to whom the cash belongs or from whom the cash was seized may apply to a Resident Magistrate's Court for interest on the detained cash.

Since the purpose of the civil suit is to determine the extent to which a person has benefited from crime and to determine what can be forfeited, the civil standard of proof, that is, on a balance of probabilities, is employed. This standard eases the evidential burden of the prosecution. The first question for determination of the court is whether a benefit has been derived from criminal conduct by the party sued.

The Act also places a lengthy, 12 year limitation period for bringing proceedings as of the date when the Agency's cause of action accrues. The legislation is far reaching as recovery orders can be made with respect to any interest in recoverable property and any interest in realty or part of realty acquired with the proceeds of crime.

This Act has implications for banks and other financial institutions who take deposits from members of the public and against whom recovery orders can be made to disgorge deposits paid into them. It therefore underscores the need for personal character references for new bank customers, being aware of unusual banking activities of existing customers and the enforcement and observation of rigorous safe banking practices and procedures by banks and other financial institutions.

**Contributor: Teri-Ann A. Lawson**  
**Attorney-at-Law**  
**DunnCox**  
**48 Duke Street**  
**Kingston**  
[Teri-ann.Lawson@dunncox.com](mailto:Teri-ann.Lawson@dunncox.com)