

LN290-E

L.N. 290 of 2001

Mutual Legal Assistance in Criminal Matters

(Canada) Order

(Made by the Chief Executive in Council under section 4 of the

Mutual Legal Assistance in Criminal Matters Ordinance

(Cap. 525) subject to the approval of

the Legislative Council)

1. Commencement

This Order shall come into operation on a day to be appointed by the Secretary for Security by notice published in the Gazette.

2. Ordinance to apply between Hong Kong and Canada

In relation to the arrangements for mutual legal assistance---

(a) which are applicable to the Government and the Government of Canada; and

(b) a copy of which is annexed at Schedule 1,

it is directed that the Ordinance shall, subject to the modifications summarized in Schedule 2, apply as between Hong Kong and Canada.

SCHEDULE 1 [s. 2]

Agreement Between

the Government of the Hong Kong

Special Administrative Region

of the People's Republic of China

and

the Government of Canada

on

Mutual Legal Assistance in

Criminal Matters

The Government of the Hong Kong Special Administrative Region of the People's Republic of China, having been duly authorised by the Central People's Government of the People's Republic of China, and the Government of Canada, Desiring to improve the effectiveness of both Parties in the investigation, prosecution and prevention of crime and the confiscation of criminal proceeds;

Have agreed as follows:

ARTICLE 1

SCOPE OF ASSISTANCE

(1) The Parties shall provide, in accordance with the provisions of this Agreement, mutual assistance in the investigation and prosecution of criminal

offences and in proceedings related to criminal offences. Such assistance shall be given by the Requested Party, irrespective of whether the assistance is sought or to be provided by a court or some other authority.

(2) For the purposes of paragraph (1) of this Article, the term "offences" means, in the case of the Hong Kong Special Administrative Region, offences under Hong Kong law, and in the case of Canada, offences created by a law of Parliament or by the legislature of a province.

(3) Assistance under this Agreement may be granted in connection with offences against a law related to taxation, customs duties, foreign exchange control or other revenue matters but not in connection with non-criminal proceedings relating thereto.

(4) Assistance shall include:

- (a) identifying and locating persons and objects;
- (b) service of documents;
- (c) provision of information, documents and other records, including judicial records and official records;
- (d) taking evidence, including the production of articles and documents and obtaining statements of persons;
- (e) delivery of property, including lending of exhibits;
- (f) executing requests for search and seizure;
- (g) making detained persons and others available to give evidence or assist investigations;
- (h) tracing, restraining, forfeiting and confiscating the proceeds and instrumentalities of criminal activities; and
- (i) other assistance consistent with the objects of this Agreement which is not inconsistent with the law of the Requested Party.

(5) This Agreement is intended solely for mutual assistance between the Parties. The provisions of this Agreement shall not give rise to any right on the part of any private person to obtain, suppress or exclude any evidence or to impede the execution of a request.

ARTICLE 2

CENTRAL AUTHORITY

(1) Each Party shall establish a Central Authority.

(2) The Central Authority of the Hong Kong Special Administrative Region shall be the Secretary for Justice or his or her duly authorized officer. The Central Authority for Canada shall be the Minister of Justice or an official designated by that Minister.

(3) Central Authorities shall transmit and receive all requests and responses thereto for the purposes of this Agreement.

ARTICLE 3

EXECUTION OF REQUESTS

- (1) The Central Authority of the Requested Party shall promptly execute the request or arrange for its execution through its competent authorities.
- (2) Requests for assistance shall be executed in accordance with the law of the Requested Party and, insofar as it is not prohibited by that law, in the manner requested by the Requesting Party.
- (3) The Requested Party shall, upon request, inform the Requesting Party of the time and place of execution of the request for assistance.
- (4) The Requested Party shall promptly inform the Requesting Party of any circumstances which are likely to cause a significant delay in responding to the request.

ARTICLE 4

CONTENT OF REQUESTS

- (1) Requests shall be made in writing except in urgent cases. In urgent cases, requests may be made orally, but shall be confirmed in writing promptly thereafter.
- (2) Requests for assistance shall include:
 - (a) the name of the authority conducting the investigation, prosecution or proceedings to which the request relates;
 - (b) a description of the purpose of the request and the nature of the assistance requested;
 - (c) a description of the nature of the investigation, prosecution or proceedings;
 - (d) a summary of the relevant facts and laws;
 - (e) any requirements for confidentiality;
 - (f) details of the period within which the request should be complied with;
 - (g) details of any particular procedure the Requesting Party wishes to be followed;
 - (h) where possible, the identity and location of the person or persons who are the subject of the investigation, prosecution or proceedings;
 - (i) in the case of requests for the taking of evidence or search and seizure, a statement indicating the basis for belief that evidence may be found in the jurisdiction of the Requested Party;
 - (j) in the case of requests to take evidence from persons, a statement as to whether sworn or affirmed statements are required, a list of questions to be put to the persons or a description of the subject-matter about which they are to be examined;
 - (k) in the case of lending of exhibits, the person or class of persons who will have custody of the exhibit, the place to which the exhibit is to be removed, any tests to be conducted and the date by which the exhibit will be returned;
 - (l) in the case of making detained persons available, the person or class of persons

who will have custody during the transfer, the place to which the detained person is to be transferred and the date of that person's return; and

(m) the court order, if any, or a certified copy thereof, sought to be enforced and a statement to the effect that it is a final order.

(3) If the Requested Party considers that the information contained in the request is not sufficient to enable the request to be dealt with, that Party may request that additional details be furnished.

(4) Requests and supporting documents shall be either in an official language of the Requested Party or accompanied by a translation into an official language of the Requested Party.

ARTICLE 5

LIMITATIONS ON COMPLIANCE

(1) The Requested Party shall refuse assistance if:

(a) in the case of Canada, the request for assistance would, in the opinion of the Government of Canada, impair its sovereignty, security or public order or, in the case of the Hong Kong Special Administrative Region, the request would, in the opinion of the Central People's Government of the People's Republic of China, impair the sovereignty, security or public order of the People's Republic of China;

(b) it is of the opinion that the granting of the request would seriously impair its essential interests; or

(c) the request for assistance relates to an offence only under military law.

(2) The Requested Party shall, if required by its laws, refuse assistance if:

(a) the request for assistance relates to an offence of a political character;

(b) there are substantial grounds for believing that the request for assistance will result in a person being prejudiced on account of his race, religion, nationality or political opinions;

(c) the request for assistance relates to the prosecution of a person for an offence in respect of which the person has been convicted, acquitted or pardoned in the Requesting or Requested Party;

(d) the acts or omissions alleged to constitute the offence would not, if they had taken place within the jurisdiction of the Requested Party, have constituted an offence.

(3) The Requested Party may refuse assistance if:

(a) the request for assistance relates to the prosecution of a person for an offence for which the person could no longer be prosecuted by reason of lapse of time if the offence had been committed within the jurisdiction of the Requested Party;

(b) the Requesting Party cannot comply with any conditions in relation to confidentiality or limitation as to the use of material provided.

(4) For the purpose of paragraph (1)(b) of this Article, the Requested Party may include in its consideration of essential interests whether the provision of assistance could prejudice the safety of any person or impose an excessive burden on the resources of the Requested Party.

(5) The Requested Party may refuse assistance if the request relates to an offence which carries the death penalty in the Requesting Party but in respect of which the death penalty is either not provided for in the Requested Party or not normally carried out unless the Requesting Party gives such assurances as the Requested Party considers sufficient that the death penalty will not be imposed or, if imposed, not carried out.

(6) The Requested Party may postpone assistance if execution of the request would interfere with an ongoing investigation or prosecution in the Requested Party.

(7) Before denying or postponing assistance pursuant to this Article, the Requested Party, through its Central Authority:

(a) shall promptly inform the Requesting Party of the reason for considering denial or postponement, and

(b) shall consult with the Requesting Party to determine whether assistance may be given subject to such terms and conditions as the Requested Party deems necessary.

(8) If the Requesting Party accepts assistance subject to the terms and conditions referred to in paragraph (7)(b) of this Article, it shall comply with those terms and conditions.

ARTICLE 6

LOCATION AND IDENTITY OF PERSONS AND OBJECTS

The Requested Party shall, if requested, endeavour to ascertain the location and identity of persons or the location of objects specified in the request.

ARTICLE 7

SERVICE OF DOCUMENTS

(1) The Requested Party shall serve any document transmitted to it for the purpose of service.

(2) The Requesting Party shall transmit a request for the service of a document pertaining to a response or appearance in the Requesting Party within a reasonable time before the scheduled response or appearance.

(3) The Requested Party shall, subject to its law, return a proof of service in the manner required by the Requesting Party.

(4) A person who fails to comply with any process served shall not thereby be liable to any penalty or coercive measure pursuant to the law of the Requesting Party or Requested Party.

ARTICLE 8

TRANSMISSION OF DOCUMENTS AND OBJECTS

(1) When the request for assistance concerns the transmission of records and documents, other than publicly available records and documents, the Requested Party may transmit certified true copies thereof. Originals may be transmitted at the discretion of the Requested Party.

(2) Original records or documents or objects transmitted to the Requesting Party shall be returned to the Requested Party as soon as possible, upon the latter's request.

(3) In the case of publicly available records and documents, the Requested Party shall only be obliged to provide copies thereof.

(4) The Requested Party may provide copies of any document, record or information in the possession of a government department or agency, but not publicly available, to the same extent and under the same conditions as such document, record or information would be available to its own law enforcement and judicial authorities.

(5) Insofar as not prohibited by the law of the Requested Party, all records, documents or objects shall be transmitted in a form or accompanied by such certification as may be requested by the Requesting Party in order to make them admissible according to the law of the Requesting Party.

ARTICLE 9

TAKING OF EVIDENCE

(1) Where a request is made that evidence be taken for the purpose of an investigation, prosecution of a criminal offence or proceeding in relation to a criminal matter, the Requested Party shall, to the extent not prohibited by its laws, arrange to take such evidence.

(2) For the purposes of this Agreement, the giving or taking of evidence shall include the production of documents, records or other material.

(3) Where, pursuant to a request for assistance a person is to give evidence, the parties to the relevant proceedings in the Requesting Party, their legal representative or representatives of the Requesting Party may, to the extent not prohibited by the laws of the Requested Party, appear and question the person giving that evidence.

(4) The persons present at the execution of a request shall be permitted to make a verbatim transcript of the proceedings. The use of technical means to make such a verbatim transcript may be permitted.

(5) If permitted by their laws, the Parties may agree in specific cases that the taking of evidence of a witness in accordance with this Article may take place by means of video conference or other technological means.

(6) A person who is required to give evidence in the Requested Party pursuant

to a request for assistance may decline to give evidence where either:

(a) the law of the Requested Party would permit that witness to decline to give evidence in similar circumstances in proceedings which originated in the Requested Party; or

(b) the law of the Requesting Party would permit that person to decline to give evidence in such proceedings in the Requesting Party.

(7) If any person claims that there is a right to decline to give evidence under the law of the Requesting Party, the Requested Party shall with respect thereto rely on a certificate of the Central Authority of the Requesting Party.

ARTICLE 10

OBTAINING STATEMENTS OF PERSONS

Where a request is made to obtain the statement of a person for the purpose of an investigation, prosecution or proceeding in relation to a criminal offence in the Requesting Party, the Requested Party shall endeavour to obtain such statement.

ARTICLE 11

SEARCH AND SEIZURE

(1) The Requested Party shall, insofar as its law permits, carry out requests for search, seizure and delivery of any material to the Requesting Party which is relevant to an investigation, prosecution or proceeding in relation to a criminal offence.

(2) The Requested Party shall provide such information as may be required by the Requesting Party concerning the result of any search, the place of seizure, the circumstances of seizure and the continuity of possession of the material seized.

(3) The Requesting Party shall observe any conditions imposed by the Requested Party in relation to any seized material which is delivered to the Requesting Party.

ARTICLE 12

AVAILABILITY OF PERSONS IN CUSTODY TO GIVE ASSISTANCE

(1) A person in custody in the Requested Party whose presence in the Requesting Party is requested for the purpose of providing assistance pursuant to this Agreement shall, if the Requested Party consents, be transferred from the Requested Party to the Requesting Party for that purpose, provided the person consents.

(2) Where the person transferred is required to be kept in custody under the law of the Requested Party, the Requesting Party shall hold that person in custody and shall return the person in custody at the conclusion of the execution of the request.

(3) Where the sentence of imprisonment of a person transferred pursuant to this Article expires while the person is in the Requesting Party, the Requested Party shall so advise the Requesting Party which shall ensure the person's release from custody and that the person is treated as a person referred to in Article 14(3) of this

Agreement.

ARTICLE 13

AVAILABILITY OF OTHER PERSONS TO GIVE ASSISTANCE

(1) The Requesting Party may request the assistance of the Requested Party in making a person available for the purpose of providing assistance pursuant to this Agreement.

(2) The Requested Party shall invite the person to provide assistance and seek that person's concurrence thereto. That person shall be informed of any expenses and allowances payable.

ARTICLE 14

SAFE CONDUCT

(1) Subject to Article 12(2) of this Agreement, a person who consents to provide assistance pursuant to Articles 12 or 13 shall not be prosecuted, detained or restricted in their personal liberty in the Requesting Party for any acts or omissions which preceded that person's departure from the Requested Party, nor shall that person be obliged to provide assistance other than the assistance to which the request relates.

(2) Persons who consent to give evidence under Articles 12 or 13 of this Agreement shall not be subject to prosecution based on their testimony, except for perjury, contempt and contradictory evidence.

(3) Paragraphs (1) and (2) of this Article shall not apply if the person, not being a person in custody transferred under Article 12 of this Agreement and being free to leave, has not left the Requesting Party within a period of 30 days after being notified that that person's presence is no longer required, or having left the Requesting Party, has returned.

(4) Any person who fails to appear in the Requesting Party may not be subjected to any sanction or compulsory measure in the Requested or Requesting Party.

ARTICLE 15

PROCEEDS OF CRIME

(1) The Requested Party shall, upon request, endeavour to ascertain whether any proceeds or instrumentalities of crime are located within its jurisdiction and shall notify the Requesting Party of the result of its inquiries. In making the request, the Requesting Party shall notify the Requested Party of the basis of its belief that such proceeds or instrumentalities may be located in its jurisdiction.

(2) Where, pursuant to paragraph (1) of this Article, suspected proceeds or instrumentalities of crime are found, the Requested Party shall take such measures as are permitted by its law to prevent any dealing in, transfer or disposal of, those suspected proceeds or instrumentalities of crime, pending a final determination in

respect of those proceeds or instrumentalities by a court of the Requesting Party.

(3) Where a request is made for assistance in securing the confiscation of proceeds or instrumentalities such request shall be executed pursuant to the laws of the Requested Party. This may include enforcing an order made by a court in the Requesting Party and initiating or assisting in proceedings in relation to the proceeds or instrumentalities to which the request relates.

(4) Proceeds or instrumentalities confiscated pursuant to this Agreement shall be retained by the Requested Party unless otherwise agreed upon between the Parties.

ARTICLE 16

LIMITATIONS OF USE

(1) The Requested Party may require, after consultation with the Requesting Party, that information or evidence furnished or the source of such information or evidence be kept confidential or be disclosed or used only subject to such terms and conditions as it may specify.

(2) The Requesting Party shall not disclose or use information or evidence furnished for purposes other than those stated in the request without the prior consent of the Central Authority of the Requested Party.

(3) The Requested Party shall, to the extent requested, keep confidential a request, its contents, supporting documents and any action taken pursuant to the request except to the extent necessary to execute it.

ARTICLE 17

CERTIFICATION AND AUTHENTICATION

Subject to the provisions of Article 8(1) of this Agreement, documents, transcripts, records, statements or other material which are to be transmitted to the Requesting Party shall only be certified or authenticated if the Requesting Party so requests. Material shall be certified or authenticated by consular or diplomatic officers only if the law of the Requesting Party specifically so requires.

ARTICLE 18

REPRESENTATION AND EXPENSES

(1) The Requested Party shall make all necessary arrangements for the representation of the Requesting Party in any proceedings arising out of a request for assistance and shall otherwise represent the interests of the Requesting Party.

(2) The Requested Party shall assume all ordinary expenses of executing a request within its boundaries, except:

- (a) fees of counsel retained at the request of the Requesting Party;
- (b) fees of experts;
- (c) expenses of translation; and
- (d) travel expenses and allowances of persons.

(3) If during the execution of the request it becomes apparent that expenses of an extraordinary nature are required to fulfil the request, the Parties shall consult to determine the terms and conditions under which the execution of the request may continue.

ARTICLE 19

OTHER ASSISTANCE

The Parties may request or provide assistance pursuant to other agreements, arrangements or practices.

ARTICLE 20

CONSULTATIONS AND DISPUTE SETTLEMENT

(1) The Central Authorities shall consult promptly, at the request of either of them, concerning the interpretation, application or implementation of this Agreement.

(2) Any dispute arising out of the interpretation, application or implementation of this Agreement shall be resolved through diplomatic channels if the Central Authorities are themselves unable to reach agreement.

ARTICLE 21

ENTRY INTO FORCE AND TERMINATION

(1) This Agreement shall enter into force on the first day of the second month after the date on which the Parties have notified each other that their legal requirements have been complied with.

(2) This Agreement shall apply to any requests presented after its entry into force even if the relevant acts or omissions occurred before that date.

(3) Each of the Parties may terminate this Agreement at any time by giving notice to the other. In that event the Agreement shall cease to have effect on receipt of that notice. Requests for assistance which have been received prior to termination of the Agreement shall nevertheless be processed in accordance with the terms of the Agreement as if the Agreement were still in force.

IN WITNESS WHEREOF, the undersigned, being duly authorized thereto by their respective Governments, have signed this Agreement.

Done at the Hong Kong Special Administrative Region on the sixteenth day of February Two Thousand and One in two copies, in Chinese, French and English, each text being equally authentic.

SCHEDULE 2 [s. 2]

Modifications to the Ordinance

1. Section 5(1)(e) of the Ordinance shall be modified to read as follows---

"(e) the request relates to the prosecution of a person for an external offence

in a case where the person---*

(i)* has been convicted, acquitted or pardoned by a competent court or other authority in the place_,** or Hong Kong;* or

(ii)* has undergone the punishment provided by the law of that place or Hong Kong*,

in respect of that offence or of another external offence constituted by the same act or omission as that offence;".

2. Section 17(3)(b) of the Ordinance shall be modified to read as follows---

"(b) the person has had an opportunity of leaving Hong Kong, 30 days have expired since that opportunity* and the person* has remained in Hong Kong otherwise than for---

(i) the purpose to which the request relates; or

(ii) the purpose of giving assistance in relation to a criminal matter in Hong Kong certified in writing by the Secretary for Justice to be a criminal matter in relation to which it is desirable that the person give assistance.".

* The words underlined are added. (The underlining is for ease of identifying the modification).

** The words crossed out are deleted. (The crossing out is for ease of identifying the modification).

CHENG Mei-sze, Maisie

Clerk to the Executive Council

Council Chamber

18 September 2001

Explanatory Note

This Order directs that the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) shall apply as between Hong Kong and Canada. The Order is made in consequence of the arrangements for mutual legal assistance entered into by the Government of Hong Kong and the Government of Canada and signed in Hong Kong on 16 February 2001. A copy of those arrangements is annexed at Schedule 1 to the Order. It should be noted that the Ordinance is subject to the modifications summarized in Schedule 2 to the Order.