

THE DRUG OFFENCES (FORFEITURE OF PROCEEDS) ACT

INTRODUCTION

The introduction of The Drug Offences (Forfeiture of Proceeds) Act represents an acknowledgement of the need for several methods to address the international and national drug trafficking problem and forms part of the legislative framework within which it is proposed to deal with this problem.

In recognition of the need to eliminate the power and wealth of the various drug trafficking cartels several countries have ratified the 1988 Vienna Convention against illicit traffic in narcotic drugs and psychotropic substances.

Jamaica, although a signatory to this Convention, is not in a position to ratify that Convention (which has already been ratified by ninety-five countries) until it has put in place legislative measures for its implementation.

Numerous countries, including a number of Caribbean countries have already enacted legislation providing for the forfeiture of the proceeds of drug trafficking. Some of these countries have also enacted legislation dealing with money laundering in relation to the proceeds of drug offences as well as legislation enabling mutual assistance in investigating, obtaining evidence, enforcing forfeiture, or similar orders in respect of such offences.

The Drug Offences (Forfeiture of Proceeds) Bill, which is now before Parliament (and was passed in the Lower House on the 12th May, 1994), as well as a mutual assistance criminal matters Bill, and proposed money laundering legislation are part of a legislative package being pursued by the Government.

OVERVIEW

Captioned legislation makes provision for the forfeiture of proceeds derived from offences committed in connection with illegal drug trading.

Provision is made for the forfeiture of property, and the making of restraining or pecuniary orders where there is no property but it is necessary to recover proceeds.

In order to ensure the ability to recover proceeds, the Bill extends duties and obligations on financial institutions for the furnishing of information.

The Bill provides that the Director of Prosecutions may make applications for three types of Orders, that is, Forfeiture Orders, Orders For Payment In Lieu of the Forfeiture Order, and Pecuniary Penalty Orders.

FORFEITURE ORDERS.

Forfeiture Orders can only be issued by a Judge of the Supreme Court and can only be made against property which the Judge is satisfied is **tainted property** in respect of the prescribed offence for which the person has been convicted.

There must be a nexus between the property against which the Order is sought and the prescribed offence.

Tainted property refers to property used in, or in connection with, the commission of the prescribed offence; or property derived, obtained or realised directly by the person convicted from the commission of the offence.

A person must be convicted of a prescribed offence which is defined to include producing, manufacturing, supplying or otherwise dealing in any dangerous drugs in contravention of the Dangerous Drugs Act; transporting or storing a dangerous drug where possession of that drug contravenes the Dangerous Drugs Act; importing or exporting a dangerous drug in contravention of the Dangerous Drugs Act; aiding, abetting, counselling or procuring the commission of any offences specified above; and conspiring to commit such offences.

The Act does not have retrospective effect and therefore commission and conviction of the prescribed offence must have taken place after the Act comes into force.

Where the Judge is satisfied that a forfeiture order should be made against the property of a person convicted of a prescribed offence but the property or any part thereof or any interest therein cannot be made subject to such an order, the Judge may order the person to pay to the Crown an amount equal to the value of the property part or interest.

This type of Order is also enforceable against all **realisable property** of the person if that gift satisfies one or other of two sets of conditions.

Realisable property includes any property held by another person to whom the convicted person made a gift if that gift was made after the commission of the prescribed offence (or of the earliest of the prescribed offences if the conviction of the donor was for more than one prescribed offence) and the Judge considers it appropriate to take that gift into account.

Circumstances which would preclude the making of a forfeiture order include where the property cannot be located or is outside Jamaica, where it has been transferred to an innocent third party, or has been substantially diminished in value or rendered worthless, or has been comingled with other property that cannot be divided without difficulty.

The Director of Public Prosecutions is required on making an application for a forfeiture order, to give not less than fourteen days notice to the convicted person and to any other person who the Director of Prosecutions has reason to believe may have an interest in the property.

Such notice must also be published in the Gazette and in a daily newspaper printed and circulated in Jamaica.

The convicted person and any other person claiming an interest in the property may appear and adduce evidence at the hearing of the application.

In considering whether a forfeiture order should be made, the Judge shall take into consideration the rights and interest, if any, of third parties in the property; the gravity of the offence concerned; and any hardship which may reasonably be expected to be caused to any person by the operation of the order.

The Bill makes provisions for the procedure for amendments to an application for a forfeiture order.

Where a forfeiture order is made against any property, the property vests absolutely in the Crown by virtue of the order.

If the property against which the order is made is subject to the Registration of Titles Act, the property vests in the Crown in equity until the applicable registration requirements are met.

The property may not be disposed of without the leave of the Court until the period allowed by the rule of court for an appeal against conviction or appeal against the forfeiture order expires, or lapses, or the appeal is determined.

PECUNIARY PENALTY ORDER.

A **Pecuniary Penalty Order** is an Order issued by a Judge of the Supreme Court directing a person convicted of a prescribed offence to pay to the Crown a sum of money equal to the total value of any benefits derived by that convicted person from the commission of the prescribed offence. This sum of money may include the value of any benefit derived or obtained by, or accruing to another person at the request or on the direction of the convicted.

It should be noted that the amount payable under the Order is limited to the amount that might be realised at the time that the Order is made.

In assessing the value of benefits derived by or accruing to a person from the commission of a prescribed offence, the Judge may if satisfied on a balance of probability, lift the corporate veil and treat as that person's property, any property that is subject to the effective control of the person.

This applies whether or not the person has any legal or equitable interest in the property or any right, power or privilege in connection with the property.

The Judge may further take into consideration the shareholding in, debentures over or directorships in, any company that has an interest (direct or indirect) in the property, and may order the investigation and inspection of the books of a company named in the order. He/she may also have regard to any trust that has a relationship with the property, and any relationship between persons having interest in the property or in such company or trust, as well as any other persons.

Where the Judge treats particular property as the person's property, the Judge may on an application by the Director of Prosecutions, declare the property to be available to satisfy the pecuniary penalty order in which event the order may be enforced against that property and a restraint order may be made in respect thereof.

The Director of Public Prosecutions is required to give written notice of any application to the person against whom the pecuniary order is made or to any person whom he/she has reason to believe may have an interest in the property.

Such persons have the right to appear and present evidence at the hearing.

No acceptance by a person under this section that he received any benefits from the commission of a prescribed offence shall be admissible in any proceedings for any offence.

WARRANT TO SEARCH PREMISES FOR TAINTED PROPERTY

A Justice of the Peace may issue a search warrant to a named constable after being satisfied by information under oath that there is reasonable grounds for suspecting that tainted property is to be found on any property specified in the information.

The warrant may authorise the named constable to enter upon premises, and to search and seize any property found which the constable believes, on reasonable ground, to be tainted property.

Where property is seized in pursuance of the warrant, the constable is required to prepare a list of the property seized and to give a copy thereof to the owner or occupier of the premises searched if such person is present at the seizure. Such list must also be sent to the Clerk of Courts in the location of the premises where the property is seized.

Seized property may be returned to any person claiming an interest therein following an application by that person to a Judge for an order that the property be returned to him.

RESTRAINT ORDERS.

The Director of Public Prosecutions may apply to the Court for a Restraint Order against any realisable property held by a person charged or convicted of a prescribed offence or by any other person.

The main purpose of a restraint order is to prohibit the disposal of or any dealing with the property or any specified part of the property, or any interest in it, except as the order itself may specify.

An application for a restraint order may be made ex parte. The application must be supported by an affidavit containing stipulated information and the Judge is empowered to make the restraint order if satisfied on a balance of probability as to the various matters stated in the affidavit and that any grounds for belief stated therein are reasonable.

The Judge may require the Crown to give such undertakings as the Judge considers appropriate with respect to the payment of damages or costs, or both in relation to the making and execution of the order.

A copy of a restraint order which affects registered land must be registered with the Registrar of Titles and the Registrar of the Supreme Court.

A restraint order remains in force until it is revoked, or expires (at the end of six months after the order was issued), or a forfeiture order or a pecuniary penalty order is made in respect of the property.

PRODUCTION ORDERS

Where a person has been convicted of a prescribed offence or is reasonably suspected of having committed such an offence, a Judge may, on the application of a constable, make an order for the production of documents which is reasonably suspected to be in the possession and control of any person.

The document(s) must be relevant to identifying, locating, or quantifying tainted property or property of the person who committed the offence, or identifying or locating a document necessary for the transfer of the tainted property or property of the person who committed the offence.

An order cannot be made under this section in respect of accounting records used in the ordinary business of banking, including ledgers, day-books, cash books and accounting books.

Where a document is produced or made available pursuant to an order, the constable may inspect it, take extracts from it, copy it, and retain it if the retention is reasonably necessary for the purposes of the Act.

MONITORING ORDERS

The Director of Prosecutions may apply to a Judge in Chambers for a monitoring order directing that a financial institution give information to a named constable.

The monitoring order shall direct the financial institution to disclose information obtained by the institution about transactions conducted through an account held by a particular person with the institution.

Financial Institutions include:

- a **bank** licensed under the Banking Act;
- a **financial institution** licensed under the Financial Institutions Act;
- a **building society** registered under the Building Societies Act;
- a **society** registered under the Co-operative Societies Act; and
- an **insurance company** registered under the Insurance Act.

A monitoring order is applicable to **transactions conducted during the period specified in the order**. This period will commence on the day on which the order is given to the financial institution and expires three months thereafter.

A transaction conducted through an account includes a reference to-

- the making of a fixed term deposit;
- in relation to a fixed term deposit, the transfer of the amount deposited or any part thereof at the end of the term; and
- the opening, existence or use of a deposit box held by the institution.

Duty of Non-disclosure.

A financial institution that is, or has been subject to an order, **must not disclose** the existence or the operation of the order to any person.

Exceptions are specifically stated and a **financial institution may disclose the existence or operation of the order to an Attorney-At-Law for the purpose of obtaining legal advice or representation in relation to the order and/or an officer or agent of the institution for the purpose of ensuring that the order is complied with.**

Persons to whom disclosure is allowed as well as the named constable in the order must not disclose the existence or operation of the order except to another Attorney-At-Law or officer or agent of the institution where it is essential for the performance of that person's duties or for ensuring that the order is complied with or for obtaining legal advice or representation.

Such persons are bound to maintain their duty of non-disclosure even when they cease to hold their respective positions and duties.

The duty of non-disclosure is extended to disclosing the existence or operation of a monitoring order to a person who could reasonably be expected to infer the existence or operation of the monitoring order.

Contravention of the duty of non-disclosure by an individual will attract a penalty of a fine of up to One Hundred Thousand Dollars(\$100,000) or to imprisonment for a term not exceeding three (3) years or to both such fine and imprisonment on summary conviction in a Resident Magistrate's Court.

In the case of a body corporate, the penalty is a fine not exceeding Two Hundred Thousand Dollars(\$200,000).

In determining whether a monitoring order should be granted, the Judge must be satisfied that the person in respect of whose account the information is sought-

- has committed or is about to commit a prescribed offence;
- was involved in the commission, or is about to be involved in the commission of, a prescribed offence; or
- has benefited directly or indirectly, or is about to benefit directly or indirectly, from the commission of a prescribed offence.

The order must specify the name or names in which the account is believed to be held, the class of information that the institution is required to give, and the name of the constable to whom the information is to be given and the manner in which it is to be given.

Any financial institution that knowingly contravenes the order or provides false and misleading information is guilty of an offence and is liable on summary conviction in a Resident's Magistrate Court to a fine not exceeding Two Hundred Thousand Dollars (\$200,000).

Retention of Records.

A financial institution is required to retain certain documents in their original form for a **minimum retention period**.

These documents are those that relate to a financial transaction carried out by the financial institution in its capacity as such as well as documents that relate to a financial transaction carried out by the financial institution in its capacity as such and are given to the institution by or on behalf of the person, whether or not the documents are signed by or on behalf of the person.

Minimum retention period means-

- in relation to the opening of an account, the period of **five years** after the day on which the account is closed;
- in relation to the opening by a person of a deposit box, the period of **five years** after the day on which the deposit box ceases to be used by the person;
- in any other case, the period of **five years** after the day on which the transaction takes place.

Documents that relate to a financial transaction carried out by the financial institution in its capacity as such and which must be retained for the minimum retention period include documents relating to-

- the opening and closing by a person of an account;
- the operation by a person of an account;
- the opening or use by a person of a deposit box;
- the telegraphic or electronic transfer of funds by the institution on behalf of a person to another person;
- the transmission of funds between Jamaica and a foreign country or between foreign countries on behalf of a person; or
- an application by a person for a loan from the institution, where a loan is made to the person pursuant to the application.

The minimum retention requirement does not apply to a financial transaction document that relates to a single deposit, credit, withdrawal debit or transfer of an amount of money under Two Hundred Thousand Dollars (\$200,000) or such larger amount which may be prescribed for the purposes of this sub-section.

Register of Original Documents.

A financial institution must maintain a register of documents which are released.

Where a financial institution is required to release the original of a document before the end of the applicable minimum retention period, the institution must retain a complete copy of the document until the period has ended or the original document is returned.

Communication of information to Law Enforcement Authorities.

If a financial institution has information about an account held with it and the institution has reasonable grounds for believing that the information may be relevant to an investigation of, or the prosecution of, a person for a prescribed offence, or that such information would otherwise be of assistance in the enforcement of the Act or any regulations made thereunder, the financial institution may give the information to a constable or the Director of Public Prosecutions.

Where information is given in keeping with the above, the institution or its officer, agent or employee acting in the execution of his/her duties, **cannot be subject to any action, suit or proceedings in relation to the communication of information.**

GENERAL

Where a person who held realisable property has suffered substantial loss as a result of some serious default in the investigations or conduct leading to an application for a forfeiture or pecuniary penalty order which application was refused, a Judge may order that compensation be paid to that person.

The amount of compensation payable is such amount as the Judge thinks fit in all the circumstances.

The standard of proof applicable to any question of fact to be decided by a Judge under this Act shall be decided on a balance of probabilities.

Shirley-Ann Eaton
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