Chapter 8
Civil Processes and Tainted Assets: Exploring Canadian Models of Forfeiture

Michelle Gallant

Introduction

Frequently trumpeted as the device to sound the death knell of organized crime, civil forfeiture laws arrived in the Canadian provinces of Alberta and Ontario in 2001 and then swiftly spread across the country. By the close of the decade, most provinces had enacted legislative regimes permitting assets tainted by association with crime to be forfeit through civil legal processes. These laws allow property related to an alleged crime to be taken by the province without any accompanying need to prove, in a criminal prosecution, the commission of a crime.[1]

The principal objective of these devices is to scythe organized crime by scything its wealth. Tainted assets are perceived as the temptress, the lifeblood, the foundation of large-scale criminal groups. Civil tools, in contrast to criminal tools, more effectively capture that wealth since a gentle tilting of the probabilities more readily taints valuable property than when pressing that balance beyond a reasonable doubt.

This chapter maps Canada's exploration of the potential of civil forfeiture to disrupt organized crime and criminal wealth. Significant parts of the journey have already been traversed, with Canada's highest court condoning aspects of the strategy in 2009. Other aspects, including compliance with constitutional rights, remain to be explored. Some aspects of the civil legal strategy arguably require serious reconsideration.

1 See Civil Forfeiture Act (British Columbia), 2005; Victims Restitution and Compensation Payment Act (Alberta), 2001; Seizure of Criminal Property Act (Saskatchewan), 2005; Criminal Property Forfeiture Act (Manitoba), 2004; Civil Remedies Act (Ontario), 2001; Act Respecting the Forfeiture, Administration and Appropriation of Proceeds and Instruments of Unlawful Activity (Quebec), 2007; Civil Forfeiture Act (New Brunswick), 2010; Civil Forfeiture Act (Nova Scotia), 2007. There is no federal law equivalent. A principal debate underpinning these laws, discussed latterly, is which level of government, federal or provincial, has the constitutional competence to create civil forfeiture laws.

A Brief History of Civil Forfeiture

Modern forfeiture law, sometimes called civil forfeiture, refers to contemporary legal devices developed to facilitate the taking of property tainted by crime together with the vesting of title to that property in the state. Typically, forfeiture connotes the ability of the state, or some agency representing the state, to use civil processes to divest assets, whether money, personal property (such as cars and boats) or real property, based on a suspected link to criminal activity.

Some commentators trace the origins of forfeiture to biblical passages in Exodus and to the ancient deodands doctrine, a phrase meaning 'given up to God'.[2] Broadly, the term referred to the idea that some interest in property was to be surrendered, or 'given up to God' for its connection with some species of wrongful activity. Later, forfeiture came to be applied to things categorized as *malem in se*, things evil in and of themselves. Evil generally meant things whose possession or use was unlawful such as distillery equipment during prohibition, illegal arms, or illegal drugs. In neither of these historical contexts, either in ancient times or more recently, was the forfeiture necessarily preceded by a criminal conviction. Forfeiture happened whether someone was prosecuted for some related offence or not.

A different version, usually described as criminal forfeiture, has long co-existed. Criminal forfeiture refers to the termination of property rights predicated upon conviction for a criminal offence. While the medieval criminal-forfeiture law has long been abolished, its automatic consequences too harsh for a compassionate society to bear, criminal forfeiture continues to have a place in modern law.[3] In the United States, criminal forfeiture refers to the post-conviction access to legal mechanisms that ease the task of securing title to property. In Canada, criminal forfeiture, triggered by a conviction, captures certain categories of property, chiefly any riches derived from crime, commonly known as the proceeds of crime.[4] New forfeiture laws, arguably appropriately characterized as civil forfeiture, also capture the proceeds of crime though they are not precipitated by a criminal conviction.

Ancient and modern admiralty and customs law acknowledge another forfeiture device. Ships involved in wrongdoing occasioned on the high seas were liable to be seized and forfeit upon arrival at a port, as were goods upon which excise duties had not been paid.[5] Unlike criminal forfeiture, these proceeding did not depend upon any parallel or prior prosecution. In fact, in this context, the subject of the

2 J. Finklestein, 'The goring ox: Some historical perspectives on deodands, forfeiture, wrongful death and the western notion of sovereignty' (1973) 46 *Temple Law Quarterly* 169 at 182–182; M. Gallant, *Money Laundering and the Proceeds of Crime: Economic Crime and Civil Remedies* (Cheltenham: Edward Elgar, 2005) 58–59.

3 Forfeiture Act 1870 (UK) c. 23.

4 Criminal Code RSC 1985 ss 462.37–462.49.

5 See *Martineau v MNR* (2004) 3 SCR 737.

forfeiture was the ship, not the owner of the ship, or the goods, not the importer of the goods. Not preceded by any conviction, admiralty and custom law takings are sometimes referred to as civil forfeitures.

Modern forfeiture, or civil-forfeiture law, entered the contemporary lexicon through the United States. It was plucked from relative anonymity of customs and admiralty law to become the foundation of new crime control strategies. However, apart from its non-conviction based character, on a substantive level current civil forfeiture laws, whether in the United States, Canada, or elsewhere, share little in common with their historical forebears. Much judicial interpretation of modern forfeiture often begins the inquiry deep in legal history, whether with the forfeiture of ships or the forfeiture of assets whose possession is unlawful.[6] Present-day civil forfeiture emerged as the antidote for the vast accumulations of criminal wealth. Modern devices are starkly different from any ancestors.[7]

In the 1970s, the United States initiated an assault on resources linked to criminal activity. The money component of crime, chiefly the amounts tied to the illegal drugs trade, precipitated the development of strategies focused on criminal resources, whether cash and assets tainted by connections with crime or things used in the commission of crime.[8] Forfeiture was chosen as an integral piece of this strategy, an essential feature of legislative instruments. Both criminal (conviction-based) and civil forfeiture provisions were enacted. This enabled unprecedented seizures of money, assets and real property derived from criminal activity or used in the furtherance of crime.

While US developments influenced the Canadian provinces, the global community also awakened to the problem posed by extraordinary criminal wealth. Wealth supposedly figured as the enticement to crime, the grease that facilitated its commission and the foundation of global criminal enterprises.[9] A series of latter-day international conventions, starting with a drugs trafficking treaty in 1988, encouraged the implementation of laws attentive to criminal finance.[10]

6 *The Palmyra* (1827) 25 US 1; *Harmony v United States* (The Brig Malek) (1844) 2 How 210; *AG Coffey v United States* (1886) 116 US 684; *Boyd v US* (1886) 116 US 616.

7 The differences are so stark, the US courts' insistence on interpreting modern laws in light of previous forfeiture jurisprudence proved confusing and contradictory: M. Gallant, 'Ontario (Attorney General) v $29,020 in Canadian Currency: A Comment on Proceeds of Crime and Provincial Forfeiture Laws' (2006) 52 *Criminal Law Quarterly* 64, 78–79.

8 Racketeer-Influenced and Corrupt Organizations (RICO) Act introduced forfeiture and other civil strategies: 18 USC ss 1961–1968 (1982). See G. Lynch, 'RICO: The crime of being a criminal, Parts I & II' (1987) 87 *Columbia Law Review* 661; N. Abrams, 'A new proposal for limiting private civil RICO' (1989–1990) 37 *University of California Los Angeles Law Review* 1.

9 See Gallant n 2, 7–17.

10 W. Gilmore, *Dirty Money: The Evolution of International Measures to Counter Money Laundering and the Financing of Terrorism* (4th ed., Strasbourg: Council of Europe Publishing, 2008); William Gilmore, *Combating International Drug Trafficking* (London: Commonwealth Secretariat, 1991).

Preventing money laundering, the act of attempting to purge tainted earnings of their unlawful character, captivated global actors throughout the 1990 and generated copious international initiatives. Confiscation, the post-conviction taking of criminal property (also known as criminal forfeiture) was mandated.[11] Although this cascade of norms did not speak specifically to civil forfeiture, it did draw significant attention to the link between money and crime and galvanized a global pursuit of tainted assets.

Prompted by the global action, in the early 1990s Canada introduced proceeds of crime laws.[12] In the main, these consisted of the criminalization of money laundering and the establishment of criminal, though not civil, forfeiture laws. This first brush with forfeiture laws, emanating from the federal government, facilitated the removal of funds tainted by crime upon conviction of an offence. Also established were certain quasi-civil forfeiture laws that applied to the export and import of financial instruments.[13] The export or the import of currency or monetary instruments in excess of CAN$10,000 coupled with a failure to declare that action results in immediate forfeiture. With these forfeitures, the actual seizure and forfeiture operate on the basis of 'reasonable grounds', rather than a balance of probabilities standard.[14] Once forfeit, a claimant's recourse is a direct appeal to the Federal Minister of Public Safety and Emergency Preparedness. Sometimes called 'administrative forfeiture', a criminal conviction does not precede forfeiture of the financial instrument.[15] These are triggered by the failure to declare the export or import of the instruments, and not on the basis of a belief that the instruments represent criminal funds.[16]

With anti-money laundering laws, criminal forfeiture and the new customs' law forfeiture in place, the task fell to the provinces to decide whether to follow the American model and to enact much more comprehensive civil devices. Two

11 UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988, art. 5 (requiring confiscation, or criminal forfeiture, of the proceeds of drugs offences); UN Convention Against Transnational Organized Crime, 2000, art. 12 (extending confiscation, and criminal forfeiture, to non-drug offences) (UNTS I-39574).

12 Proceeds of Crime (Money Laundering and Terrorist Financing Act SC 2000 c 17 (which repealed and replaced Canada's first money-laundering legislation, Proceeds of Crime (Money Laundering) Act SC s 26, 1991).

13 Ibid., s 9.

14 Ibid., s 18.

15 See for example, *Hui v Minister of Public Safety* (2008) FCA 281; *Tourki v Canada* (*Minister of Public Safety and Emergency Preparedness*) (2007) FCA 186; *Sellathurai v Canada* (*Minister of Public Safety and Emergency Preparedness*) (2008) FCA 255; *Haman v Minister of Public Safety and Emergency Preparedness* (2007) FC 691; *Van Phat Hoang v Minister of National Revenue and Emergency Preparedness* (2006) FC 182.

16 The forfeited instrument, however, can be returned to the claimant upon payment of a penalty unless it is suspected that the instrument represents proceeds of crime or terrorist finance: Proceeds of Crime (Money Laundering and Terrorist Financing Act SC 2000 s 18 (2).

rationales were repeatedly cited for adopting civil instruments. The first, echoing the flavour of US and global developments, was organized crime and the need to tackle its financial underpinnings.[17] Organized crime, gang violence, drugs trafficking and drugs profits, all served to justify laws targeting criminal assets. The second was the interests of the victims of crime, the offering of some mechanism to ensure victims received some measure of compensation:

> … this new bill that will allow the courts to use wrongfully obtained profits and property to repair harm done to victims of crime and other illegal acts. It will do this by making it easier for Albertans to regain their property or obtain court-ordered restitution for losses suffered as a result of illegal activity.[18]

Seizing assets linked to crime would readily provide a pool of resources from which payments could be made to defray the social costs, individual and collective, of criminal activity.

In the wider global debates, it is lucidly clear that the dominant purpose of the assault on criminal assets is the control of organized crime. In the Canadian provincial context, compensation for victims of crime jostles with control of organized crime as the rationale for civil forfeitures. Much of the jurisprudence arising under provincial forfeiture recognizes twin objectives, fighting crime and the achievement of some kind of compensation for the victims. None of the modern laws, however, emerged from a victim's rights movement or some other ideal traditionally serviced by the canons of the civil justice system.

In 2001, the province of Ontario enacted a civil forfeiture under the rubric of remedies for organized crime.[19] A few weeks later, Alberta enacted a restitution and compensation law.[20] Other provinces followed.

Taking property linked to crime, without any accompanying criminal proceedings, is quite an astonishing proposal. The provinces receive an extraordinary power to interfere with, and divest, interests in property. Ordinarily the principles of criminal law and the panoply of rights that govern the criminal process would regulate the provinces' ability to take property because of the intersection with crime. Civil forfeiture regimes circumvent that process and the accompanying rights. Access to the tainted assets is thereby greatly eased.

17 Manitoba Legislative Assembly, Hansard, 4 December 2003 No. 11B 441–446; Ontario Legislative Assembly, Hansard, 1 November 2001, 1850–2130; Saskatchewan Legislative Assembly, Hansard 25 April 2005 No, 98A, 2605–2680; Ontario, *Taking the Profit out of Crime: The Ontario Government's Summit on New Approaches to Fighting Organized Crime* (Queen's Printer, 2002).

18 Alberta Legislative Assembly, Hansard, 19 November 2001, 1101.

19 Civil Remedies Act (Ontario) 2001.

20 Victims Restitution and Compensation Payment Act (Alberta) 2001.

Provincial Forfeiture Models

Over the course of the last decade, eight Canadian provinces have implemented civil regimes that permit the taking of assets tainted by crime, the majority of which rely on forfeiture.[21] Uniquely, the province of Alberta relies on disposal orders and disposal hearings although these processes are not distinctly different in substance from forfeiture.[22]

A series of common architectural features define the provincial laws. First is the creation of two provincial statutory actions, both of which are forms of forfeiture. The province receives the ability to bring an action to forfeit property derived from crime, typically defined as the proceeds of unlawful activity. The second power the province receives is the ability to bring an action to forfeit the instruments of unlawful activity. 'Proceeds of unlawful activity' connotes any property, inclusive of real property, derived from, or intended for use in, unlawful activity. 'Instruments of unlawful activity' refers to things used in, or likely to be used in, the commission of unlawful activity and is intended to, or would be likely to result in the acquisition of property.[23] With the exception of New Brunswick and Quebec, the latter provision extends to property that caused, or might cause, serious bodily harm to a person.[24] In this latter respect, the Canadian models differ from laws forged in other jurisdictions. Creating civil regimes that enable the taking of the proceeds of crime, or the instruments of crime, are somewhat common. Less orthodox are modern devices that permit the forfeiture of property that caused, or is likely to cause, serious bodily harm.

A second shared feature of provincial laws is the explicit incorporation of the trappings of civil legal processes. The most notable civil law characteristic is an explicit reference to the civil standard of proof as the legal norm governing a forfeiture action.[25] This is a rather unusual feature of any legislative device. Direct references to a particular standard of proof, whether civil or criminal, do not ordinarily feature in legislative instruments since the nature of the process and subject matter typically implies the standard. The governing threshold for criminal

21 Civil Forfeiture Act (British Columbia) 2005; Seizure of Criminal Property Act (Saskatchewan), 2005; Criminal Property Forfeiture Act (Manitoba) 2004; Act Respecting the Forfeiture, Administration and Appropriation of Proceeds and Instruments of Unlawful Activity (Quebec) 2007; Civil Forfeiture Act (New Brunswick), 2010; Civil Forfeiture Act (Nova Scotia) 2007.

22 Equally anomalous is the fact that the Alberta law is entitled the Victims Restitution and Compensation Act whereas most of the laws feature the word 'forfeiture' in the title.

23 See Civil Remedies Act (Ontario) 2001, s 7 (1) & (2) and Civil Forfeiture Act (British Columbia) 2005, s 1. References are chiefly to the Ontario and British Columbia regimes as representative models.

24 Ibid.

25 Civil Forfeiture Act (British Columbia) 2005, s 16; Civil Remedies Act (Ontario) 2001, s 16; Victims Restitution and Compensation Payment Act (Alberta) 2001, s 51; Seizure of Criminal Property Act (Saskatchewan) 2005, s 13.

prosecutions is the criminal standard of proof beyond a reasonable doubt. The civil standard, normally implicit, regulates all other proceedings in Canada, whether at the provincial or federal level.[26] The provincial forfeiture laws unequivocally provide that the civil standard of proof, in other words, a balance of probabilities standard, regulates forfeitures.

Similarly, the provincial laws contemplate *in rem*, as opposed to *in personam*, liability, another feature that is indicative of a civil process. '*In rem*' typically refers to a thing, with liability attaching to that object. This form of liability is common to admiralty law and the *in rem* liability of ships.[27] '*In personam*' denotes the implicit burden arising from most criminal and civil proceedings, the personal liability of the individual. Consistent with *in rem* liability – a liability that cannot readily be associated with the criminal law since it does not involve any sentient person who stands accused of an offence – the subject of the action is the proceeds of crime or the instrument of crime.[28] It is not the person who possesses, or otherwise enjoys some proprietary interest, in that property. The reliance on *in rem* liability is explicit under Ontario law.[29] Under other regimes, it is palpably obvious given that the property is the defendant named in a forfeiture action.

A third shared attribute of the provincial regulation is the provision of some kind of protection for persons who have interests in property liable to forfeiture but who may not be aware of, or connected to, the unlawful activity that underlies the action. The British Columbia model, for example, offers a measure of protection to 'uninvolved interest holders'. These are defined as individuals who own some interest in property that is an instrument of crime yet did not engage, directly or indirectly, in the crime nor had they knowledge of the crime nor did they receive a financial benefit from the crime.[30] Similarly, the laws afford some protection to owners who acquire property for fair value but did not know, nor could they have known, that the property was the proceeds of crime.[31] Sometimes that protection comes at a price. The interests of owners of the instruments of crime may be protected, but to be sheltered from forfeiture they must have taken measures to prevent the co-optation of the property into criminal ventures.[32] A property owner in receipt of rental payments that exceed fair market value (a financial benefit) who turns a blind eye to illicit uses of premises might lose their property interests.[33]

26 *Continental Insurance Co v Dalton Cartage Co* (1982) 1 SCR 164.

27 Liability is limited to the value of the ship, or goods, seized and the owner of the *res* is not personally liable; *Goodwin v AT & B No. 28* [1954] SCR 513.

28 Obscene books may be a close exception, e.g. UK Obscene Publication Act 1959 s 3 and *United States v One Book Entitled Ulysses by James Joyce* 72 F 2d 705 (1934).

29 Civil Remedies Act (Ontario) 2001, s 15.6.

30 Civil Forfeiture Act (British Columbia), 2005, s 12 & 14. Under the Ontario model, the protection applies to responsible owners: Civil Remedies Act (Ontario) 2001, s 7 & 8.

31 Ibid.

32 Ibid.

33 *British Columbia (Director of Civil Forfeiture) v Rai* [2011] BCSC 186.

Fourth, the provincial mechanisms seek to channel forfeited assets to public purposes or other beneficial usages, including financial benefits to the victims of crime. In this way, forfeited property does not flow into general provincial revenues. It remains segregated subject to re-investment into crime control, the alleviation of the costs of crime and assistance to victims. At times, the victims of crime might be well known or easy to identify, such as an individual affected by an investment fraud.[34] At others, the connection between the proceeds and a civil claimant may be less direct such as the use of recovered drug proceeds to fund assistance for drug addicts.

Fifth, under all models, the forfeiture action is triggered by criminal offences. 'Unlawful activity' refers to acts that constitute crimes pursuant to the Canadian criminal code.[35] There is, of course, no need to prove that offence beyond a reasonable doubt. The triggering happens if, on the balance of probabilities, a crime has occurred.

Finally, the provincial regimes acknowledge a residual discretionary power in the courts to refuse to order forfeiture when it is 'in the interests of justice' to do so.[36]

While the precise ingredients of the provincial laws differ, these themes constitute the organizational core of Canadian forfeiture. Some of these components clearly underscore why civil forfeiture has gained prominence as a modern crime control device. Reliance on the civil, as opposed to the criminal, standard of proof greatly eases the province's task of securing its claim to property. The threshold of a balance of probabilities is considerably lower than the criminal norm of beyond a reasonable doubt. At no point in a forfeiture action must the province meet the higher criminal standard. Some regimes categorically reject placing any faith in prior acquittals or stays of proceedings.[37] The unlawful activity may still be proven. Others ease the burden on the province by creating a presumption that proceeds exist if a claimant's legitimate income is significantly disproportionate to his lifestyle.[38] Still other laws countenance the fact that the province need not prove that any unlawful acquisition of property is linked to any specific criminal offence.[39] It need only be proved that the property is linked to *some* offence.

Targeting tainted assets through the reliance on the *in rem* modality is also appreciably more efficient in a global crime control environment. In a setting in

34 *Director of Civil Forfeiture v Doe* [2010] BCSC 940.

35 They can also include offences defined under provincial law; Civil Remedies Act (Ontario) 2001, s 2.

36 Civil Forfeiture Act (British Columbia) 2005, s 6; Civil Remedies Act (Ontario) 2001, s 3.

37 Civil Forfeiture Act (British Columbia) 2005, s 18.

38 Act Respecting the Forfeiture, Administration and Appropriation of Proceeds and Instruments of Unlawful Activity (Quebec) 2007, s 11.

39 Seizure of Criminal Property Act (Saskatchewan) 2005, s 7 (2) A & B; Criminal Property Forfeiture Act (Manitoba) 2004, s 14.11 (a) and (b).

which assets readily cross borders, the ability to seize the tainted object and take action against the objects assists enforcement. Individuals do not have to be sought and extradited to the enforcing jurisdiction. Rather, the assets, the proceeds or the instrument tainted by criminal activity, can be immediately seized and subject to forfeiture proceedings.

Though pallid in contrast to the stirring of opposition in the United States,[40] the introduction of provincial civil forfeiture regimes elicited modest resistance in Canada.[41] Only in the Yukon Territory was resistance sufficient to cause a legislative retreat.[42] Nor have constitutional challenges met with much success, as shall next be considered.

Constitutional Constraints

Two constitutional constraints shape legislative action in Canada. Since Canada is a federal state, specific areas of legislative competence are assigned to the federal government and others to the provincial governments. It is unconstitutional for one level of state to pass legislation that comes within the jurisdiction of the other. If it does, the law is *ultra vires* and therefore invalid. The second constraint is the Canadian Charter of Rights and Freedoms (the 'Charter').[43] The validity of a provincial law requires that it both lies within the constitutional competence of a particular state actor and that it complies with constitutional rights.

Civil forfeiture regulation attracts constitutional considerations of both types. The dominant theme animating current constitutional challenges, largely derivative of the common architecture, is whether forfeiture is a criminal or quasi-criminal action or whether it is wholly, or exclusively, a civil proceeding. Classification plays a role in determining the appropriate jurisdictional allocation of the tool, whether federal or provincial. It also plays a significant role in discerning whether

40 T. Piety, 'Scorched Earth: How the expansion of the civil forfeiture doctrine has laid waste to due process' (1991) 45 *University of Miami Law Review* 911; M. Schecter, 'Note: Fear and loathing and the forfeiture laws' (1990) 74 *Cornell Law Review* 1151; L. Levy, *A License to Steal: The Forfeiture of Property* (Chapel Hill: University of North Carolina Press, 1996); J. Maxeiner, 'Bane of American forfeiture law: Banished at last?' (1977) 62 *Cornell Law Review* 768.

41 There is virtually no academic commentary in Canada regarding the introduction of civil forfeiture laws. See M. Gallant, 'Alberta and Ontario: Civilizing the money-centered model of crime control' (2004) 4 *Asper Review of International Business and Trade Law* 13.

42 In the Yukon territory, civil forfeiture law was proposed in May 2010 and withdrawn, due to public protest, in October 2010: 'Yukon Shelves Civil Forfeiture Act' (*CBC News*, 26 October 2010): http://www.cbc.ca/news/canada/north/story/2010/10/26/yukon-civil-forfeiture-act.html (accessed 12 November 2011).

43 Part 1 of the Constitution Act 1982 being Schedule B to the Canada Act 1982 (UK) c 11.

the law respects *Charter* rights given that a criminal characterization would necessarily draw into operation more stringent rights-based safeguards. A criminal characterization would also be fatal to the provincial strategy.

Federalism

The jurisdictional question has already been decided by Canada's highest court. *Chatterjee v Attorney General of Ontario* involved a challenge to Ontario's civil forfeiture law, the claim being that the law exceeded provincial constitutional competence.[44] The province contended that the law fell within provincial jurisdiction over property and civil rights.[45] The respondent contended that the law fell into the category of criminal law, a legislative area over which the federal government enjoys exclusive legislative authority.[46]

The Supreme Court determined that the civil forfeiture regime was a law in relation to property and civil rights and, therefore, within provincial competence. While the court concluded that the law touched on powers assigned the federal parliament, namely the criminal law power, it found that provincial forfeiture law did not create new offences, did not seek to impose criminal liability and did not extend, or add to, a criminal sentence. The law's underlying purpose, stated as deterring crime and compensating victims, fell squarely within provincial competence. Any overlap with federal jurisdiction over the criminal law was incidental. Moreover, though the law might have certain punitive effects, a characteristic familiar to the criminal sphere, its dominant objective was to render crime unprofitable, to seize tainted assets and to ensure some measure of compensation to the victims of crime or otherwise remedy the social costs of criminal activity. All of these were valid provincial objects in the constitutional context. Accordingly, the court upheld the constitutionality of Ontario's civil forfeiture law.

In this respect, the aspects of a forfeiture action associated with the realm of the civil law were sufficiently pronounced to secure its location within the ambit of property and civil rights for the purposes of the constitutional inquiry. Criminal features, particularly the fact that provincial actions are intimately tied to breaches of Canadian criminal law, were not sufficient to dislodge the civil character.

Obviously the division of powers question differs from the rights-based analysis. The Canadian Charter applies to federal and provincial legislative actions. A series of rights, generally referred to as Charter rights, govern the relationship

44 [2009] SCC 19, [2009] 1 SCR 624. For an excellent critical analysis of this decision, see J. Krane, *Forfeited: Civil Forfeiture and the Canadian Constitution* (Toronto: LLM Thesis, University of Toronto, 2010) (arguing that the provincial civil regimes are clearly not consonant with constitution norms).

45 Constitution Act 1982 being Schedule B to the Canada Act 1982 (UK) c 11, s 92(13). See also R. Hubbard et al., *Money Laundering and the Proceeds of Crime* (Toronto: Irwin Law, 2004) 593–651.

46 Ibid., s 91(27).

between individuals and the state, imposing a constraint on legislative power.[47] A law that is not consonant with particular Charter rights may be held to be invalid. Some violations, however, are tolerable provided that the violation occurs as a reasonable limit within a free and democratic society.[48]

Charter Rights

Although rights-based challenges to provincial laws have begun to percolate through the courts, very little of decisive quality can be distilled from these scatterings. Given that forfeiture affects rights to property, an anticipated challenge would be a violation of property rights, but the Canadian constitution does not protect these.[49]

The Charter confers a series of specific legal rights on individuals charged with an offence. These are referred to as section 11 (d) rights and include the right to be informed of the charge, the right to be tried within a reasonable time, and the right to be presumed innocent until proved guilty in a court of law. The presumption of innocence is intimately tied to the criminal standard of proof beyond a reasonable doubt. It operates in the criminal, and not the civil, context. The *Chatterjee* decision weakens arguments that civil forfeiture attracts the presumption of innocence and therefore that the incorporation of the civil standard into the proceedings violates section 11 (d).

To invoke section 11 (d) rights, an individual must be 'charged with an offence'. In deciding whether to place the provincial forfeiture law in the criminal or the civil justice sphere, *Chatterjee* held that no one risked conviction for a criminal offence. Nor was forfeiture part of a criminal sentence. 'Charged with an offence' does not necessarily require a formal charge, the classic mark of the criminal law. If an individual risks a punitive sanction, section 11 (d) might be invoked.[50] The court in *Chatterjee* recognized that forfeiture might have punitive effects in some cases although the weight of its analysis is more fully supportive of the non-criminal, remedial, civil character of the proceeding. That analysis does not completely preclude the argument that forfeiture attracts the presumption of innocence but the decision certainly moves away from the application of s 11 (d) Charter rights.

The lower standard of proof, the civil standard, might shape Charter challenges emanating from section 7, the right to life, liberty and security of the person, and not to be deprived thereof except in accordance with the principles of fundamental justice. A particular argument is whether the civil standard of proof in the context of allegations of criminal activity coheres with section 7. Since the balance of

47 *McKinney v University of Guelph* [1990] 3 SCR 229 at 261.

48 Charter (n 36) s 1.

49 P. Hogg, *Constitutional Law of Canada Volume II* (5th ed., Toronto: Thomson Carswell, 2007) 381–383.

50 *R v Wigglesworth* (1987) 2 SCR 541.

probabilities standard is a central tenet of the civil justice system,[51] it would be odd to conclude that reliance on this standard rankles with principles of fundamental justice.[52] Notably, in *Chatterjee* rights-based challenges were pursued early in the litigation and later abandoned.[53]

Apart from constitutional limits, the legal doctrines of *res judicata*, issue estoppel and abuse of process limit the enforcement of provincial forfeiture laws. Rather than invaliding the legislative apparatus these legal doctrines might offer some relief in individual cases. Where forfeiture sought and refused within the confines of a criminal proceeding is followed by an action to obtain a similar result under provincial forfeiture law, an abuse of process might pre-empt the subsequent action.[54] Aspects of these doctrines have arisen under the civil forfeiture laws, with mixed results.[55] Similar to the rights-based challenges and the division of powers inquiry, the distinction between civil and criminal processes informs the operation of these doctrines.

Prospects and Problems

As challenges filter through the judicial system, facets of the civil forfeiture experiment in Canada should elicit a little unease. The project seems to have become firmly rooted in law without garnering much attention. In species, the provincial laws parallel, in their jurisdictional reach, the entire scope the criminal law. This yields tremendous potential to supplant much of the criminal law since most crime involves assets in one form or another, whether accumulations of property, wrongful appropriations of property or the use of property in connection with an offence. Yet civil forfeiture has failed to generate much analysis.[56] The idea of forfeiting criminal wealth has much merit. There are also reasons to be decidedly cautious.

51 *F.H. v McDougall* (2008) 3 SCR 41.

52 *Ontario (Attorney General) v 8477 Darlington Crescent* (2011) ONCA 363.

53 *Ontario (Attorney General) v Chatterjee* (2007) ONCA 406.

54 *Chatterjee*, [2009] SCC 19, [2009] 1 SCR 624 paras 50–52. At para. 40, the Court said there is no 'general bar to a province enacting civil consequences to criminal acts provided the provinces does so for its own purposes in relation to provincial heads of legislative power'.

55 *British Columbia (Director of Civil Forfeiture) v Hyland* (2010) BCCA 148 (in which a prior prosecution did not preclude a subsequent action); *Ontario (Attorney General) v Cole-Watson* [2007] OJ No. 1742 (in which a forfeiture action subsequent to a criminal proceeding was denied on the basis of abuse of process and issue estoppel); *British Columbia (Director of Civil Forfeiture) v Wolff* (2010) BCSC 774.

56 An exception is J. McKeachie and J. Simser, 'Civil asset forfeiture in Canada' in S. Young (ed.), *Civil Forfeiture of Criminal Property: Legal Measures for Targeting the Proceeds of Crime* (Cheltenham: Edward Elgar, 2009).

Many, if not most, of the civil forfeitures actions brought under provincial law occur in the presence of existing or anticipated criminal proceedings. They sometimes follow a failed prosecution or an investigation that has failed to yield sufficient proof to attach criminal liability. Most forfeiture is in connection with offences related to illegal drugs. Many obviously involve alleged drugs proceeds, principally cash. A considerable portion of reported cases concerns real property. Quite often, that property is rental property, commonly identified as a 'grow-op'. Marijuana production, rather than synthetic drugs or cocaine derivatives, are the most frequent.[57]

Regarding the specific struggle with organized crime, the legislation would appear to achieve some of its ambitions. Organized crime's chief illegal business is notoriously the drugs trade. In Canada, the media and the police regularly refer to a group known as 'Hell's Angels' as a criminal organization involved in drug trafficking and other nefarious activities. In 2007, the province of British Columbia brought an action to forfeit a clubhouse owned and operated by Hell's Angels.[58] The province claimed that the clubhouse constituted an instrument of crime because it was used to promote and facilitate both social and criminal activities for the benefit of its members, prospects, frequenters and associates. There appeared to be an unlicensed bar on the premises and possibly illegal weapons. A number of motorcycles were also seized. At trial, an interim order was granted, preserving the clubhouse and assets and denying access.[59] A court later upheld the order, with the exception of the motorcycles, concluding that these were merely incidentally parked at the property.[60] Ultimate disposition of the forfeiture remains to be concluded.

Predictably, forfeiture has been applied to wealth associated with organized crime. Civil forfeiture has also been used in rather unexpected ways. Vehicles, particularly expensive vehicles, linked to racing activity on public roads have been subject to forfeiture.[61] So, too, has the property of individuals allegedly culpable of

57 This trend is reflected in British Columbia and Ontario where forfeiture has been more widely used. It is anticipated that other provinces will echo this pattern.

58 *British Columbia (Director of Civil Forfeiture) v Angel Acres Recreation and Festival Property Ltd* [2007] BCSC 1648, [2007] BCJ No. 2475.

59 Ibid.

60 *British Columbia (Director of Civil Forfeiture) v Angel Acres Recreation and Festival Property Ltd* [2009] BCSC 322, [2009] BCJ No. 455. Upheld on appeal, *British Columbia (Director of Civil Forfeiture) v Angel Acres Recreation and Festival Properties Ltd* [2010] BCCA 539, [2010] BCJ No. 2347.

61 Tracy Holmes, 'Forfeiture Office to Assess Street-Racing Luxury Cars' (11 September 2011): http://www.bclocalnews.com/news/129469313.html (accessed 9 December 2011). These forfeitures occurred under British Columbia law. Ontario civil forfeiture law was specifically amended to include provisions that allow vehicles to be forfeit for highway safety infractions: Civil Remedies Act (Ontario) 2001 Part III.I.

assaults been liable to forfeiture.[62] Notions of criminally acquired wealth form no part of the latter. Nor is there any claim of a connection to some broader organized criminal group. To a degree, then, civil forfeiture may be gently drifting from its moorings, the implications of which, as discussed latterly, are worrisome.

Given that the provinces have seized and forfeited considerable amounts of assets tainted by the drugs trade, arguably the strategy is succeeding in undermining criminal activity. Precisely how success is measured is unclear. In the United States, where forfeiture has been increasingly deployed since the late 1980s, there is no particular agreement as to the achievements of this strategy. Much of the American programme, often called 'asset forfeiture', uses the amounts of forfeited revenues as indicia of success.[63] Such a formulation tends to invite the question of whether the civil devices are about crime control or about revenue generation. Some claim that the evidence only shows that vast amounts of property are being seized and that vast intrusions into the rights of Americans are occurring. If judged as a device for dampening criminal activity, these returns are not measures of the success of forfeiture but measures of failure.

Within Canada, it is not clear how the provinces propose to measure the success of the civil forfeiture regime although hints of the American 'revenue' generation model certainly exist. In British Columbia, for example, a government report cites the impressive scope of assets seized and liable to forfeiture as indications of the promise the new laws hold.[64] There is no apparent pretence of offering any other barometer of accomplishment. Of course, bringing tainted assets under provincial control, removing tainted assets from the public domain and re-investing in the social structure can be a gauge of achievement.

A particularly disconcerting piece of the provincial efforts are undercurrents that indicate that civil forfeiture operates on a cost-recovery basis. To handle the attacks on tainted earnings, most provinces have created units or divisions to administer forfeiture laws. Some of these operate on a cost-recovery basis.[65] The provincial agencies aim to recover sufficient tainted assets to covers the costs of their forfeiture operations thus imposing no budgetary costs. The units generate, rather than expend, government funds. This is a rather unusual, and troubling,

62 'Lawsuit Over Manitoba House Spurs Rights Concerns' (CBC News online) 30 December 2010: http://www.cbc.ca/news/canada/manitoba/story/2010/12/30/mb-skavinsky-civil-claim-reaction.html (accessed 13 December 2011).

63 Most accounts of asset forfeiture in the US speak of the amounts of property forfeit rather crime levels or effects on the illegal drugs trade. Congressional reports related to asset forfeiture merely delineate amounts forfeit and their geographic origins; United States Department of Justice, *Asset Forfeiture Program*: http://www.justice.gov/jmd/afp/ (accessed 4 December 2011).

64 British Columbia Minister of Public Safety and Solicitor General, *Civil Forfeiture Office: Two Year Status Report* (Victoria: Civil Forfeiture Office, 2008) 2–3. Particularly worrisome is the fact that the report lists as one of the criteria for commencement of a forfeiture action the 'potential return on investment'.

65 Ibid., 3.

feature for state entities dealing with crime.[66] It tends to distort priorities and jeopardize independent objective analysis.[67] On occasion, tying forfeiture revenues to specific budgets can cause corruption or risk instilling a competitive fervour, which, at the very least, would not be a welcome feature of state responses to crime.

The fact that forfeiture may have drifted significantly from its initial mooring is perhaps the most alarming development. Gradually, civil forfeiture has expanded from the idea of targeting the acquisition of criminal wealth to targeting any crime and any element of crime. This occurs through the marching of civil devices into territory that is not, in any manner, allied with organized crime or burgeoning criminal wealth. That expansion happens partly through application of the instrument. More formally, it happens through legislative expansion.

Many countries have devised instruments that enable civil proceedings to be used to seize assets tainted by crime. The ability to seize the proceeds of crime, or the profits of crime, or some other description of revenues derived from criminal activity is common. It is less common to embark on the Canadian path of permitting the forfeiture of the instruments of crime. Much, much less widespread is an action to forfeit an instrument of unlawful activity likely to be used to engage in crime that, in turn, might cause serious bodily harm. The provincial devices, then, cast the broadest net to capture tainted property.

Certain forfeitures might be justified as loose approximations of civil justice, the taking of the proceeds of crime proportionate to the damage caused to individuals as well as the costs to provincial treasuries. The amount of compensation owed equates to the acquired wealth. There is considerable symmetry in this analytical understanding, whereby forfeiture fulfils the role of generic civil actions with the quantity of the proceeds taken constituting the remedy, roughly equivalent to the injury caused. Civil actions usually seek to restore the status, to place the plaintiff in the position they would have occupied prior to the defendant's interference. The defendant surrenders his profit from crime, his gains, and is thereby restored to the position he occupied before the offence. The surrender of the gains helps restore the social equilibrium that existed prior to the offence.

This loose approximation only holds for the forfeiture of the proceeds of crime. The forfeiture of the instruments of crime, this extension of forfeiture beyond the proceeds, does not approximate any sense of civil justice. It is not aimed at the profits of the venture. It is aimed at resources tainted by association with crime. There is no civil law equivalent for the instruments concept. In ancient times, and under current Canadian criminal law, some forfeiture provisions capture assets

66 E. Blumenson and E. Nilson, 'Policing for Profit: the drug wars hidden economic agenda' (1998) 65 *University of Chicago Law Review* 35; M. Williams et al., *Policing for Profit: The Abuse of Civil Asset Forfeiture* (Arlington, VA: Institute for Justice, 2010).

67 J. Worrall, 'Addicted to the drug war: The role of civil asset forfeiture as a budgetary necessity in contemporary law enforcement' (2001) 29 *Journal of Criminal Justice Studies* 171.

that are unlawful to possess. That does not apply to a vehicle or to real property. If the quantity of the proceeds of crime is loosely analogous to the amount of compensation, there is in some sense proportionality between the taking and the wrongdoing. Forfeiture of the instruments of crimes offers no such equivalency: the action may be vastly out of proportion with the alleged offences. Expensive vehicles caught engaged in road racing, for example, trigger a far more significant cost than the loss of much cheaper models. Tax evasion, the deceitful failure to declare a few thousand dollars of cash income, could precipitate the forfeiture of an expensive house if the tax returns were completed in a home office.

If the expansion to instruments of crimes presents a strain, the liability to forfeiture of 'instruments likely to cause, or that may have caused, bodily harm' proves much more troubling. What if forfeiture is sought for a house within which an alleged assault occurred – perhaps after much drinking one individual punched another? The house allegedly qualifies at an instrument of crime liable to forfeiture given it was the location of the crime. To a pronounced degree, this progression from serious wealth and profitable crime to the crime of assault deviates starkly from the initial purposes of the introduction of civil forfeiture. The situation would not involve organized crime where wealth creation is an objective. Nor does the idea of tackling the financial dimension of crime have any application. Taking the profits of crime hardly serves as a justification for the forfeiture. Nor does the taking of a house on this basis fit within some even relaxed notion of 'instrument of crime'. It is difficult to conceive of any random physical location somehow facilitating criminal activity. Perhaps a fast sleek aeroplane capable of flying low to avoid detection might facilitate crime if it is specifically designed to conceal the transport of drugs across national boundaries. Or maybe vast tracts of land purchased at the edge of mountain ranges and used to cultivate marijuana plants serve as instruments that facilitate drug trafficking. In these cases, there is some real connection, a meaningful connection, between the instrument and an offence.[68] Yet what is the profit connection, or the facilitative connection, between a house and an assault?

Moreover, civil forfeiture represents a vast extension of state power, replicating the ambit of the criminal law and placing powerful new civil tools at the state's disposal. There may be some reason to suspend concern about the incredible span of this power when the state is confronting organized crime. There may be some parity of arms between the state and organized crime. Perhaps powerful new tools are needed to confront a powerful contemporary phenomenon. But the alleged perpetrator of the assault is not that powerful entity. Rather, the enormous power of the state may be pitted against the powerless, the ill, the addicted, the socially excluded or the marginalized. The residual discretionary power of the courts to

68 Some courts have read in a proportionality requirement to forfeitures of the instruments of crime, requiring that an instrument be 'meaningfully' linked to an offence: *Alberta (Minister of Justice and Attorney General) v Sykes* [2011] ABCA 191, [2011] AJ No. 678.

decline forfeiture when it determines it is 'in the interest of justice' offers little comfort for an aggrieved property owner. It is a weak constraint on possible individual enforcement excesses, particularly if it applies sparsely and only in exceptional cases.[69] In any event, to leave these concerns at the altar of judicial discretion may not be prudent strategy.

It is evidently premature to offer a final assessment of the advantages and disadvantages of the arrival of civil forfeiture on Canadian shores. There is much promise, much potential for changing tainted wealth into public benefit. There is also much potential for excesses. Some thought to revising the pernicious aspects of civil forfeiture laws is warranted, in particular, ensuring some proportionality between the taking of property and the underlying alleged criminal offences.

69 *Ontario (Attorney General) v 1140 Aubin Road, Windsor and 3142 Halpin Road Windsor (in rem)* [2011] ONCA 363, [2011] OJ No. 2122.

This page has been left blank intentionally