

Repurposing Frozen Assets to Assist the Forcibly Displaced

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Acronyms

CFA	Civil Forfeiture Act
CRA	Civil Remedies Act
FACFOA	Freezing Assets of Corrupt Foreign Officials Act
FARA	Frozen Assets Repurposing Act
FIAA	Foreign Illicit Assets Act
IEEPA	International Emergency and Economic Powers Act
IRA	Irish Republican Army
PCMLTFA	Proceeds of Crime (Money Laundering) And Terrorist Financing Act
POCA	Proceeds of Crime Act
SCC	Supreme Court of Canada
SEMA	Special Economic Measures Act
SPMA	Seized Property Management Act
UNA	United Nations Act
UNSC	United Nations Security Council
VRCPA	Victim Restitution Compensation Payment Act
WRMC	World Refugee & Migration Council

Introduction

With the number of refugees and internally displaced persons currently at more than 70 million, the global level of forced migration is now greater than ever. The present arrangements for responding to their needs are falling far short in almost every respect. Fresh thinking is required to develop a more effective legal, social and financial framework to meet this challenge.

The World Refugee & Migration Council (WRMC) was created as a catalyst for that fresh thinking, and as a forum in which policy innovations can be developed. The WRMC's starting point is the principle of shared responsibility, leading to a more equitable distribution of the tasks involved in hosting, settling and integrating refugees, and providing support and protection to those who are internally displaced.

The WRMC recognizes that a framework based on shared responsibility will endure only if there are mechanisms for enforcement and accountability. At the same time, the framework must include incentives for states to comply with their obligations, and resources to assist them in doing so.

In considering accountability, it is important to remember that forced displacement is often the result of bad governance. Violent or oppressive regimes, or those that fail or refuse to protect their populations, are responsible for much of the forced migration in the world today. Those regimes are also often corrupt, stealing from their treasuries and placing the money and other assets offshore for the unlawful benefit of the rulers and their associates.

When the jurisdictions in which the purloined assets are placed become aware of the assets' existence, they frequently "freeze" and, in some circumstances, seize them. These steps may be authorized by court order, by domestic legislation, or through sanctions imposed by the United Nations Security Council (UNSC).

As a result, such assets are often tied up for extended periods. Meanwhile, the countries that are hosting those who were forcibly displaced struggle to manage the cost of accommodating large numbers of refugees or displaced persons whose dislocation was often caused by the very regime that stole the money.

To achieve both greater accountability and a fairer allocation of responsibility, could the stolen money be used in such cases to assist the forcibly displaced? If the money is to be returned to the country from which it was stolen, can conditions be attached, requiring that it be used for the fair treatment and safe resettlement of refugees and the internally displaced? Where the corrupt regime is still in power, can the money be paid out directly to NGO's, or jointly to the country of origin and, perhaps, an NGO or the Office of the United Nations High Commissioner for Refugees?

These questions raise complex, sensitive and sometimes unprecedented issues, but given the acute shortage of resources to assist refugees, they are well worth pursuing. It is estimated that corrupt leaders of countries whose population has been displaced, have deposited billions of dollars in cash and assets in foreign jurisdictions.

The Frozen Assets Repurposing Act

Since the publication of this paper in its original form, legislation was introduced in Canada that would make it possible for the Government of Canada to apply to the court for authority to seize and repurpose frozen assets.

On March 21, 2019, the Honourable Senator Ratna Omidvar introduced Bill S-259 An Act respecting the repurposing of certain seized, frozen or sequestered assets (referred to as FARA).¹

FARA has been reproduced in Appendix A to this paper.

FARA is based upon and reflects the principles advanced in this paper. FARA seeks to address the increasing number of forcibly displaced persons globally in two ways: first, by imposing a measure of accountability on those responsible for displacement through bad governance; and second, by easing the financial costs associated with that bad governance and corruption. FARA does so by creating a regime allowing a judge, on the application of the Attorney General or any other person with the written consent of the Attorney General, to order that an asset frozen under SEMA, the Freezing Assets of Corrupt Foreign Officials Act or the Justice for Victims of Corrupt Foreign Officials Act (Magnitsky Law) be paid into court. The court could also order a frozen asset be sold and the proceeds from the sale paid into court, or deal with the frozen asset in some other appropriate manner.²

Before making such an order, the court must be satisfied on a balance of probabilities that the frozen asset is associated with a foreign national responsible for or complicit in extrajudicial killings, torture or other gross violations of internationally recognized human rights, the enforced displacement of peoples, the ordering, controlling or direction of significant corruption, or violated human rights standards set by customary international law and the international human rights conventions to which Canada is a party.³

The court must provide notice of the proceeding to any person or entity that may have a valid interest in the frozen asset. If the court considers it necessary, the court may hear evidence from a person or entity claiming an interest in the frozen asset, regardless whether the person or entity received notice.⁴ This protects the rights of innocent third parties.

If the asset is forfeited, the court may use it (or the proceeds of its sale), at its discretion, to benefit persons harmed by the impugned acts, to support humanitarian relief for forcibly displaced persons, or assist a foreign state in accommodating refugees. Any allocation of assets must include a requirement that the recipient report to the court on its spending of moneys. A court may also restrict the use of the moneys and set prohibitions on certain uses.⁵

¹ Bill S-259, An Act respecting the repurposing of certain seized, frozen or sequestered assets, 1st Sess, 42nd Parl, 2019 (first reading 21 March 2019).

² *Ibid*, cls (1), 2.

³ *Ibid*, cl 6.

⁴ *Ibid*, cl 7.

⁵ *Ibid*, cl 8.

FARA would require that the Minister of Foreign Affairs publish and maintain a registry listing the name or entity associated with a frozen asset and the value of the asset.⁶

FARA died on the order paper with the dissolution of the last Parliament. However, the Liberal Party of Canada (2019, 72), which now forms a minority government, included in its 2019 election platform the prospect of building on the Magnitsky sanctions regime by allowing the transfer of seized assets with appropriate judicial oversight.

This paper will address some of the questions that arise in relation to FARA and relating more broadly to the policy question whether governments should confiscate and repurpose frozen assets for the benefit of the forcibly displaced.

⁶ *Ibid*, cl 4.

Freezing Assets in Canada: By What Authority?

As a starting point, it will be useful to review the sources of lawful authority in Canada for the freezing of assets. There are four Canadian statutes that provide that authority.

United Nations Act

Through the United Nations Act (UNA), the Government of Canada gives effect to sanctions imposed by the UNSC, meeting its obligation under the Charter of the United Nations. The UNA allows the Cabinet to enact regulations that implement UN sanctions, including asset freezes, and create offences for contravening them.

It should be noted that UNSC resolutions imposing asset freezes may include provisions that directly or by implication limit the member state's ability to confiscate or "repurpose" the frozen assets, or may impose conditions before such repurposing may take place. Where repurposing is being considered, the UNSC resolutions that impose asset freezes will therefore have to be examined closely to determine the effect of their provisions. Depending on the circumstances, it may be necessary to request the Security Council to amend the terms of its resolution to permit the repurposing.

Freezing Assets of Corrupt Foreign Officials Act

The Freezing Assets of Corrupt Foreign Officials Act (FACFOA) enables the Government of Canada to comply with a demand from a country in turmoil to freeze the assets or restrain the property of its current or former government officials or politicians. The FACFOA is not sanctions-based legislation, which is generally punitive; rather, the asset freeze under the FACFOA is a type of assistance that Canada provides to the requesting country.

The objective is "to allow the foreign state the opportunity to seek the ultimate seizure and recovery of assets through mutual legal assistance frameworks." The FACFOA regulations include a list of "Politically Exposed Foreign Persons" who are subject to an asset freeze in Canada under those regulations. There are currently FACFOA regulations for Tunisia and Ukraine.

Special Economic Measures Act

The Special Economic Measures Act (SEMA) enables the Governor in Council to make regulations restricting or prohibiting certain activities in relation to a foreign state, or any person in a foreign state or a national of a foreign state, as well as to freeze or seize assets. SEMA regulations include a schedule listing individuals and entities subject to sanctions (including asset freezes). There are SEMA regulations at present for the following countries: Burma (Myanmar), Iran, Libya, North Korea, Russia, Syria, Ukraine and Yemen.

Justice for Victims of Corrupt Foreign Officials Act

The recently adopted Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law), the so-called Magnitsky Act,⁷ provides for “the taking of restrictive measures in respect of foreign nationals responsible for gross violations of internationally recognized human rights.”⁸ The purpose of the statute is to authorize the imposition of sanctions, including asset freezes, against foreign nationals who have committed gross violations of internationally recognized human rights, or acts of significant corruption.

Existing Authorities to Seize Assets

None of these statutes provides a procedure for confiscating or repurposing seized or frozen assets for the objectives discussed in this paper. Nor are there other Canadian statutes that do so.⁹ However, there are some statutes which authorize the seizure of assets generally¹⁰.

⁷ This law is named in honour of an activist who was murdered while fighting corruption in Russia.

⁸ Bill S-226, An Act to provide for the taking of restrictive measures in respect of foreign nationals responsible for gross violations of internationally recognized human rights and to make related amendments to the Special Economic Measures Act and the Immigration and Refugee Protection Act, 1st Sess, 42nd Parl (assented to 19 October 2017, c 21).

⁹ The Seized Property Management Act (SPMA) allows the Attorney General (or anyone with the Attorney General's consent) to apply to the courts for a management order in respect of any “seized property.” However, the SPMA's provisions make clear that the statute relates to property forfeited (seized, and not frozen) in the context of a prosecution in Canada where the owner was found to be engaged in criminal conduct. It does not, therefore, provide a basis for an order permitting the release of foreign assets frozen in Canada, in the context of assistance to the forcibly displaced in the country of origin.

¹⁰ Assets may be seized under SEMA, the Justice for Victims of Corrupt Foreign Officials Act, various provincial civil forfeiture statutes, the proceeds of crime provisions of the Criminal Code, and the Proceeds of Crime (Money Laundering) and Terrorist Financing Act.

The Experience in Other Countries

It may be instructive to consider the experience in other countries in examining ways in which frozen assets in Canada might be used for the benefit of refugees and displaced persons.

Switzerland

In 2015, Switzerland enacted the Foreign Illicit Assets Act (FIAA), allowing for assets deposited in Switzerland by foreign corrupt officials or their close associates to be frozen, confiscated and restituted.¹¹ The FIAA came into force on July 1, 2016, and has never been amended.

Under the FIAA, the Swiss Federal Council may order assets to be frozen, provided certain conditions have been met.¹² The FIAA then provides a procedure by which the Swiss government can seek an order of the Federal Administrative Court to confiscate those frozen assets. Once the assets have been confiscated, Switzerland can seek to restore the assets to the country of origin for the purpose of improving “the living conditions of the inhabitants of the country of origin,” and strengthening “the rule of law in the country of origin and thus... [contributing] to the fight against impunity.”¹³

The Swiss statute also makes provision for those cases in which it is not possible, for one reason or another, to come to an agreement with the government of the country of origin. Articles 18(4) and 18(5) of the FIAA provide, in substance, as follows:

18 (4). In the absence of an agreement with the country of origin, the Federal Council shall determine the process of restitution. It may, in particular, return confiscated assets via international or national organizations, and provide for the supervision of the FDFA [Federal Department of Foreign Affairs].

18 (5). To the extent possible, it shall include non-governmental organizations in the restitution process.¹⁴

Switzerland has also used civil society organizations to help ensure transparency when assets are returned to the countries of origin, and to monitor the process. For example, in returning assets to Kazakhstan following criminal bribery proceedings in Switzerland, an independent non-profit foundation was set up to monitor the return of the assets. As an added layer of transparency, the foundation was supervised by the International Research & Exchanges Board (Washington) and the international non-governmental organization Save the Children (Fenner Zinkernagel and Attisso 2013, 340).

¹¹ Loi sur les valeurs patrimoniales d'origine illicite, Federal Act on the Freezing and the Restitution of Illicit Assets held by Foreign Politically Exposed Persons (Foreign Illicit Assets Act, FIAA), 1 July 2016, 196.1 [translation provided by the Official Publications Centre of the Federal Council] [FIAA], online:

<<https://www.admin.ch/opc/en/classified-compilation/20131214/index.html>>.

¹² The FIAA states the conditions: “a. the government or certain members of the government of the country of origin have lost power, or a change in power appears inexorable; b. the level of corruption in the country of origin is notoriously high; c. it appears likely that the assets were acquired through acts of corruption, criminal mismanagement or other felonies; d. the safeguarding of Switzerland’s interests requires the freezing of the assets.” FIAA, 1 July 2016, 106.1, art 3(2).

¹³ *Ibid*, art 17.

¹⁴ *Ibid*, arts 18(4)-18(5).

The United States

In the United States, the International Emergency and Economic Powers Act (IEEPA) authorizes the president to impose financial sanctions, including asset freezes on other nation-states¹⁵ in circumstances that are found to pose an “unusual and extraordinary threat” to national security, foreign policy or the US economy. This requirement for a threat to national security distinguishes the IEEPA from what the Frozen Assets Repurposing Act (FARA) that has been proposed in Canada intends to address.

In February 2011, President Barack Obama used the authority of the IEEPA to order a freeze on all Libyan property and interests in the United States after finding that the government of Moammar Gadhafi had used violence against unarmed civilians (Levey 2011). Although the IEEPA does not change the ownership of the frozen assets, it gives the president the power to confiscate the property of any person, organization or country determined to be responsible for attacks against the United States or US interests.¹⁶ The president is then authorized to use those assets in any way determined to be in the best interest of the United States.¹⁷

An illustration of the exercise of that authority was provided when President George W. Bush issued an executive order under the IEEPA on March 20, 2003, confiscating certain Iraqi government property for the purpose of using that property “to assist the Iraqi people and to assist in the reconstruction of Iraq”(ibid.; Federal Register 2003). This order applied the approximately US\$1.7 billion in assets that had been frozen by sanctions on Iraq to the reconstruction effort (Levey 2011).

The United Kingdom

The British House of Lords debated a private member’s bill that would have provided for the repurposing of frozen assets for humanitarian compensation.¹⁸ The bill would have imposed “restrictions on assets owned by persons involved in conduct that gives support and assistance to terrorist organizations in the United Kingdom” and would have allowed for the use of those assets to compensate UK citizens affected by terrorism.¹⁹ The bill failed to complete its passage through Parliament before the end of the session.

The bill originated with demands for compensation arising from victims who sustained injuries as a result of Irish Republican Army (IRA) attacks in the United Kingdom from the 1970s to the 1990s.²⁰ It is alleged that Libya’s President Gadhafi supplied the IRA with weapons, including bomb material, during those years. The bill would have allowed victims of the attacks to seek compensation from Gadhafi’s

¹⁵ 50 USC § 1701 [IEEPA].

¹⁶ IEEPA, *supra* note 9 at § 1702(1)(c).

¹⁷ Ibid.

¹⁸ Bill 6, *Asset Freezing (Compensation) Bill* [HL] 2017-2019 sess, 2017.

¹⁹ UK, HL, *Parliamentary Debates*, vol 785, col 1077 (27 October 2017).

²⁰ UK, House of Lords Library, *Asset Freezing (Compensation) Bill* [HL] (*HL Bill 6 of 2017-19*) (Briefing Paper), online: <<https://researchbriefings.parliament.uk/ResearchBriefing/Summary/LLN-2017-0061>>.

almost £9.5 billion of assets currently frozen in the United Kingdom. The bill faced opposition by the UK government.²¹

The United Kingdom currently provides for the confiscation, restraint and recovery of assets that are proceeds or instruments of crime under the Proceeds of Crime Act (POCA). Part 5 of the POCA deals with the civil recovery of the proceeds of unlawful conduct. The purpose of this part is to enable the enforcement authority²² to recover in civil proceedings cash and property obtained through, or intended to be used in, unlawful conduct. A proceeding need not be brought for an offence in connection with the property.²³ Part 5 is extraterritorial and specifically lists gross human rights abuse or violation as included criminal acts.²⁴ A recovery order proceeding is initiated by the enforcement authority in the High Court.²⁵ A finding of unlawful activity is established on the balance of probabilities.²⁶ However, cash can be seized as forfeit without a court order providing that notice is given for the appropriate period and the notice lapses without an objection being filed.²⁷

France

France provides for the confiscation of assets in its criminal legislation and typically requires a criminal conviction. It has no legislation now in force that provides for the confiscation of frozen assets in the sense that the WRMC is proposing (Shentov, Stoyanov and Yordanova 2014).²⁸ However, the French legislature is now considering legislation designed to repatriate assets seized by corrupt foreign officials.²⁹ It is currently in the Assemblée Nationale, having passed first reading on May 3, 2019.³⁰ This proposed legislation is very similar to what this paper proposes.

²¹ *Ibid* at 3, n 13. The government argues that since the resolutions of the United Nations and the European Union do not provide for transferring the assets to a third party, the bill cannot lawfully establish a means for doing so. The government's second argument is that since the resolutions provide for recourse to the assets only for limited purposes, such as providing for the "basic needs" of the person sanctioned, no other use can be permitted.

²² As defined in *Proceeds of Crime Act 2002* (UK), s 316(1).

²³ *Ibid* s 240.

²⁴ *Ibid* s 241.

²⁵ *Ibid* ss 243, 244.

²⁶ *Ibid* s 241.

²⁷ *Ibid* s 297.

²⁸ See also, Policy Department C: Citizens' Rights and Constitutional Affairs, "The Need for New EU Legislation Allowing the Assets Confiscated from Criminal Organizations to be Used for Civil Society and in Particular for Social Purposes" (2012), *European Parliament's Committee on Civil Liberties, Justice and Home Affairs* at 34-35.

²⁹ *PROPOSITION DE LOI relative à l'affectation des avoirs issus de la corruption transnationale*, N° 109 Sénat Session Ordinaire de 2018-2019, Enregistré à la Présidence du Sénat le 6 novembre 2018, online: <<https://www.senat.fr/leg/pp18-109.pdf>>.

³⁰ Sénat, « Projets/propositions de loi » (20 août 2019), online: <<https://www.senat.fr/dossier-legislatif/pp18-109.html>>.

Germany

German asset forfeiture is set out in the Strafgesetzbuch (Criminal Code) and the Strafprozessordnung (Criminal Procedure statute).³¹ Restitution is the priority use of seized assets, but beyond that there is currently no provision for the social use of seized assets.³² There is evidence, however, of German interest in a Magnitsky Act (EUOBSERVER 2019; Browder 2019).

The European Communities

The Council Framework Decision on the mutual recognition of foreign confiscation orders is a binding³³ European Community decision requiring Member States, under some conditions, to recognize and execute a confiscation order issued by a court competent in criminal matters of another member state.³⁴

The list of enumerated offences which give rise to such an obligation includes crimes within the jurisdiction of the International Criminal Court.³⁵

³¹ "Need for New EU Legislation", *supra* note 25 at 36.

³² *Ibid* at 37.

³³ EC Framework Decisions are binding according to the *Lisbon Treaty* art 34(2)(b), but national authorities are given the responsibility of implementing the decision, though the United Kingdom has not, see *Disposal*, *supra* note 25 at 105.

³⁴ The Council Framework Decision 2006/758/JHA on the mutual recognition of foreign confiscation orders art 1.

³⁵ *Ibid* art 6.

The Canadian Charter of Rights and Freedoms

Would a statute such as FARA, providing for confiscation by the Government of Canada of frozen assets and their repurposing for the relief and support of those forcibly displaced in and from the country of origin, survive a constitutional challenge in Canada?

More particularly, would such legislation be lawful, having regard to the provisions of the Canadian Charter of Rights and Freedoms?

The “Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with... the Constitution is...of no force or effect.”³⁶ The constitutionality of FARA could be challenged under the Canadian Charter of Rights and Freedoms. Any legislation that is passed in Canada must be compliant with the provisions of the Constitution, including the Charter.

The most likely Charter challenge would be made under section 7, which guarantees the right to life, liberty and security of the person. Section 7 applies to “economic rights fundamental to human life or survival.”³⁷ However, this does not mean section 7 applies wholesale to property rights. Section 7 applies to “economic rights” as they are intertwined with one’s “basic health.” The Supreme Court of Canada (SCC) draws a distinction between economic rights as they affect a claimant’s security of the person and “corporate-commercial economic rights.”³⁸ Any Charter claim on the basis of section 7 would turn on whether the claimant could establish that the seizure or forfeit of his or her asset violated their right to life or security of the person. This seems unlikely to succeed in the context that is relevant to this paper³⁹.

Section 7 Test

For a violation of section 7 to be found, the applicant must demonstrate that one of the enumerated rights is engaged, that there is a causal connection between the state action and the effect on the right,⁴⁰ and that the violation is contrary to the principles of fundamental justice.

The *right to life* is engaged “where the law or state action imposes death or an increased risk of death on a person, either directly or indirectly.”⁴¹ This could be argued by a hypothetical claimant who argues the funds could be used to escape or prevent a rebellion or revolution. However, by the time of confiscation, the asset would have been already frozen, and the hypothetical claimant would not have had access to that asset. The forfeiture of the asset would not materially change the position of the claimant. In these

³⁶ Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11, s 52(1).

³⁷ *Gosselin v Québec (Attorney General)*, 2002 SCC 84 at para 311.

³⁸ *Ibid* at paras 311-312.

³⁹ This paper does not express a legal opinion, and the authors are not providing legal advice. The paper’s purpose is to identify potential issues and offer comment about how those issues might be resolved.

⁴⁰ Note that this is a low standard requiring only a “sufficient causal connection”, see *Canada (Attorney General) v Bedford*, 2013 SCC 72 at para 75 [*Bedford*].

⁴¹ *Carter v Canada (Attorney General)*, 2015 SCC 5 at para 62.

circumstances, a section 7 challenge on the grounds of the right to life poses little threat to the intended legislation.

The *right to liberty* is engaged when an offence stipulates imprisonment as a possible penalty or for immigration or mental health reasons.⁴² This is not relevant in the present context. The right to liberty also extends to “those matters that... by their very nature... implicate basic choices going to the core of what it means to enjoy individual dignity and independence”.⁴³ Legislation threatening a claimant’s ownership of assets will almost certainly not rise to the level necessary to engage the right to liberty.

The *right to security of the person* can be engaged either by state interference with a claimant’s physical or bodily integrity or through serious state-imposed psychological stress.⁴⁴ The proposed legislation would not interfere with a claimant’s physical or bodily integrity. It may cause stress, raising the question of whether it may cause stress rising to the level required by the jurisprudence to engage a claimant’s right to security of the person. This is not an exact science, but cases in which a section 7 right to security of the person has been engaged by the state imposing stress have dealt with the removal of a child from parental custody or the uncertainty caused in women seeking to have an abortion.⁴⁵ The loss of assets are unlikely to rise to this level, however it is the best claim.

An even more significant hurdle for a claimant is that the violation would have to be contrary to the principles of fundamental justice. In *R v Marmo-Levine* the SCC identified arbitrariness, overbreadth and gross disproportionality as principles of fundamental justice. Arbitrariness deals with the connection between the law and the objective of the law, overbreadth deals with laws that are rational in some circumstances but not in others, and gross disproportionality deals with limits that are out of balance relative to the objective of the law.⁴⁶ The principles of fundamental justice ensure procedural fairness.

“Arbitrariness asks whether there is a direct connection between the purpose of the law and the impugned effect on the individual”.⁴⁷ The stated purpose of the proposed legislation is twofold: to impose accountability on those responsible for the displacement of persons; and to ease the financial costs associated with bad governance and corruption. There is, therefore, a direct connection between the impugned effect and the purpose of the law.

“Overbreadth deals with a law that is so broad in scope that it includes *some* conduct that bears no relation to its purpose.”⁴⁸ The proposed legislation would be quite narrow in scope, but could hypothetically threaten the property interest of a person not involved in any of the impugned wrongful

⁴² See, *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9.

⁴³ *R v Marmo-Levine*, 2003 SCC 74 at para 85.

⁴⁴ *R v Morgentaler*, [1998] 1 SCR 30 [Morgentaler].

⁴⁵ *New Brunswick (Minister of Health and Community Services) v G(J)*, [1993] 3 SCR 46; *Morgentaler*, supra note 41.

⁴⁶ *Ibid.*

⁴⁷ *Bedford*, supra note 37 at para 111.

⁴⁸ *Ibid* at para 112.

acts. Steps have been taken to minimize this risk, which likely protects the law from allegations that it is overbroad. The proposed statute would rely on SEMA, FACFOA and the Justice for Victims of Corrupt Foreign Officials Act to identify the targets of the forfeiture orders. These acts identify the stated targets. The proposed law would include mechanisms to prevent third parties with an interest in the asset from being adversely affected by a forfeiture order. It is therefore probable that the proposed statute would not be found to be over broad.

Gross disproportionality can be made out where “the law’s effects on life, liberty or security of the person are so grossly disproportionate to its purpose that they cannot rationally be supported.”⁴⁹ The seizure of mere assets when compared to the acts targeted by the proposed law make it unlikely that the law is disproportionate. The SCC has also described gross disproportionality as being a response “so extreme as to be disproportionate to any legitimate government interest.”⁵⁰ The Court in *Canada (AG) v PHS Community Services Society* found the Minister of Health’s failure to extend the exemption of a supervised injection site (“Insite”) from the Controlled Drugs and Substances Act was grossly disproportionate. The impugned government act threatened to prevent Insite from saving lives, which outweighed “any benefit Canada might derive from presenting a uniform stance on the possession of narcotics.”⁵¹ It is therefore likely that the proposed law would not be found to be grossly disproportionate.

If a Charter challenge were to conclude in a finding that the proposed law violates a claimant’s Charter rights, section 1 is unlikely to save the legislation. The SCC has never upheld a violation of section 7 under section 1. However, it seems highly unlikely that the proposed law would be found to violate section 7. The jurisprudence on similar section 7 claims supports this conclusion.

Section 7 Relevant Jurisprudence

In *Djilani v Canada*,⁵² the Federal Court of Canada considered an application for judicial review of a ministerial order freezing the Canadian assets of relatives of former President Ben Ali of Tunisia⁵³. Justice Gagné rejected the family’s application. Justice Gagné did not consider the section 7 argument. While Justice Gagné characterized the section 7 claim as weak, she did so strictly in *obiter*; Justice Gagné held that “this Court cannot rule on the argument based on section 7 of the Charter because the applicants failed to give [the respondent] prior notice to that effect.”⁵⁴ Further, the section 7 claim in *Djilani* is that the minister’s position “damages their human dignity within the meaning of section 7.”⁵⁵ This is not an argument likely to be raised in the context under discussion.

⁴⁹ *Ibid* at para 120.

⁵⁰ *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44 at para 133.

⁵¹ *Ibid*.

⁵² *Djilani v Canada (Foreign Affairs and International Trade)*, 2014 FC 631.

⁵³ To be clear, *Djilani* involved issues arising from seizing, not freezing assets.

⁵⁴ *Ibid* at para 20.

⁵⁵ *Ibid* at para 21.

Blencoe v British Columbia (Human Rights Commission) is the leading case on section 7 claims resting on psychological distress. The second challenge by the Ben Ali-Trabelsi family follows this decision in a scenario closely resembling a hypothetical challenge to the proposed law. In *Djilani v Canada (II)*, the applicants claimed that the inability to operate bank accounts in their own names made it challenging to find and maintain employment or make routine purchases and so infringes on their mental liberty.⁵⁶ The court held that:

[The court] cannot find that operating a bank account constitutes a “fundamental personal choice” according to the meaning developed in the case law. Specifically, the Supreme Court’s decisions involving the right to freedom deal with personal choices such as physician-assisted dying with dignity (*Carter*), a women’s choice to carry a fetus to term without threat of criminal sanction (*R v Morgentaler...*), a person’s place of residence (*Godbout...*), a parent making decisions on behalf of children regarding their education and health (*B (R)...*). The Court simply cannot find that operating a bank account in the applicant’s situation constitutes a fundamental personal choice involving the liberty guaranteed by section 7 of the Charter.⁵⁷

The Ben Ali-Trabelsi family further claimed that their psychological integrity was undermined causing them stress and humiliation and violating their right to security. The court held that any psychological damage caused by the media attention was a result of their ties to the Ben Ali regime, not to their identification as politically exposed persons.⁵⁸ This is the weakest rejection of the section 7 argument, but it follows the logic in *Blencoe*. However, had the government’s actions caused the psychological stress it is still unlikely that the violation would have been made out.

After the court rejected the applicant’s argument that their section 7 rights were violated, the court dealt with the issue of fundamental justice. The impugned Act and Regulation were meant to fight corruption and it was never alleged that they were arbitrary.⁵⁹ The applicants argued that by extending politically exposed persons designation to persons not in government made the Act overbroad. The court rejected this argument because “making such a finding would seriously undermine the scope of the Act”.⁶⁰ The court rejected that the act could be grossly disproportionate because, in part, “[t]he effects of the Act and the Regulations on the applicants cannot be qualified as draconian.”⁶¹

The court deals with economic rights and section 7 rights in the same way as the analysis above: “economic rights’ are protected by section 7 of the Charter if they fundamentally impact a person’s life

⁵⁶ *Djilani v Canada (Foreign Affairs)* 2017 FC 1178 at paras 64-65.

⁵⁷ *Ibid* at para 66.

⁵⁸ *Ibid* at paras 67-68.

⁵⁹ *Ibid* at para 74.

⁶⁰ *Ibid* at para 76.

⁶¹ *Ibid* at paras 78-79.

and security.”⁶² This is likely, as argued above, to be a very high bar not satisfied by mere adverse effects on the applicants economic well-being.

In conclusion, it is unlikely that an applicant would be successful in challenging Canadian legislation providing for the confiscation of the assets of corrupt foreign officials on the grounds that it contravenes the Charter.

⁶² *Ibid* at para 70.

The Canadian Bill of Rights

The Canadian Bill of Rights protects property interests in its section 1(a).⁶³ However, because the Bill of Rights is a federal quasi-constitutional statute and not a part of the Canadian Constitution, its application can be avoided simply by adding a provision that permits a statute's effect on property notwithstanding the Bill of Rights guarantee.⁶⁴

⁶³ *Canadian Bill of Rights*, SC 1960, c 44, s 1(a).

⁶⁴ *Ibid* at s 2. It may therefore be prudent to include a brief provision excluding the application of the Bill of Rights in the legislation proposed in this paper.

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Appendix A: Frozen Assets Repurposing Act

1st Session, 42nd Parliament,
64-65-66-67-68 Elizabeth II, 2015-2016-2017-2018-2019
SENATE OF CANADA

BILL S-259

An Act respecting the repurposing of certain seized, frozen or sequestered assets

Preamble

Whereas there is a greater number of forcibly displaced persons than ever before in the world today;
Whereas their displacement is frequently the result of bad governance that has led to violence, armed conflict or persecution;
Whereas those responsible for that bad governance have often unlawfully enriched themselves through corrupt practices and then placed the illicit proceeds as assets in other jurisdictions, including Canada;
Whereas Canada, upon becoming aware of the presence of those assets, has ordered them frozen in order to deprive corrupt officials of the benefit thereof;
Whereas Parliament wishes to establish a method consistent with due process and transparency by which those frozen assets can be repurposed for the benefit of the forcibly displaced and the communities that are hosting them;
And whereas Parliament's dual objectives are to achieve a measure of accountability and to make additional resources available for the benefit of the forcibly displaced;
Now, therefore, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

Short title

1 This Act may be cited as the *Frozen Assets Repurposing Act*.

Definitions

2 The following definitions apply in this Act.

foreign national has the same meaning as in section 2 of the *Immigration and Refugee Protection Act*.
(*étranger*)

foreign state has the same meaning as in section 2 of the *State Immunity Act*. (*État étranger*) **frozen asset** means any property that the Governor in Council caused to be seized, frozen or sequestered by order under

(a) paragraph 4(1)(b) of the *Special Economic Measures Act*;

- (b) paragraph 4(1)(b) of the *Freezing Assets of Corrupt Foreign Officials Act*; or
- (c) paragraph 4(1)(b) of the *Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law)*.
(*bien bloqué*)

Purpose

3 The purpose of this Act is to establish a regime by which certain property related to international human rights abuses that is seized, frozen or sequestered under Canadian law may be repurposed. **Registry**

4 Despite any other Act of Parliament, the Minister of Foreign Affairs must publish, in a registry accessible to the public and available on a website maintained by or for the Minister,

- (a) the name of the person or entity associated with a frozen asset; and
- (b) the value of the frozen asset.

Order

5 (1) On application of the Attorney General or of any other person with the written consent of the Attorney General, a judge or justice of the superior court of the province in which a frozen asset is located may, despite any order made under a provision referred to in paragraphs (a) to

(c) of the definition *frozen asset*,

- (a) order that the frozen asset be paid into court;
- (b) order that the frozen asset be sold and that the proceeds from the sale be paid into court; or
- (c) otherwise deal with the frozen asset as the court considers appropriate in the circumstance.

Non-application of previous order

(2) An order made under a provision referred to in paragraphs (a) to (c) of the definition *frozen asset* ceases to apply in respect of a frozen asset for which an order is made under subsection 5(1) on the date on which the order made under that subsection takes effect.

Condition

6 An order under subsection 5(1) may only be made if the court is satisfied on a balance of probabilities that the frozen asset is associated with a foreign national who is responsible for or complicit in

- (a) extrajudicial killings, torture or other gross violations of internationally recognized human rights;
- (b) the forced displacement of peoples;
- (c) ordering, controlling or otherwise directing acts of corruption that amount to acts of significant corruption when taking into consideration, among other things, their impact, the monetary amounts involved, the foreign national's influence or position of authority or the complicity of the government of the foreign state in question; or
- (d) violations of human rights standards that are based on customary international law and international human rights conventions to which Canada is a party.

Notification and hearing

7 (1) Before making an order under subsection 5(1), the court

Notice

(a) must give notice, in accordance with subsection (2), to any person or entity, including a foreign state, that, in the court's opinion, may have a valid interest in the frozen asset; and

(b) may, if it considers it necessary or advisable to do so, hear evidence from any person or entity, including a foreign state, that, in the court's opinion, may have a valid interest in the frozen asset, whether or not that person or entity received a notice in accordance with subsection (2).

(2) A notice must

(a) be given in the manner that the court directs or that is specified in the rules of the court; and

(b) specify the effective period of the notice that the court considers reasonable or that is set out in the rules of the court.

Distribution

8 (1) Moneys paid into court under this Act may be distributed by the court to any individual or entity, including a foreign state, in any amount or proportion that the court sees fit if, in the court's opinion, the funds will be used for a purpose that the court believes is just and appropriate in the circumstances, including

(a) benefitting persons harmed or otherwise disadvantaged by

(i) the actions of the foreign national with whom the frozen asset was associated, or

(ii) actions described in paragraphs 6(a) to (d);

(b) supporting humanitarian relief or the relief of forcibly displaced persons; or

(c) assisting a foreign state in accommodating refugees.

Order

(2) An order under subsection (1)

(a) must include a requirement that any recipient report to the court on its spending of any moneys received in accordance with any terms that the court considers appropriate in the circumstance; and

(b) may include a prohibition against certain uses of the moneys received.

Clarification

(3) For greater certainty, nothing in this section affects any remedy available under any other Act of Parliament or the legislature of a province.

Review

9 (1) Within five years after this section comes into force, a comprehensive review of the provisions and operation of this Act must be undertaken by any committee of the Senate, of the House of Commons or of both

Houses of Parliament that may be designated or established by the Senate or the House of Commons, or by both Houses of Parliament, as the case may be, for that purpose.

Report

(2) The committee referred to in subsection (1) must, within a year after a review is undertaken pursuant to that subsection or within such further time as may be authorized by the Senate or the House of Commons, as the case may be, submit a report on the review to Parliament, including a statement of any changes that the committee recommends.

World Refugee & Migration Council

Chaired by former Canadian Foreign Minister Lloyd Axworthy, the World Refugee & Migration Council offers bold thinking on how the international community can respond to refugees through cooperation & responsibility sharing.

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