

FORFEITED

Civil Forfeiture and the Canadian Constitution

by

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Civil Forfeiture and the Canadian Constitution

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Abstract

The enactment of civil asset forfeiture legislation by Alberta and Ontario in the fall of 2001, followed by the passage of similar legislation in five other provinces, has signalled a dramatic change in the way Canadian constitutional law ought to be understood. This thesis builds on American legal scholarship by highlighting how deficiencies in Canada's constitutional law could create space for more invasive civil forfeiture statutes. Following a historical overview of forfeiture law in Canada, the thesis (i) examines how the Supreme Court of Canada mischaracterized this legislation as a matter of property and civil rights; (ii) considers whether the doctrine of federal paramountcy should have rendered the legislation inoperable and the consequences of the failure by the Court to do so; and (iii) evaluates

the impact of the absence of an entrenched property right in the constitution, in regard to this matter.

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Introduction

Civil forfeiture is premised on a fundamental principle of morality that no person should profit from his or her own wrongdoing. Governments generally cast civil forfeiture as a crime-control or crime-prevention measure by contending that the confiscation of illegal profits and the instruments of unlawful activity, both by the participants of crime and by those that acquiesce to its commission, will deter crime.¹ Civil forfeiture provides a public form of restitution whereby the state can exact profits, proceeds, and future interests in property based on an underlying unlawful act. Archetypal examples of conduct that civil forfeiture legislation aims to address include the accumulation of money through the sale of illegal drugs and profiteering through corporate fraud.

Civil forfeiture laws “confer” or, some scholars and legislators would argue, “affirm” the authority of the state to seize and obtain title to property used for, or derived from, the commission of an unlawful act. But those laws actually go further. In the seven provinces with civil forfeiture statutes,² a court can order the forfeiture of property even when its owner has not been convicted of a crime. Civil forfeiture laws are directed at illicit activity that may not otherwise be read-

¹ See generally Simser, Jeffrey, “Perspectives on Civil Forfeiture” in Young, Simon, ed., *Civil Forfeiture of Criminal Property: Legal Measures for Targeting the Proceeds of Crime* (Edward Elgar Publishing, Inc.: Northampton, MA, 2009) 13 at 13.

² Alberta: *Victims Restitution and Compensation Payment Act*, S.A. 2001, c. V-3.5; Ontario: *Civil Remedies Act, 2001*, S.O. 2001, c. 28 [formerly, *Remedies for Organized Crime and other Unlawful Activities Act*]. British Columbia: *Civil Forfeiture Act*, S.B.C. 2005, c. 29; Saskatchewan: *Seizure of Criminal Property Act*, 2009, S.S. 2009, c. S-46.002 [formerly, *Seizure of Criminal Property Act*, S.S. 2005, c. S-46.001]; Manitoba: *Criminal Property Forfeiture Act*, C.C.S.M. c. C306; Quebec: *An Act respecting the forfeiture, administration and appropriation of proceeds and instruments of unlawful activity*, R.S.Q. c. C-52.2; Nova Scotia: *Civil Forfeiture Act*, S.N.S. 2007, c. 27; New Brunswick, Prince Edward Island, and Newfoundland & Labrador do not have civil forfeiture statutes currently in force.

ily actionable as criminal offences due to the absence of evidence, a breach of a person's rights, or the scarcity of resources to investigate or prosecute the crime.

Civil forfeiture regimes are popular among law enforcement agencies and victims' rights groups.³ According to the Ontario regulatory agency that administers this regime, more than \$3.6 million in property was forfeited to the Crown during the first four years of the agency's operation.⁴ Part of the property in issue was used for law enforcement programs and to support victims' services. The value of assets seized has been steadily increasing,⁵ and the agencies that administer this regime are working in concert with law enforcement to streamline referral processes to provincial prosecutors that administer these regimes.⁶ The Ontario figures pale, however, in comparison with the \$386 million in assets seized by United States ("U.S.") federal prosecutors in 2008 alone.⁷

³ See CNW, "Grants Awarded Under Civil Remedies Act" (22 January 2007), online <<http://www.oacp.ca/content/news/article.html?ID=329>>, retrieved 5 November 2009; CBC, "Drunk Drivers Risk Losing Their Cars under New Ontario Law" (20 February 2008), online: <<http://www.cbc.ca/news/story/2008/02/20/ont-drunk-driving.html>>, retrieved 5 November 2009.

⁴ Ontario, Ministry of the Attorney General, *Civil Forfeiture in Ontario, 2007: An Update on the Civil Remedies Act, 2001*, online: <www.attorneygeneral.jus.gov.on.ca/.../20070824_CRIA_Update.pdf>, retrieved 1 September 2009.

⁵ Since November 2003, \$11.2 million in property has been forfeited to the Crown under provincial civil forfeiture law. An additional \$39.6 million in property is frozen pending the completion of civil forfeiture proceedings. See Ontario, Ministry of the Attorney General, "Civil Remedies Program Helps Local Police Increase Community Safety" online: <<http://www.attorneygeneral.jus.gov.on.ca/english/news/2009/20090831-cria-nr.asp>>, retrieved 26 October 2009. Compare this figure with the \$29.9 million in assets seized pursuant to federal criminal law in the same period. See Canada, Public Prosecution Service of Canada, "Annual Report 2008-2009", online: <<http://www.ppsc-sppc.gc.ca/eng/pub/ar09-ra09/ar09-ra09.pdf>> retrieved 25 October 2009.

⁶ British Columbia, Ministry of Public Safety and Solicitor General, Civil Forfeiture Office "Two Year Status Report" (August 2008), online <www.pssg.gov.bc.ca/publications/docs/civilforfeitureoffice.pdf> at 6, retrieved 5 November 2009 [*B.C., "Two Year Status Report"*].

⁷ United States, Department of the Treasury, "Treasury Forfeiture Fund Accountability Report Fiscal Year 2008", online: <http://www.treas.gov/offices/enforcement/teofa/publications/TFF-Final%20Accountability_Report_2008.pdf>, retrieved 21 September 2009 at 1. Simser places the figure at between \$1.2 and \$1.6 billion. See Simser, *supra* note 1 at 17.

While the objectives of civil forfeiture are praiseworthy, the legislation has its opponents. From the political right, critics of civil forfeiture legislation argue that these laws unduly interfere with private property rights and involve excessive use of governmental power. From the political left, critics suggest that the regime is a colourable attempt to impose severe sanctions without protecting a person's rights. Both sides question the efficacy of these regimes.

Scholars in the U.S.,⁸ Australia,⁹ and the United Kingdom ("U.K."),¹⁰ have noted that civil forfeiture regimes have not made a marked difference in the control of organized crime. Since their inception nearly ten years ago, the Ontario government has not even surveyed whether this technique of "crime control" actually works to reduce crime. Governments point to the increasing number of seized assets as indicators of the programs' success,¹¹ but as law and economics scholars Donald Boudreaux and Adam Pritchard have explained, the enhanced risk of forfeiture may have the perverse effect of driving up drug prices in some areas, which increases profits and leads to more violent crimes as the incentives for the violent defence of drug cargo and territory increase.¹² Furthermore, with-

⁸ See e.g. Blumenson, Eric, and Nilsen, Eva, "Policing for Profit: The Drug War's Hidden Economic Agenda" (1998) 65 U. Chi. L. Rev. 35.

⁹ See e.g. Freiberg, Arie, and Fox, Richard, "Evaluating the Effectiveness of Australia's Confiscation Laws" (2000) 33 The Australian and New Zealand Journal of Criminology 239.

¹⁰ See e.g. Sproat, Peter, "An Evaluation of the UK's Anti-Money Laundering and Asset Recovery Regime" (2007) 47 Crime, Law and Social Change 169 at 177-183. Sproat notes that the approximately £250 million in seized assets represents a small fraction of the underground economy, which the government estimates ranges between £19 billion and £48 billion. Furthermore, in nearly all of the reported cases, the respondent facing forfeiture could not be classified as being associated with organized crime. See also Harvey, Jackie, "An Evaluation of Money Laundering Policies" (2005) Journal of Money Laundering Control 339.

¹¹ Consider Australia, *Report on the Independent Review of the Operation of the Proceeds of Crime Act* (2006), online: <[http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_ReportontheIndependentReviewoftheOperationoftheProceedsofCrimeAct2002\(Cth\)](http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_ReportontheIndependentReviewoftheOperationoftheProceedsofCrimeAct2002(Cth))>, retrieved 26 October 2009, at 23 [*Sherman Report*].

¹² Boudreaux, Donald, and Pritchard, Adam, "Civil Forfeiture and the War on Drugs: Lessons from Economics and History" (1996) 33 San Diego L. Rev. 79 at 84. Criminologists are divided as to whether criminal organizations operate in a competitive or a cooperative market. If the market

out accurate information about the value of the criminal “market”, the effectiveness of these measures cannot be determined.¹³

The policy justification advanced more or less globally for the enactment of civil forfeiture legislation has been framed by the belief that these legislative instruments are necessary to combat organized crime,¹⁴ especially in the context of the drug trade.¹⁵ There is no question that some countries face entrenched criminal organizations that undermine the rule of law and the authority of the state.¹⁶ However, criminal organizations are notoriously difficult to infiltrate and it is the lack of police and prosecutorial resources that is the state’s biggest obstacle in eradicating the organized crime problem.¹⁷ Shifting priorities from organized crime to anti-terrorism also compromises the state’s effectiveness at infiltrating criminal organizations.¹⁸ This means that civil forfeiture laws are more likely to be applied in fortuitous encounters between law enforcement and suspected

is cooperative, then colluding criminal organizations will be able to sustain price increases without loss of market share. In the narcotics context, since the clientele is dependent on the product, there may not be a significant decline in consumption even when prices increase. If, however, the market is competitive, then as Boudreau and Pritchard explain, criminal organizations will more vigorously protect their market share, leading to increased violence.

¹³ Compare Naylor, Thomas, “Follow-the-Money Methods in Crime Control Policy” in Beare, Margaret, ed., *Critical Reflections on Transnational Organized Crime, Money Laundering, and Corruption* (Toronto: University of Toronto Press, 2003) 256 at 268, 274-275. Naylor defines the trade in illegal goods and services as regional submarkets and cautions that following a sting or a significant infiltration of the submarket, without further observation and infiltration, patterns of exchange in that submarket may return to normal.

¹⁴ The major works of American legal scholarship are addressed throughout this text and a compiled list of articles at this point in the text is therefore unnecessary.

¹⁵ See generally Sproat, *supra* note 10 at 169.

¹⁶ See e.g. *Arcuri et al. v. Italy*, No. 54024/99 (5 July 2001) (E.C.H.R.). See also Freedom House, *Freedom in the World 2009 – Italy* (16 July 2009), online: <<http://www.unhcr.org/refworld/docid/4a6452ac23.html>>, retrieved 3 November 2009. See also Scherer, Steve, “Italian Organized Crime Called ‘Dangerous, Pervasive’” (1 August 2007), online: <<http://www.bloomberg.com/apps/news?pid=20601085&sid=ax4pHAQf7cdw>>, retrieved 3 November 2009.

¹⁷ See generally Beltrame, Julian, “The enemy within: Ottawa faces calls to clamp down on organized crime, especially bikers” (23 October 2000) *Maclean’s* 36.

¹⁸ See generally Beare, Margaret, “Introduction” in Beare, *supra* note 13, xi at xii.

members of organized crime, such as road-side stops along the Trans-Canada Highway.¹⁹

One wonders whether crime-control was ever a serious justification for the creation of these regimes. It is noteworthy that the agencies responsible for administering civil asset forfeiture have adopted the language of cost and asset recovery, as opposed to the discourse of eliminating the economic incentives for crime.²⁰ When the Standing Committee on Justice and Social Policy of the Ontario Legislature conducted its line-by-line review of the *Remedies for Organized Crime and other Unlawful Activities Act* (now the *Civil Remedies Act, 2001*) in 2001,²¹ some startling comments regarding the purpose behind the legislation were made. MPP Michael Bryant, a member of the opposition party at the time and a subsequent provincial Attorney General, conflated the organized crime “suppression” purpose of the legislation with anti-terrorism:

There is no doubt that there is a link between organized crime and terrorism through financing of terrorism, on the one hand, through to its operations, including smuggling rings, on the other hand. We need to hit terrorists, therefore, in the pocketbook, just as we're hitting organized crime in the pocketbook.²²

The source of that information for Bryant was, however, unspecified and uncertain.

American legal scholarship has been the major arena of academic critique of civil forfeiture. The principal works in that scholarship have highlighted the

¹⁹ Consider e.g. *Ontario (Attorney General) v. \$25,709.63 Canadian Currency (In Rem)*, [2009] O.J. No. 859 (Sup. Ct.) (QL).

²⁰ B.C., “Two Year Status Report”, *supra* note 6 at 9-10.

²¹ *Supra* note 2.

²² Ontario, Standing Committee on Justice and Social Policy, “Committee Transcripts - Bill 30, Remedies for Organized Crime and Other Unlawful Activities Act, 2001” (22 October 2001, 15:40), Hon. Michael Bryant.

effect of civil forfeiture on constitutional rights and have recommended techniques by which courts and legislatures should modify civil forfeiture statutes to protect rights. A near absence of criticism by Canadian legal scholars should be cause for concern.²³

Very little information is publically available regarding the efficacy of the forfeiture regimes in operation in Canada as well as their effects on crime control or the criminal justice system.²⁴ The purpose of this paper is to provide an overview of the constitutional arrangements within which civil forfeiture regimes operate in Canada and to highlight how provincial governments have distorted a traditionally “criminal law” matter into a matter falling within their jurisdiction. The paper argues that constitutional rights aside, the justifications presented by the provincial governments do not stand on solid constitutional ground and the acceptance of these arguments risks leading to injustice.

The Aim of this Project

This research and writing project serves to build on American legal scholarship first by highlighting how deficiencies in Canada’s constitutional law could create space for more invasive civil forfeiture statutes. The focus of this project is on the aspects of constitutional law, not normally considered to be rights-protecting: namely, the division of powers, paramountcy, and justified limitation on rights (or proportionality). Notwithstanding the issues that might arise as a result of the impact of civil forfeiture regimes on entrenched constitutional rights (e.g., unjustified interference with freedom of expression, association, privacy, liberty and se-

²³ But see Gallant, Michelle, “Alberta and Ontario: Civilizing the Money-Centred Model of Crime Control” (2004) 4 *Asper Rev. Int’l Bus. & Trade L.* 13 at 25-33.

²⁴ This paper is not a criminological study of the effectiveness of civil forfeiture or the reduction of crime control. The author takes the view that civil forfeiture has not been proven to deter or reduce crime. The benefits of civil forfeiture, if any, amount to the removal of property from persons who obtained interests in it through unlawful activity.

curity of the person), an insufficient focus on non-rights aspects of constitutional law, especially in the context of civil forfeiture, also serve to perpetuate failed policies of crime-control and drug-control in this country.

The Supreme Court of Canada and the Ontario Court of Appeal have recently considered the constitutionality of civil forfeiture legislation on federalism grounds. Both courts held unequivocally that civil forfeiture is a constitutionally permitted measure to control crime and compensate crime victims.²⁵ While it may be too late to extract rights-offending civil forfeiture provisions from Canadian law,²⁶ the judiciary has yet to consider all of their ramifications for constitutional, criminal, and property law. Courts adjudicating future cases will have to refine how civil forfeiture fits into the fundamental rights and freedoms regime established by the *Charter*,²⁷ the division of powers in *The Constitution Act, 1867*,²⁸ and standards of administrative procedural fairness. How courts deal with these questions will say a great deal about Canadian constitutional law and the relationship between individuals, their property, and the state. If one accepts that the Canadian constitutional project involves a move toward rights protections through a process of engagement among the state, the judiciary, and individual Canadians, then civil asset forfeiture represents a threat to that project.

²⁵ *Chatterjee v. Ontario (Attorney General)*, [2009] 1 S.C.R. 624, aff'g 2007 ONCA 406, 86 O.R. (3d) 168, 282 D.L.R. (4th) 298.

²⁶ It is a significant challenge for any litigant to convince a court that an entire administrative agency created through the exercise of a constitutional power is invalid. In 2009, for example, the federal government announced its intention to propose a reference question to the Supreme Court of Canada with regard to the proposed creation of a national securities regulator. If the Court should give its constitutional approval to the new regulator, it will be interesting to note whether it will order the provincial securities regulators to cease operation. Dickerson, Ken, "Reference Case to Confirm Constitutionality of Federal Securities Regulation" (16 October 2009), online: Centre for Constitutional Studies, University of Alberta <http://www.law.ualberta.ca/centres/ccs/news/?id=338#_edn5>, retrieved 28 October 2009.

²⁷ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Canadian Charter* or *Charter*].

²⁸ *The Constitution Act, 1867* (*The British North America Act, 1867*), 30 & 31 Vict. c. 3 (U.K.).

Furthermore, the enactment of civil forfeiture legislation ought to compel those who study the law and are concerned about its reach to re-examine the role of the regulatory state and whether this mechanism achieves the ends that Canadians believe should be pursued by government. While Canadians have considerable trust in their government officials, the spectre of abuse of civil forfeiture legislation by the state is daunting. That is not to say that civil forfeiture legislation has no place in the constitutional framework of Canadian law. Indeed, *criminals* should not be entitled to keep the proceeds of their conduct and should be deterred from using their property or the property of willing accomplices to commit crimes. This inquiry does, however, begin to consider whether the means deployed by these measures truly achieve the ends that the provincial legislatures have sought to achieve.

Outline of the Argument

The whole of the text is divided into four chapters. The first chapter unpacks the concept of civil forfeiture by describing its historical antecedents and its adoption into Canadian law. It problematizes the key concepts that underscore the definition of civil forfeiture, including the terms “property”, “crime”, and “proceeds”. The chapter explains why the discussion of civil forfeiture is relevant to the readers of this text, who are, for the most part, unlikely to be prosecuted for the commission of a crime, or engage with the state in respect of their property outside of the context of municipal planning, licensing, or taxation matters.

Chapters 2 and 3 situate civil forfeiture within conceptions of federalism in Canadian constitutional law. The second chapter explores how civil forfeiture has undermined the “division” of powers by shifting the exercise of the state’s disciplinary authority from the domain of criminal law to the domain of civil law. The effect of this move is two-fold. It undermines of the presumption of innocence – a right long protected before the enactment of the *Charter* – and it threat-

ens a person's civil capacities of citizenship by potentially denying a person the ability to hold and transfer property.

The third chapter then discusses the role of the paramountcy doctrine as a tool to control the restraint of a person's liberty by provincial law. It reviews how the courts have narrowed the scope of that doctrine to severely curtail its application to restrain the exercise of provincial power. By juxtaposing the restraint order provisions of the federal and provincial regimes in particular, the chapter shows how the provinces have rendered the federal scheme obsolete. The Court in *Chatterjee* failed to recognize this reality, because the Court concluded that the regimes do not expressly conflict with each other in their operation. The result of that conclusion, however, is that the provinces have effectively supplanted the mechanisms of the criminal law designed to protect the presumption of innocence in the forfeiture context, and they have put in place institutions with unbridled administrative discretion.

The fourth chapter explores the implications of not having a constitutionally entrenched property right for the development of asset forfeiture legislation, with particular emphasis on provisions relating to instruments of crime. That chapter takes a comparative view of three jurisdictions, Germany, South Africa, and the U.S., in an attempt to understand the impact of a constitutional right to property on the development of civil forfeiture regimes in those countries. It advances the proposition that without an entrenched property right, the benefits of the proportionality/justificatory analysis – namely, the tailoring of the forfeiture to the purpose of the regime – are not available to targets of forfeiture.

Although not discussed in this thesis, there other implications of civil forfeiture for entrenched rights and freedoms, namely the right to privacy, and the freedoms of religion, expression, and association. Future research could explore these issues in more detail. For the purposes of this paper, the discussion is limited to the division of powers, paramountcy and proportionality.

Chapter 1

Civil Forfeiture and Proceeds of Crime Legislation in Canada

Contemporary civil forfeiture regimes are not unique in the history of Anglo-American law. The origins of civil forfeiture regimes have been frequently traced to feudal causes of action like the *deodand*, as well as to letters of reprisal in maritime law. While these causes of action were long abolished in Canadian law, modern civil forfeiture regimes have drawn upon similar concepts and legal structures to achieve their purported crime-control, victim-compensatory, and cost-recovery objectives. The historical discussion when juxtaposed with the development of contemporary civil forfeiture regimes reveals that the civil forfeiture regimes have distorted many of the concepts of the *ancien regime* to try to meet these objectives. The result, however, is an elaborate state apparatus that is more threatening to individuals than the predecessor causes of action.

This first chapter begins with a brief introduction to the historical roots of civil forfeiture. It then summarizes the exponential growth of forfeiture provisions in Canadian law since 1988, including criminal and civil forfeiture regimes at federal and provincial levels of government. It also surveys provincial civil forfeiture legislation currently in force and explores how provincial legislatures and courts interpreting that legislation have come to understand the concepts of “property”, “crime”, and “proceeds”. The chapter concludes with a discussion of why this exposition is relevant to all Canadians, and not just to those facing the loss of their property to the Crown.

The Origins of Civil Forfeiture

In feudal England, a person's property was the object of forfeiture to the Crown when the property was the instrument of a human fatality. That royal cause of action was known as deodand and was based on the religious belief that instruments that cause death were guilty of a wrong and required atonement.¹ The property was figuratively "given to God" even though the Crown confiscated title. Over time, deodand had lost much of its religious significance and by the nineteenth century, deodand forfeitures simply became another source of Crown revenue until their ultimate abolition in 1846.²

Statutory forfeiture and attainder were also antecedents to civil forfeiture.³ According to British law until 1870, in the event of a person's conviction for a felony crime, which usually entailed a sentence of death, the felon's property would be forfeited to the Crown and would, therefore, not devolve to his or her family.⁴ The law regarded the person's property as being corrupted by his or her

¹ See generally Finkelstein, Jacob, "The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty" (1973) 46 Temp. L. Q. 169 at 182. See also Sackett, Robin, "The Impact of *Austin v. United States*: Extending Constitutional Protections to Claimants in Civil Forfeiture Proceedings" (1994) 24 Golden Gate U. L. Rev. 495 at 499. See also Pervukhin, Anna, "Deodands: A Study in the Creation of Common Law Rules" (2005) 47 Am. J. Legal Hist. 237. See also Sutton, Teresa, "The Nature of the Early Law of Deodand" (1999) 30 Cambrian L. Rev. 9. See also Cawthon, Elisabeth, "New Life for the Deodand: Coroners' Inquests and Occupational Deaths in England, 1830-46" (1989) 33 Am. J. Legal Hist. 137.

² *Deodands Act* (U.K.), 9 & 10 Vict. c. 62 (1846). Abolition of the deodand occurred at roughly the same period as the introduction of the statutory tort that permitted claims for wrongful death. *The Fatal Accidents Act*, 9 & 10 Vict. c. 93 (1846) [commonly known as *Lord Campbell's Act*].

³ See generally Bourque, Paul, "Provincial Responses to Municipal Crime Concerns" (1995) 37 Crim. L.Q. 89 at 91.

⁴ *Forfeiture Act* (U.K.), 33 & 34 Vict., c. 23.

crime and he or she could neither inherit property nor transmit it to an heir.⁵ In essence, statutory forfeiture and attainder killed a person civilly, before he or she was killed physically.

The Supreme Court of the United States has cited deodand, attainder, and statutory forfeiture as precursors to the civil forfeiture regimes enacted in that country over the past three decades.⁶ However, the aforementioned causes of action were long abolished in the United States (“U.S.”), England, and Canada, well before legislatures in those jurisdictions enacted the civil forfeiture regimes in force today.⁷ Jacob Finkelstein has argued that much like those old forms of action, modern legislatures and courts use the power of the state to seize property on the basis of moral suasion.⁸ Despite the lack of historical continuity among deodand, attainder, and statutory forfeiture, the modern story of civil forfeiture is part of a recurring historical pattern: the religious or (in the contemporary context, the moral) objective to support a forfeiture regime is advanced by the state, the state entrenches its power to seize and claim property, and financial considerations ultimately replace the moral underpinnings of the exercise of power.⁹

⁵ See Keele, W.C., *The Provincial Justice, or, Magistrate’s Manual being a Complete Digest of the Criminal Law of Canada, and a Compendious and General View of the Provincial Law of Upper Canada with Practical Forms, for the Use of All Magistracy* (Toronto: H. Roswell, 1864) at 77-79.

⁶ *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974) at 681-683.

⁷ See generally Levy, Leonard, *A License to Steal: The Forfeiture of Property* (Chapel Hill, NC: University of North Carolina Press, 1996) at 13-20, 36-38.

⁸ See Finkelstein, *supra* note 1 at 251-252. See also Piety, Tamara, “Scorched Earth: How the Expansion of Civil Forfeiture Doctrine Has Laid Waste to Due Process” (1991) 45 U. Miami L. Rev. 911 at 934. Piety has criticized the historical continuity argument linking these pre-modern forms of action to forfeiture regimes as historical fiction.

⁹ By contrast, Jeffrey Minson’s account of the nature of civil forfeiture places it within the context of anti-liberal thought. Minson, Jeffrey, “Civil Prudence, Sovereignty and Citizenship in the Justification of Civil Forfeiture” (2006) 29 U.N.S.W.L.J. 61 at 63-64, 84, 87. The connection between forfeiture, the prerogative powers of the sovereign, and its corresponding duty to ensure order, explains why forfeiture resonates so well with the state and why it draws criticism from civil libertarians. Minson suggested that the responsibility to protect citizens from crime and to govern the

Apart from the criminal law origins of forfeiture statutes, forfeiture has long been a part of maritime law in the Anglo-American legal tradition. Informed in large measure by British law, admiralty statutes in Canada and the U.S. often contained procedures for the seizure and forfeiture of naval vessels in retaliation for damages inflicted by a foreign state or its agents.¹⁰ The attribution of something akin to legal personality to the ship allowed courts to exercise jurisdiction over events that occurred on the high seas when issues of sovereignty were contested without triggering open war.¹¹ Courts have characterized that type of forfeiture as *in rem* (or against the object), as opposed to *in personam* (against the person) to avoid questions of jurisdiction that would otherwise arise given that persons involved reside in a foreign jurisdiction.¹² Many of the procedural rules for contemporary civil forfeiture law derive from those maritime actions, including the inclusion of the object as the respondent in the cause and the exercise of extra-territorial jurisdiction.

Whether one agrees with these historical accounts or not, the question of what to do with a wrongdoer's property has been, and continues to be, the subject of much debate. The enactment of civil forfeiture laws and the creation of new administrative agencies to enforce those laws again invite consideration of what

civil state, a concept borrowed from Samuel Pufendorf's exposition on civil prudence, support the reversion of title to instruments and proceeds of crime to the state. The problem with a purely moral or value-laden argument to support civil forfeiture is that the line between just confiscation of assets and disproportionate confiscation becomes too difficult to draw. That is why the imposition of legal standards becomes so important in restraining the spectre of this disciplinary power by the state.

¹⁰ See Cooperstein, Theodore, "Letters of Marque and Reprisal: The Constitutional Law and Practice of Privateering" (2009) 40 (2) J. Maritime L. & Comm. 221 at 222.

¹¹ See Lobel, Jules, "Covert War and Congressional Authority: Hidden War and Forgotten Power" (1986) 134 U. Pa. L. Rev. 1035 at 1068.

¹² See Rubin, Alfred, *The Law of Piracy* (Newport, RI: Naval War College Press, 1988) at 88.

impact those changes will have on crime, the power of the state, and civil liberties in Canada.

The Proliferation of Forfeiture Laws in Canada

Forfeiture of property, in some manifestation, has always been a part of federal Canadian law. Apart from deodand and attainder, mechanisms providing for forfeiture formed part of trade law in Canada. For example, even before Canada became a federated domination, customs agents could seize and forfeit goods used in connection with customs offences.¹³

Forfeiture schemes, however, are most closely linked to the criminal law. Although the first *Criminal Code* of 1892 contained a provision that pertained to the disposal of property,¹⁴ not until the late 1980s did Parliament include comprehensive forfeiture regimes in its criminal legislation. In 1892, Parliament granted judges in the criminal courts the authority to dispose of the property seized by the police and used as evidence following the conclusion of a trial.¹⁵ The Code empowered judges to forfeit that property or, where appropriate, to return it to its rightful owner. Although the relevant provision did not give much guidance to judges about the standards for determining ultimate possession or title to property, it did permit innocent third parties to claim an interest in the seized property and seek its restoration. The 1892 version of the Code also contained a section that

¹³ Consider *Canada v. Industrial Acceptance Corp. Ltd.*, [1953] 2 S.C.R. 273.

¹⁴ *Criminal Code, 1892*, S.C. 1893, c. 32, s. 569.

¹⁵ *Ibid.*

authorized peace officers to seize money from an illegal gaming house, money that could then be forfeited to the Crown.¹⁶

The first major amendment to the forfeiture provisions of the *Criminal Code* occurred in 1955. Parliament amended section 431 of the Code to provide that a peace officer in the execution of a warrant could seize “anything that on reasonable grounds he believes has been obtained by or has been used in the commission of an offence.”¹⁷ While that provision represented a formal change in the law, it was merely an attempt at providing legitimacy to the existing police practice of seizing property purported to be evidence of a crime or proceeds of crime.¹⁸ Under the 1955 Code, courts retained the authority to order forfeiture of seized property where the property’s lawful owner did not claim title or possession of it.

It is noteworthy that even in 1955 parliamentarians grappled with the same themes that have been raised in the context of the civil forfeiture debates of the last twenty-five years. One MP vigorously complained that the new provisions appeared to be civil in nature and would create difficulties in the administration of criminal justice. He went further in his observations, however. He noted that a seizure of property based merely on the officer’s reasonable belief that it was proceeds of crime, without an *ex ante* justification for the seizure, could lead to an abuse of power, because no one would question the officer’s reasonable belief which could later be proven to be mistaken. He cautioned that the law did not provide guidance to judges to determine whether an object could be said to prop-

¹⁶ *Ibid.*, s. 575.

¹⁷ *Criminal Code*, S.C. 1954, c. 51, s. 431.

¹⁸ Canada, Parliamentary Debates, House of Commons, 26 February 1954 at 2514-2517, 2830-2835. See also Martin, J.C., *The Criminal Code of Canada* (Toronto: Cartwright & Sons, 1955) at 717-718.

erly belong to a person who had been the subject of a criminal investigation. The objections did not win the day and the House of Commons pushed through the amendments without further opposition.

It was not until the mid-to-late 1980s, however, when forfeiture became a more integral part of Canada's law enforcement regime. In 1985, Parliament amended the *Criminal Code* to bolster the powers of a criminal trial judge to order restitution for both property loss and bodily injury.¹⁹ Prior to that amendment, the court's power was limited to restitutionary awards for property damage alone. It is noteworthy, however, that orders for restitution will have no legal bearing on subsequent civil remedies orders.²⁰

In 1988, Parliament provided for a more comprehensive forfeiture scheme under the *Narcotic Control Act*. Before then, forfeiture as an incident of the exercise of the criminal law power was quite limited due to limited powers conferred on the courts to order forfeiture. For example, under the *Narcotic Control Act*, forfeiture could occur only upon conviction and was limited to the money and objects used in connection with the offence.²¹ Parliament also added sections to the *Criminal Code* that permitted the seizure of proceeds of crime provisions for other offences as well.²² In 1993, Parliament consolidated the two forfeiture regimes by

¹⁹ *An Act to Amend the Criminal Code (Victims of Crime)*, R.S.C. 1985, c. 23 (4th Suppl.), s. 6, amending *Criminal Code*, R.S.C. 1985, c. C-34, s. 725.

²⁰ *Criminal Code*, *ibid.*, s. 714.2, as amended by *An Act to Amend the Criminal Code (sentencing), etc.*, S.C. 1995, c. 22, s. 6.

²¹ *Narcotic Control Act*, R.S.C. 1970, s. 10(8) [now repealed].

²² *An Act to amend the Criminal Code, the Food and Drugs Act and the Narcotic Control Act*, S.C. 1988, c. 51, enacting *Narcotics Control Act*, R.S.C. 1985, s. 19.1 and following and *Criminal Code*, *supra* note 19, s. 420.1 and following.

amending the *Narcotic Control Act* to incorporate the *Criminal Code*'s proceeds of crime provisions by reference.²³

In addition to criminalizing the offence of money laundering, that is, the intentional conversion of proceeds of crime, the amendments conferred power to courts to issue restraint orders that prohibit their targets from dissipating or converting the property in question. The amendments also require judges to balance competing interests of the Crown and property owners before they issue such restraint orders. For example, a judge may require that the Attorney General ("AG") provide an undertaking of damages (essentially, post a bond) to mitigate the effects of the restraint order, should the courts ultimately decide in favour of an accused. While the new provisions provided that the court may order forfeiture even in the absence of a conviction, the AG bears the burden of proof beyond a reasonable doubt to establish that the property was proceeds or instruments of crime.

In 2002, Parliament amended the *Criminal Code* again to simplify the proceeds of crime regime, bringing all proceeds provisions under one legislative instrument.²⁴ Only one year earlier, Parliament had created the Financial Transactions and Reports Analysis Centre of Canada ("FINTRAC"), a federal agency designed to track suspicious or large movements of cash by imposing a reporting requirement on members of the financial industry.²⁵

For the most part, the forfeiture regimes discussed so far are uncontroversial and pose little concern for civil libertarians, because forfeiture is justified as a

²³ *Seized Property Management Act*, S.C. 1993, c. 37, s. 29.

²⁴ *An Act to amend the Criminal Code (organized crime and law enforcement) and to make consequential amendments to other Acts*, S.C. 2001, c. 32. For a further discussion of the legislative amendments, see generally Hubbard, Robert, *et al.*, *Money Laundering & Proceeds of Crime* (Toronto: Irwin Law, 2004) at 82.

²⁵ See generally German, Peter, *Proceeds of Crime and Money Laundering* (Toronto: Carswell, 1998) at 16-6 and following.

punishment stemming directly from unlawful activity.²⁶ What is common to those regimes is that the government must establish a direct link between a particular offence, falling within the authority's jurisdiction, and the property's implication either as an instrument of, or a gain from, the offence. Forfeiture will occur post-conviction, or in the case of an acquittal through the application of a more stringent standard of proof – proof beyond reasonable doubt. This is one of the main points of difference between the civil- and the criminal-centric regimes.²⁷

The provincial civil forfeiture statutes discussed below are deceptively similar in structure, though markedly different in stated purpose, from their federal cousins. Provincial forfeiture regimes do not tie the civil remedy to a particular offence to further the objectives of a particular statute or regulatory regime. Michelle Gallant has described those statutes as “civilizing the money-centred model of crime control,”²⁸ because they are autonomous regimes aimed at capturing property that would not otherwise be subject to *in personam* forfeiture, and because other statutes either limit the scope of forfeiture or do not contemplate attaching forfeiture as a consequence of a breach.²⁹

²⁶ Forfeiture provisions in the *Criminal Code*, particularly under section 490, are also less controversial in that they provide a mechanism for the courts to dispose of “ownerless” property.

²⁷ Parliament has also appended *in rem* and *in personam* forfeiture provisions to non-criminal law statutes like the *Fisheries Act*, R.S.C. 1985, c. F-14. When a fisheries officer searches a boat and discovers unlawfully trapped fish, the officer may seize the fish, and the Crown can then apply for the forfeiture of the fish, or even of the proceeds of their disposition. A court may even order forfeiture if the person searched receives an acquittal, where the Crown proves that the fish were caught in contravention of the act or accompanying regulations. A court can, therefore, dispossess persons of certain property, such as untagged narwhal tusks, even when the Crown cannot prove that the property was appropriated in breach of a law. Provincial forfeiture regulation also attached to specific statutes. See *infra* note 30 for a discussion of forfeiture in the context of temperance legislation.

²⁸ Gallant, Michelle, “Alberta and Ontario: Civilizing the Money-Centred Model of Crime Control” (2004) 4 *Asper Rev. Int'l Bus. & Trade L.* 13 at 17.

²⁹ *Ibid.* at 24.

The first fully autonomous provincial forfeiture regimes became law in Alberta and Ontario in late fall of 2001.³⁰ At that time, governments around the world were legislating in the fields of criminal law and crime control driven in part by the fear and political will that captured the legislative process during the immediate aftermath of 9/11.³¹ During the fall of that year, Parliament amended the *Criminal Code* by criminalizing terrorism-related conduct, including perpetrating a terrorist offence, financing terrorism, and providing aid to terrorist organizations.³² Indeed, the commission of crime to amass funds for terrorist activity seems a pressing matter requiring governmental intervention.

Despite the timing of those enactments, civil forfeiture regimes were being studied by Alberta and Ontario before the 9/11 attacks.³³ Experts from the U.S., Ireland, and South Africa worked with Ontario government officials on the draft bill put before the Provincial Parliament. Those experts, however, did not testify before a legislative committee. What is clear from the Parliamentary record in Ontario is that the 9/11 attacks in part motivated lawmakers to demonstrate their

³⁰ The *Victims Restitution and Compensation Payment Act*, S.A. 2001, c. V-3.5 came into force on November 29, 2001, while the *Civil Remedies Act, 2001*, S.O. 2001, c. 28 [formerly, *Remedies for Organized Crime and other Unlawful Activities Act* came into force on 14 December 2001. Since the days of prohibition, some provinces had appended forfeiture provisions to the liquor control statutes to empower magistrates to order forfeiture upon contravention of those statutes or when the liquor went unclaimed. See e.g. *The Liquor Act*, S.A. 1916, c. 4, s. 80, as amended by *An Act to amend The Liquor Act*, S.A. 1917, c. 22, s. 15. It is noteworthy that Justice Nicholas Beck, of the Alberta Supreme Court Appeal Division, criticized a local magistrate for ordering the forfeiture of an entire stock of whiskey for a summary offence resulting from the unauthorized sale of twelve bottles of whiskey. *R. v. Nat Bell Liquors, Ltd.* (1921), 16 A.L.R. 149 (Supr. Ct. Appl. Div.) at 188, rev'd [1922] 2 A.C. 128 (U.K.P.C.).

³¹ The enactment of Ontario's civil forfeiture regime was marked by the events of 9/11. See Ontario, Legislative Debates (7 November 2001, 16:20), Hon. Gerry Martiniuk. See also Ontario, Standing Committee on Justice and Social Policy, "Committee Transcripts - Bill 30, Remedies for Organized Crime and Other Unlawful Activities Act, 2001" (22 October 2001, 15:50), Hon. Michael Bryant.

³² *Anti-terrorism Act*, S.C. 2001, c. 41.

³³ Ontario, Legislative Debates (21 November 2001, 15:50), Hon. David Young. See also Gallant, *supra* note 28 at 20.

interest and involvement in pursuing an anti-terror agenda.³⁴ It is also noteworthy that at the time of the writing of this work, several policies that the federal Parliament put into place in response to global pressure to combat terrorism have been repeatedly questioned or declared unconstitutional by the courts because they contravened the *Canadian Charter*.³⁵

Following the adoption of the first provincial civil forfeiture regimes in Alberta and Ontario, other provincial legislatures followed suit soon after. In 2005, both the British Columbia³⁶ and Saskatchewan legislatures enacted civil forfeiture laws,³⁷ followed by Quebec and Nova Scotia in 2007,³⁸ and Manitoba in 2008.³⁹ New Brunswick has not enacted a civil forfeiture law; however, its Office of the AG in that province is in the process of compiling new legislation to supplement existing property management laws.⁴⁰ As of 2007, the Newfoundland and

³⁴ Ontario, Legislative Debates (12 November 2001, 16:20), Hon. Bruce Cozier. The Alberta Hansard did not contain a reference to 9/11; however, the legislature adopted the Alberta civil forfeiture statute without much debate, other than the criticisms voiced by NDP MPP Dr. Raj Pannu before third reading. Dr. Pannu noted concerns regarding the characterization of the underlying unlawful act, the lack of judicial pre-authorization for seizures, and the shifting of the legal onus on the respondent to prove lawful ownership of certain assets. The bill, however, received royal assent the following day. Alberta, Legislative Debates (28 November 2001, 20:10), Hon. Dr. Raj Pannu.

³⁵ See e.g. *R. v. Khawaja* (2006), 214 C.C.C. (3d) 399, 42 C.R. (6th) 348, 147 C.R.R. (2d) 281 (Ont. Sup. Ct.). See also *Canada (Prime Minister) v. Khadr*, 2009 FCA 246, var'd 2010 SCC 3. See also *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350; *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Canadian Charter of Rights and Freedoms*].

³⁶ *Civil Forfeiture Act*, S.B.C. 2005, c. 29.

³⁷ *Seizure of Criminal Property Act, 2009*, S.S. 2009, c. S-46.002 [formerly, *Seizure of Criminal Property Act*, S.S. 2005, c. S-46.001].

³⁸ *An Act respecting the forfeiture, administration and appropriation of proceeds and instruments of unlawful activity*, R.S.Q. c. C-52.2; *Civil Forfeiture Act*, S.N.S. 2007, c. 27.

³⁹ *Criminal Property Forfeiture Act*, C.C.S.M. c. C306.

⁴⁰ *Management of Seized and Forfeited Property Act*, S.N.B. 2008, c. M-0.5. New Brunswick, Office of the Attorney General, "2007-2008 Annual Report", online: <www.gnb.ca/0062/publications/OAGAnnualReport2007-2008.pdf>, retrieved 21 September 2009, at 31.

Labrador AG's office was not planning to propose civil forfeiture legislation.⁴¹ Prince Edward Island has not made public any plans to adopt similar legislation.

Interestingly, while the provincial legislatures were passing forfeiture legislation, they were also enacting parallel legislation pertaining to the forfeiture of proceeds from the recounting of crimes.⁴² Although legislatures have described the purpose of the legislation as compensatory for victims, the Crown can petition courts for forfeiture of proceeds, which then get placed in the consolidated revenue fund.⁴³ The money may never be spent on the victims of crime. The laws become increasingly problematic in respect to persons who claim to have been wrongfully convicted and who recount the details of the crime for which a court convicted them.

In only one recently reported case has such a law been the subject of a constitutional challenge.⁴⁴ The Saskatchewan courts recently ordered Colin Thatcher to turn over the advance he received from a publisher for a book related to the murder of JoAnn Wilson, for which Thatcher spent twenty-two years in custody.⁴⁵ Thatcher has maintained his innocence. The Saskatchewan Court of Queen's Bench rejected Thatcher's claim, but after fighting to proclaim his inno-

⁴¹ See Newfoundland & Labrador, Department of Justice, "Annual Report 2007-2008", online: <http://www.justice.gov.nl.ca/just/publications/Annual_Reports_Dept/DoJ_Annual%20Justice%20Report%202007-08.pdf>, retrieved 21 September 2009.

⁴² See *Prohibiting Profiting from Recounting Crimes Act*, 2002, S.O. 2002, c. 2; See also *The Profits of Criminal Notoriety Act*, C.C.S.M. c. P141; *Criminal Notoriety Act*, S.A. 2005, c. C-32.5; *Criminal Notoriety Act*, S.N.S. 2006, c. 14; *Profits of Criminal Notoriety Act*, S.S. 2009, c. P-28.1; In Australia, the forfeiture of proceeds of recounting of crime forms part of comprehensive forfeiture statutes. See e.g. *Proceeds of Crime Act 2002* (Cth.), ss. 151-179.

⁴³ *Prohibiting Profiting from Recounting Crimes Act*, *ibid.*, s. 9.

⁴⁴ *Saskatchewan (Justice) v. Thatcher*, 2010 SKQB 109.

⁴⁵ Canadian Press, "Colin Thatcher hands over book profits to province" (22 April 2010), online, CTV: <http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20100422/thatcher_book_100422/20100422?hub=Canada>, retrieved 23 April 2010.

cence for the past quarter-century, Thatcher lacked both the resources and the will to fully contest the law's constitutional validity.

It is undeniable that future cases will raise constitutional arguments on the grounds that such laws are unjustifiable limitations on the freedom of expression. Despite being acquitted by the Ontario Court of Appeal in 2007 for the murder of Lynne Harper, the proceeds of the sale of books written by, or on behalf of, Stephen Truscott could also be subject to forfeiture under the statute.⁴⁶

While forfeiture statutes share many characteristics, the differences among them indicate that legislatures assess their authority differently and have set different policy objectives for the implementation of those laws. Although federalism is often touted as a legal mechanism that can encourage innovation in law making,⁴⁷ the diversity of the civil forfeiture legislation puts into question whether this is subject matter over which provincial sovereignty is properly exercised. The following paragraphs will outline the differences in how legislatures define the problem, namely how they characterize what "property" constitutes "proceeds" of "unlawful activity". Chapters 2 and 3 will review the differences in the legislative means through which that property is seized, frozen, and then forfeited.

Civil Forfeiture Defined

In order to understand the concept of civil asset forfeiture and its impact on law, policy, and individual rights, it is necessary to define and circumscribe the topic. To do so, one can begin by looking at the constitutive components of the concept,

⁴⁶ Compare Sher, Julian, *Until You Are Dead: Steven Truscott's Long Ride into History* (Mississauga, Ont.: Vintage, 2002). This text was published two months after the *Prohibiting Profiting from Recounting Crimes Act, 2002*, *supra* note 42 came into force.

⁴⁷ See generally Daniels, Richard, "Should Provinces Compete? The Case for a Competitive Corporate Law Market" (1991) 36 McGill L. J. 130 at 149 and following. See also Schmeiser, Douglas, "The Entrenchment of a Bill of Rights" (1981) 19 Alta. L. Rev. 375 at 381.

starting with an examination of the type of property in jeopardy of forfeiture, the nature of the unlawful acts that can give rise to it, and the degree of forfeiture – that is, whether it addresses mere profits or extends to gross revenues and capital property as well.

Each civil forfeiture statute, except the Quebec statute, defines the term “property” in similar terms. Property generally includes all real property, such as buildings and land, and personal property, such as boats and vehicles. It also includes any “interest” in that property, meaning that the property need not be vested in the person’s patrimony or estate for it to be subject to forfeiture. The Quebec statute does not even define the term at all. The definition in the Alberta statute expressly includes contingent and future interests in property, as well as causes of action.⁴⁸ More importantly, the provision leaves open the possibility that intellectual property could constitute forfeitable property for the purposes of the act.

The forfeiture of intellectual property – a departure from the typical case involving proceeds derived from the sale of illegal drugs – is not unimaginable. While it is well accepted that intellectual property is inherently intangible, and therefore not capable of physical custody, an intangible asset is chargeable, assignable, and transferable, like tangible property. The Hells Angels, for example, a known criminal organization, currently owns two registered trade-marks in Canada, which they use in association with clothing, magazines, and other paraphernalia.⁴⁹ Indeed, one ambitious prosecutor in the U.S. pursued the seizure of the trade-mark of the Mongols gang before a California court.⁵⁰ The Court ulti-

⁴⁸ *Victims Restitution and Compensation Payment Act*, *supra* note 30, s. 1(1)(c).

⁴⁹ TMA354187, HELLS ANGELS, Registered 25 May 1988; TMA356391, HELLS ANGELS & Design, Registered 26 May 1988.

⁵⁰ *Rivera v. U.S.*, Case No. 2:09-cv-2435-FMC-VBKX (U.S. Dist. Ct., Dist. Cal., 31 July 2009).

mately rejected the claim on the basis of its interpretation of the legislative provision in issue and commented on its constitutional implications for freedom of expression.

The absence of intellectual property from the definition of property under these statutes demonstrates a lacuna in the scope of their application and may exclude a source of criminal income. It also highlights how the state's primary interest may be the collection of pecuniary goods (cash, real estate, and other movable property) and not on the dismantling of criminal enterprises, which use intellectual property for criminal ends. Should criminal enterprises, or other organizations engaged in criminal conduct, acquire or develop intellectual property (such as a trade-mark, a copyright, or a patent) with proceeds of crime, or through unlawful activity, that capital property would be unforfeitable under these regimes. This definitional deficit also foreshadows constitutional issues that can arise from the operation of provincial civil forfeiture statutes and leads one to question whether the policy objectives of this legislation are being properly served through these legislative instruments.⁵¹

The inclusion or exclusion of Aboriginal property (particularly real property situated on reserve land) is another aspect of the definition not considered by the provincial legislatures. Suppose that the AG of a province restrained and ultimately sought forfeiture of a house located on a reserve as defined by the *Indian Act* or on treaty land, it is not clear how the province could then manage the property in light of restrictions on alienability and issues of collective ownership characteristic of Aboriginal title.⁵² The Supreme Court of Canada held in *Derrickson*

⁵¹ The provision also may be *ultra vires* the provincial legislature due to its interference with sections 91(2), 91(22), and 91(23) of *The Constitution Act, 1867* (*The British North America Act, 1867*), 30 & 31 Vict. c. 3 (U.K.).

⁵² *Indian Act*, R.S.C. 1985, c. I-5, s. 2(1).

v. Derrickson that “the right to possession of lands on an Indian reserve is manifestly of the very essence of the federal exclusive legislative power under s. 91(24) of the *Constitution Act, 1867*. It follows that provincial legislation cannot apply to extinguish the right of possession of Indian reserve lands.”⁵³

In addition to differences in their definitions of property, the provincial statutes define unlawful activity in different ways. The Manitoba law defines unlawful activity as any act or omission that is an offence anywhere in Canada, as well as offences in other countries, provided a *similar* act or omission would be an offence in Canada.⁵⁴ It seems rather incongruous that a statute painted as victim-compensation and crime-prevention legislation would be concerned with the forfeiture of assets related to unlawful activities committed elsewhere. It also seems unlikely that the provincial AGs would send money to victims of crime in foreign jurisdictions after they confiscate property from persons under their jurisdiction.

The Manitoba law also does not define the degree of similarity required between the foreign conduct and the Canadian offence. Nor does the statute specify a minimum level of severity for the conduct in question. Presumably a minor highway traffic offence, such as failing to signal a turn, could trigger the application of the statute and lead to the forfeiture of the vehicle.⁵⁵

Other enactments have more limited definitions of unlawful activity. Under the Alberta statute, the Minister in charge of the statute’s enforcement may

⁵³ *Derrickson v. Derrickson*, [1986] 1 S.C.R. 285 at para. 41; See also *Paul v. Paul*, [1986] 1 S.C.R. 306.

⁵⁴ *Criminal Property Forfeiture Act*, C.C.S.M. c. C306, s. 1.

⁵⁵ Undeniably, the police or Crown attorneys retain the discretion not to pursue forfeiture for such conduct. Consider *R. v. Beaudry*, [2007] 1 S.C.R. 190. Consider also *R. v. Beare*; *R. v. Higgins*, [1988] 2 S.C.R. 387. However, the “rule of persons” cannot replace the rule of law. *O’Neill v. Canada (Attorney General)*, 82 O.R. (3d) 241, 272 D.L.R. (4th) 193, 213 C.C.C. (3d) 389 (Sup Ct.) at para. 59.

only pursue civil forfeiture where a peace officer has been involved in carrying out an investigation.⁵⁶ While that provision may be read in a restrictive light, the term “investigation” is undefined and could include something as trivial as a roadside stop. Only the British Columbia law attempts to restrict the scope of its application by including a provision excluding certain laws that are expressly prescribed under the Act.⁵⁷ No laws have been excluded, however.

A discussion of the scope of the definition of unlawful activity is material for several reasons. The American experience with forfeiture demonstrates that proportionality between the underlying activity and the extent of the forfeiture has not always been a principle considered by courts applying similar legislation in that country.⁵⁸ Without intervening constitutional arguments, even the most harmless offence could, therefore, yield unjust results in the form of a disproportionately large seizure and forfeiture of property when compared with the severity of the underlying offence or danger to the community.

Furthermore, the definition of the concept of proceeds also signals marked differences among various civil forfeiture regimes. The Ontario law defines proceeds as “property acquired, directly or indirectly, in whole or in part, as a result of criminal activity.”⁵⁹ While that definition seemingly includes traceable property, converted using the property obtained by unlawful means, it is an open question whether the statute includes gains in value to the instruments or to the proceeds, especially in light of the strict rule of statutory interpretation when legisla-

⁵⁶ *Victims Restitution and Compensation Payment Act*, *supra* note 30, s.3(2).

⁵⁷ *Civil Forfeiture Act*, S.B.C. 2005, c. 29, s. 1.

⁵⁸ See discussion in Chapter 4, *infra*.

⁵⁹ *Civil Remedies Act, 2001*, *supra* note 30, s. 2.

tion purports to take away property rights.⁶⁰ To that end, the Saskatchewan statute expressly includes increases in value to the impugned property, as does the B.C. statute.⁶¹

The debate over what constitutes proceeds will form a central part of the discussion in later chapters on concepts of punishment. When members of the Ontario legislature debated the passage of that province's forfeiture regime, one Member of Provincial Parliament noted that the bill was "aimed at the profits of organized crime."⁶² While profits are an appropriate measure of damages in civil law, the forfeiture of gross revenue proves more problematic. Furthermore, the legislation targets not only the profits of organized criminals, but also captures property of law-abiding citizens, who unbeknownst to them, may find that their property is caught up in the activities of purported criminals.

Why All the Fuss?

The constitutional issues that arise from provincial civil forfeiture regimes have only begun to be explored in this chapter. An examination of the discrepancies among the regimes necessitates a deep look into their operation, including the powers of the courts to freeze property, the burden and standards of proof borne by the parties in the matter, as well as the diversion of the property once a court has ordered its forfeiture to the Crown. It is through the examination of those issues that one can begin to draw conclusions about the implications that arise from the enactment of civil forfeiture regimes by the provinces.

⁶⁰ See generally Sullivan, Ruth, *Sullivan on the Construction of Statutes*, 5th ed. (Markham, Ont.: Butterworths, 2008) at 476.

⁶¹ This might include increases in the value of land or other immovables, or reinvested proceeds of crime, such as stocks or bonds.

⁶² Ontario, Legislative Debates (17 May 2001, 16:10) Hon. David Tilson.

No doubt some readers of this text will ask why anyone should be concerned about civil forfeiture, since it is clear from the legislative and judicial records that the predominant purpose of these regimes is to transfer property from wrongdoers to victims of crime and members of the law-abiding community. It is the spectre of abuse by state officials enforcing this regime that should concern readers of this text. The implications are that judicial decisions upholding civil forfeiture regimes will resonate in other areas of the law as well. While it is unlikely that someone will ever be witness to a civil forfeiture, at least one American legal scholar has cited numerous examples of innocent people being deprived of all of their property on the basis that there was reasonable suspicion that the property was somehow proceeds or instruments of crime.⁶³ The voices of Canada's legal community calling into question the proliferation of civil forfeiture legislation have not been nearly as loud.

While the next two chapters will comment on the leading Canadian and foreign court decisions on this subject, it is not restricted to an analysis of the correctness of legal rulings. Its aim is more ambitious. It will be argued that the reaction by the legal community (including judges, lawyers, law students, and legislators) to the introduction of civil forfeiture – that is, marked silence – reveals a great deal about the constitution and the foundational principles of the Canadian state.

Canadian constitutional law is at a crossroads. The formulaic review of the constitutionality of Ontario's *Civil Remedies Act, 2001*, by the Supreme of Court of Canada in the 2009 decision in *Chatterjee v. Ontario (Attorney General)* demonstrates that Canadians have failed to heed warnings from the U.S. about the dangers of civil forfeiture and have failed to put in place adequate safeguards to

⁶³ See generally Levy, *supra* note 7 at 1-7.

protect the rights of Canadians.⁶⁴ That failure is partially due to the perpetuation of antiquated doctrines of constitutional interpretation and the failure of the *Canadian Charter* to provide a language for Canadians to engage with this issue.

⁶⁴ *Chatterjee v. Ontario (Attorney General)*, [2009] 1 S.C.R. 264.

Chapter 2

Redefining the Criminal-Civil Divide

This chapter explores whether the provincial legislatures and the courts rightfully characterized civil forfeiture statutes as “civil” law (i.e., the statutes fall within the province’s jurisdiction over property and civil rights), or whether these regimes are criminal law.¹ The chapter also places civil forfeiture legislation within a larger contemporary legislative context in which legislatures appear to be moving toward using civil procedures to achieve traditional criminal law ends, such as prevention, deterrence, punishment, and incapacitation. The move away from the criminal to civil enforcement means that rules of criminal evidence and criminal procedure designed to safeguard the rights and interests of individuals may be discarded by the legislature in favour of rules that are more state-friendly.

Despite the exceptional incidental forfeiture provisions attached to certain statutes, as discussed in the previous chapter, forfeiture has been the traditional domain of federal criminal law. Since Confederation, forfeiture rules attached specifically to nominate criminal or quasi-criminal legislative instruments, such as the *Criminal Code*,² narcotics legislation,³ and customs legislation.⁴ As Parlia-

¹ This chapter uses the term “civil” law to mean the domain of public law that is not “criminal” law. While civil law incorporates concepts from the private law, it does not refer to private law generally, or Quebec civil law in particular.

² *Criminal Code*, R.S.C. 1985, c. C-46.

³ *Controlled Drugs and Substances Act*, S.C. 1996, c. 19.

⁴ *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.).

ment expanded its forfeiture powers, particularly under the *Criminal Code*, courts responded by requiring that forfeiture be exercised in accordance with the principles of criminal law, particularly the presumption of innocence.⁵

The first section of this chapter explores the legal and political motivations giving rise to the enactment of the provincial forfeiture regimes in Canada. It places the enactment of these regimes within a larger political context in which the federal and provincial government are moving away from traditional criminal law regulatory techniques to civil ones. While this move may be appropriate in some areas of the law such as market regulation, it is highly questionable whether such a move is appropriate where a person's entire patrimony or estate is in jeopardy of confiscation.

The second section reviews the leading Supreme Court of Canada decision on civil forfeiture, *Chatterjee v. Ontario (Attorney General)*.⁶ It outlines the facts, issues, and an overview of the arguments presented in that case.

The third section critiques the Court's approach to the division of powers issue in *Chatterjee*, by looking at the Court's analysis of the legislation's purpose, substance and effects of the forfeiture law in issue. In addition, although the Court has historically relied on the criminal law power to curtail rights-infringing legislation in cases known to have established "the implied bill of rights", during the period from just prior to the enactment of the *Charter* and continuing until today, this doctrine has become suppressed and was not considered in *Chatterjee* even though civil forfeiture legislation significantly impacts the civil capacities of citizenship, a recognized right that pre-exists the creation of the state. The chapter

⁵ The presumption of innocence lies at the core of the criminal law. The two concepts are virtually inseparable. See generally *Woolmington v. D.P.P.*, [1935] A.C. 462 (U.K.H.L.).

⁶ *Chatterjee v. Ontario (Attorney General)*, [2009] 1 S.C.R. 624 [*Chatterjee*].

concludes with a comment on the repercussions of the move to civil techniques of regulation and suggests that legislatures and courts adopt hybridized techniques that balance the need for efficiency with the promotion of fairness.

Moving Beyond the Boundaries of the Criminal Law

As the previous chapter highlighted, Parliament made significant amendments to its narcotics laws and to the *Criminal Code* during the late 1980s and 1990s that provided for increased powers of forfeiture. Courts, however, were unwilling to grant free reign to the federal and provincial Attorneys General (“AG”) to administer these schemes without significant judicial oversight. Although many of the forfeiture provisions did not define the standard of proof, the courts imposed criminal standards since they regarded forfeiture as an extension of Parliament’s criminal law authority.

The Supreme Court of Canada considered that very issue in 1986 in the case of *Fleming (Gombosh Estate) v. The Queen*.⁷ Prior to his death, Eric Fleming applied for the restoration of funds that had been seized under a warrant issued pursuant to the *Narcotic Control Act*.⁸ Justice Bertha Wilson, speaking for the Court, noted that it would be inappropriate to use civil standards of proof when dealing with criminally tainted property. The Court required the Attorney General to prove taint beyond reasonable doubt.⁹ Failing to have done so in *Fleming*, the Court ordered the money returned to the applicant.

⁷ *Fleming (Gombosh Estate) v. The Queen*, [1986] 1 S.C.R. 415 [*Fleming*].

⁸ *Narcotic Control Act*, R.S.C. 1970, c. N-1, s. 10 [now repealed].

⁹ *Fleming*, *supra* note 7 at para. 44.

Between 1982 and 1992, the federal and provincial AGs advanced the position that the *Canadian Charter* did not apply to forfeiture proceedings on the basis that forfeiture pertained to property rights, which are not protected by the *Charter*. The British Columbia Supreme Court held in *R. v. Clymore*, however, that the AGs were not permitted to use unlawfully obtained evidence in support of its forfeiture application.¹⁰ According to the Court, the relevant right in issue was not the right to property, but the right to privacy, which is protected under section 8 of the *Charter*. The Ontario Court of Appeal also suggested in *R. v. West* that section 24(1) of the *Charter* could ground the return of unlawfully seized property,¹¹ although this dictum has been subject to some scrutiny.¹²

Appellate courts have also imposed criminal standards of proof on the AG in forfeiture matters. In the 1995 case of *R. v. Mac*, the Ontario Court of Appeal ordered the restoration of approximately thirty-seven thousand dollars in cash, after it had been seized from the appellant and his companions at the Canada-U.S. border.¹³ Despite the trial judge's rejection of the appellant's clearly fictitious reason for possessing the cash, the Court of Appeal ordered that the money be returned, since the AG failed to prove beyond reasonable doubt that the funds were tainted by crime.

In 2001, the Ontario Court of Appeal affirmed in *R. v. West* that the criminal rules of evidence applied to the federal forfeiture regime.¹⁴ In that case, the

¹⁰ *R. v. Clymore*, [1992] B.C.J. No. 1705 (S.C.) (QL), aff'd [1992] B.C.J. No. 1588 (C.A.) and 1999 BCCA 225.

¹¹ *R. v. West* (2005), 77 O.R. (3d) 185, 257 D.L.R. (4th) 90, 199 C.C.C. (3d) 449 (Ont. C.A.) at para. 48.

¹² See e.g. Krane, Joshua, "Proprietary Rights and Remedies under the *Charter*" (2008) 54 Crim. L. Q. 215 at 237 and following.

¹³ *R. v. Mac* (1995), 97 C.C.C. (3d) 115, 1995 CanLII 2071 (Ont. C.A.).

¹⁴ *R. v. West*, *supra* note 11.

AG relied on expert evidence to establish that the property in issue was proceeds of crime. The Ontario Court of Appeal upheld the decision of the justice of the peace at first instance, which rejected the evidence on the basis of it being inadmissible hearsay. By then, Ontario and Alberta's civil forfeiture legislation was in force. The Court in *R. v. West* held that there is a relationship between the standard of proof (beyond reasonable doubt) and the applicable evidentiary rules.¹⁵ The AG could not use relaxed rules of evidence to achieve its ends, even though forfeiture pursuant to provincial legislation could.

The repeated imposition of more stringent standards on the AGs in forfeiture matters invited the provinces to consider whether they could enact parallel regimes outside the scope of the criminal law. By creating forfeiture regimes using the property and civil rights power (so called "civilizing" crime control),¹⁶ the provinces legislated around many of the procedural and evidentiary standards imposed by the courts as well as by Parliament itself, not to mention that it was smart politics. Figure 1 compares the different aspects of the criminal and civil regimes as set out by the *Criminal Code* and the *Ontario Civil Remedies Act, 2001* to show how the provincial schemes were tailored to avoid many of the constraints imposed under the criminal law.¹⁷ Figure 2 in Chapter 3 provides a more complete comparison of the respective federal and provincial restraint and management provisions.

¹⁵ *Ibid.* at para. 23.

¹⁶ See Gallant, Michelle, "Alberta and Ontario: Civilizing the Money-Centred Model of Crime Control" (2004) 4 *Asper Rev. Int'l Bus. & Trade L.* 13.

¹⁷ *Civil Remedies Act, 2001*, S.O. 2001, c. 28.

Figure 1 - Comparison of the Important Federal and Provincial Forfeiture Rules (Ontario)

Rule	<i>Criminal Code & Case Law</i>	<i>Civil Remedies Act, 2001 (Ont.)</i>
Property subject to forfeiture	<p>Any property, benefit or advantage, within or outside Canada, obtained or derived directly or indirectly as a result of the commission in Canada or elsewhere of an indictable offence (s. 462.3 (1))</p> <p>Any property, within or outside Canada, that is used or intended to be used that is used in any manner in connection with the commission of an indictable offence (s. 2)</p>	<p>Real or personal property, and includes any interest in property acquired, directly or indirectly, in whole or in part, as a result of an offence under an Act of Canada, Ontario or another province or territory of Canada, or elsewhere</p> <p>(s. 2)</p>
Standard of proof for forfeiture	<p>If convicted, then it is proof on a balance of probabilities that property is proceeds of crime, otherwise it is proof beyond a reasonable doubt (s. 462.37(1)-(2))</p>	<p>The balance of probabilities applies to all proceedings (s. 16)</p>
Applicable Rules of Evidence	<p>The criminal law rules of evidence apply to all proceedings (<i>R. v. Mac</i>)</p>	<p>The rules of the civil court apply to all proceedings.</p> <p>(s. 15.6)</p>
When forfeiture can occur	<p>A court must order forfeiture if it finds that the property is proceeds or instruments of crime (s. 462.37). A court may decline forfeiture if it is in the interests of justice (s. 462.37(2.07)).</p>	<p>A court must order forfeiture if it finds that the property is proceeds or instruments of crime (ss. 3, 8), unless it would clearly not be in the interests of justice.</p>
Nature of the Unlawful Conduct	<p>An offence means an indictable offence or inchoate indictable offences such as conspiracy or attempt (s. 462(3)).</p>	<p>An offence is an offence under an Act of Canada, Ontario or another province or territory or an offence elsewhere if a similar act were committed in Ontario (s. 2).</p>
Presiding Court	<p>Jurisdiction over forfeiture matters is shared by the Provincial and Superior Court. However, warrants issued in one jurisdiction for the seizure of property must be endorsed by a justice in another jurisdiction if executed in the latter jurisdiction (s. 487(2)).</p>	<p>The Superior Court presides over matters under the statute (s. 4). Therefore, any limitations on the jurisdiction arise only from international law.</p>

Limitation Period	No limitation periods are imposed. The Attorney General, however, is bound by procedural requirements when pursuing forfeiture either post-trial or in the absence of a trial.	For proceeds, the limitation period is fifteen years after the property was first acquired (s. 3(5)). There is no limitation period for instruments of crime (s. 8(5)).
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The move to the civil law as a mechanism for policy-implementation in areas formerly regulated by the criminal law is not unique to forfeiture regimes. Several of the regulatory techniques contained in the provincial forfeiture statutes have started to appear in other provincial and federal regulatory schemes as well.

Most recently in 2009, Parliament made several amendments to the *Competition Act*, which enhanced the Commissioner of Competition’s civil enforcement powers.¹⁸ Of particular note, Parliament implemented these significant structural changes without any public consultation,¹⁹ by burying the amendments into the lengthy and complex budget implementation bill.²⁰ The amendments continued an on-going process of converting formerly criminal offences, such as price maintenance, into civil offences, which do not require proof of *mens rea* or fault. Parliament also increased the maximum penalties for breaches of the civil provisions from \$50,000 to \$750,000 for individuals and from \$100,000 to \$10 million for corporations for first-time offences, but unlike the *Criminal Code* provisions on sentencing, the *Competition Act* does not provide any guidance as to how these penalties are to be administrated.²¹

¹⁸ *Competition Act*, R.S.C. 1985, c. C-34.

¹⁹ See e.g. Gascon, Denis, et al. “Canada’s Budget Bill to Overhaul the Competition Act and Investment Canada Act” (10 February 2009), online: Ogilvy Renault, <http://www.ogilvyrenault.com/en/resourceCentre_9101.htm>, accessed 21 January 2010.

²⁰ *Budget Implementation Act*, 2009, S.C. 2009, c. 2.

²¹ *Competition Act*, *supra* note 18, s. 74.1(1)(c). Furthermore, Parliament amended several of the criminal provisions of the Act allowing courts to impose severe sentences of up to fourteen years imprisonment and \$25 million fines for *per se* violations of the Act. The result in this area of the

The increase of administrative powers and penalties has not been restricted to competition law. In 2002, the Ontario Legislature increased the penalty for contravention of the *Securities Act* from \$1 million to \$5 million in addition to increasing the maximum term of imprisonment from two to five years.²² For the first time, breaches of the *Investment Canada Act* have been enforced using civil penalties.²³

The use of human rights legislation to prosecute hate speech is yet another recent high-profile example of this move. Although the *Canadian Human Rights Act* has contained an anti-hate-speech provision since 1977,²⁴ the Canadian Human Rights Commission has become more active in the administrative prosecution of purported hate speakers.²⁵ Unlike the hate-speech provisions in the *Criminal Code*,²⁶ section 13(1) of the *CHRA* does not require that the Commission prove an intention to cause injury.²⁷ Furthermore, the Commission need only prove the act on the balance of probabilities. Nor can a person avail him or herself of the truth defence otherwise available in the criminal law.²⁸ Given that the Canadian Human Rights Tribunal – the body that adjudicates these cases – can set its

law, as in others, has been a polarization of sanctioning provisions, which has eviscerated more moderate provisions suited to achieving proportionality between the offence and the punishment.

²² *Keeping the Promise for a Strong Economy Act (Budget Measures), 2002*, S.O. 2002, c. 22, s. 181 (1) amending *Securities Act*, R.S.O. 1990, c. S.5, s. 122.

²³ See *Canada (Attorney General) v. United States Steel Corporation*, 2010 FC 642.

²⁴ *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, s. 13 [*CHRA*].

²⁵ See Canada, Canadian Human Rights Commission, “Hate on the Internet”, online: <http://www.chrc-ccdp.ca/proactive_initiatives/hoi_hsi/qa_qr/page1-en.asp>, retrieved 15 February 2010.

²⁶ *Criminal Code*, *supra* note 2, ss. 318-319.

²⁷ See *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892 at 932.

²⁸ *Ibid.* at 939.

own rules of evidence, it is possible that the Tribunal could substantiate a finding of culpability largely on the basis of hearsay.²⁹

Mary Cheh has noted the appeal of the “civil” category to achieve regulatory ends.³⁰ By relying upon the civil category to classify legislation with a sanctioning component, the state can require a lower burden of proof, giving the state greater prospects for success. These schemes also allow the state to transfer responsibility for regulating conduct to individuals by threat of prosecution or penalty through doctrines such as vicarious liability, which the criminal law does not recognize. Furthermore, in the forfeiture context in the U.S. at least, civil procedure makes victims, prosecutors, and the police the beneficiaries of “prosecution”. In Canada, the argument that those persons are beneficiaries is tempered at present, because insufficient resources and attention is placed on civil forfeiture laws. Further funding for agencies responsible for the enforcement of those laws could make that link more apparent.

The enactment of provincial schemes also makes for good politics. While politicians frequently espouse the purpose of these regimes as providing another tool to combat organized crime, the enactment of forfeiture regimes have other political advantages. The enactment of these schemes allows governments to portray themselves as supporting vulnerable groups, particular victims of crime, even though relatively little money goes toward victims’ support programs. As discussed in Chapter 4, these schemes can lead to significant and unexpected consequences for individuals knowingly (or even unknowingly) implicated in the drug

²⁹ See Canada, Canadian Human Rights Tribunal, *Rules of Procedure*, as promulgated 5 March 2004, online: <<http://chrt-tcdp.gc.ca/NS/about-apropos/download/rop-pdt-eng.asp>>, retrieved 15 February 2010.

³⁰ Cheh, Mary, “Civil Remedies and Criminal Law Objectives” (1991) 42 *Hastings L.J.* 1325 at 1345.

trade, including eviction from social housing.³¹ Provincial governments also present civil forfeiture schemes as cost-neutral or even profit generating, as prosecutors can seize and forfeit a potentially large, indeterminate treasure chest of tainted property. Nevertheless, it is still unclear whether the seven current provincial schemes are indeed cost-neutral. Civil forfeiture schemes do, however, create jobs for prosecutors, police officers, accountants, judges, court staff, and property management personnel. Some of the funds that are not used to cover the costs of forfeiture schemes are also used to help fund the police, including the units that confiscate tainted property.

Only a constitutional review by the courts could have constrained the provinces' powers to enact or amend civil forfeiture schemes. Yet, the Supreme Court of Canada was all but willing to validate these laws as the *Chatterjee* decision revealed. Nevertheless, the Court overlooked many of the implications of these regimes on the criminal law, which for the most part of Canada's constitutional history, provided the principal source of protection from punitive state action, namely through the doctrine of the presumption of innocence.

And Then Came *Chatterjee*

Robin Chatterjee had been charged with robbery and assault, but was released on bail subject to a recognizance that required him to remain in the Ottawa area pending trial.³² In 2003, Chatterjee made his way to Toronto, in breach of his bail conditions, when officers of the York Regional Police pulled over his vehicle af-

³¹ See e.g. *Residential Tenancies Act, 2006*, S.O. 2006, c. 17, s. 61.

³² *Ontario (Attorney General) v. \$29,020 in Canadian Currency*, 2006 CanLII 18735 (Ont. Sup. Ct.) [*\$29,020 in Canadian Currency*], aff'd *Chatterjee* (S.C.C.), *supra* note 6.

ter noticing that his car was missing its front license plate. This is not an unlikely way for drug prosecutions and forfeiture cases to arise. These cases often arise by virtue of “random” or “unrelated” roadside stops.³³

Chatterjee told the officers that he was living in Thornhill, outside of Toronto. The officers arrested Chatterjee for breach of his recognizance and searched the vehicle incident to arrest. They noted that the vehicle smelled like marijuana. After a search of the vehicle’s interior, the officers found roughly twenty-nine thousand dollars in cash, a light socket and ballast, as well as an exhaust fan: items that the police associated with a marijuana grow-operation. The officers then seized the material, which the Crown later confiscated. Chatterjee claimed that the money belonged to his sister, but the trial judge at the forfeiture hearing rejected his testimony.³⁴ Chatterjee was never charged with a drug offence.

Realizing that an admission as to the ownership of the money could have landed Chatterjee in more trouble by potentially triggering a money-laundering investigation or prosecution, Chatterjee denied ownership and contested the validity of the statute instead, arguing that the *Civil Remedies Act, 2001* lay beyond the power of the Ontario legislature (*ultra vires*). The Superior Court, Court of Appeal, and Supreme Court of Canada disagreed with Chatterjee’s position. Those courts all concluded that because the legislation was aimed at suppressing crime and compensating victims, it was properly enacted pursuant to the province’s property and civil rights power, not the criminal law power. Justice Ian Binnie, speaking for the Supreme Court of Canada, concluded, “the province was concerned with the deleterious *effects* of crime in general rather than attempting in a

³³ See e.g., *R. v. Sookram*, 2007 ONCJ 370. See also *R. v. Nolet*, 2009 SKCA 8.

³⁴ \$29,020 in Canadian Currency, *supra* note 32 at paras. 25-28.

colourable way to tack a penalty onto the federal criminal sentencing process.”³⁵ Justice Binnie considered that the source of the province’s legislative authority lay within its property and civil rights power, noting the “practical (and intended) effect is also to take the profit out of crime and to deter its present and would-be perpetrators.”³⁶

The use of the “civil” category, as opposed to the “criminal” category, is what ultimately allowed the courts deciding *Chatterjee* to detach their conclusions from the authority of past jurisprudence. It is noteworthy that neither the court of first instance, nor either of the appellate courts, referenced the decisions in *Fleming*, *Mac*, or *West* that had highlighted the judiciary’s prior concerns about mixing civil law concepts with forfeiture regimes. Furthermore, as a point of comparative constitutional law, unlike the Supreme Court of the United States in its leading forfeiture decisions, the Supreme Court of Canada did not conduct a historical analysis of English, Canadian, or American forfeiture laws to determine the constitutional implications of adopting mechanisms derived from old forms of action, like *deodand*, into modern forfeiture laws.³⁷

The Supreme Court of Canada’s analysis of the division of powers did not delve into the implications of accepting the AGs’ argument that civil forfeiture legislation was a matter of property and civil rights, despite the Court’s own previously-held view that such analysis should not be so restrictive.³⁸ The judges were swayed by the government’s formalistic argument that, because the statute addresses compensation and crime-prevention and because the legislative scheme

³⁵ *Chatterjee*, *supra* note 6 at para. 20. Emphasis in original.

³⁶ *Ibid.* at para. 22.

³⁷ *Calero-Toledo et al. v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974) at 681-688.

³⁸ *R. v. Morgentaler*, [1993] 3 S.C.R. 463 at 481-482 [*Morgentaler* (1993)].

incorporates concepts characteristic of the civil law, the forfeiture regime must be, in pith and substance, a matter of civil law. The remainder of this chapter will analyze the civil remedies legislation in light of all elements of the division of powers analysis to highlight how the protections afforded by the criminal law have been negated by the civil categorization.

Forfeiture: In Pith and Substance

The Supreme Court of Canada's analysis in *Chatterjee* mischaracterization of the *Civil Remedies Act, 2001* as a matter of property and civil rights and not criminal law was the result of four separate analytical errors, each discussed in turn. First, the Court mischaracterized the purpose of the regime. Second, it failed to recognize that the subject matter of the statute was, in substance, criminal law, rather than civil law. Third, the Court did not foresee the considerable effects of the statute on the criminal law and criminal justice system. Finally, the Court neglected to consider whether the constitution imposes an implied limit on the provinces' power to incapacitate a person's economic affairs.

The result of the *Chatterjee* decision is a watering-down of the criminal law power, namely through the separation of punishment from prosecution and criminality. Had the Court looked deeper into the (punitive) purpose of the statute and into the effects both on the criminal law and on individual rights, it would have realized that the *Civil Remedies Act, 2001* and its sibling statutes not only represent a usurping of the criminal law power, but a direct threat to a person's ability to possess and exchange property.

Mischaracterization of the Purpose as Remedial and not Punitive

To determine whether a law is a valid exercise of a legislature's law-making power, courts will assess whether the pith and substance of a law falls within the enacting legislature's authority under sections 91 through 95 of the *Constitution Act, 1867*. The first stage of any pith and substance analysis requires an examination of the law's purpose. A legislature can, therefore, only validly enact laws for a proper purpose within their authority.³⁹

The Court's first error in its analysis of the purpose of the *Civil Remedies Act, 2001* was that it failed to look beyond the text of the preamble to identify the purpose of the civil forfeiture regime.⁴⁰ The Court held:

It is true that forfeiture may have *de facto* punitive effects in some cases, but its dominant purpose is to make crime in general unprofitable, to capture resources tainted by crime so as to make them unavailable to fund future crime and to help compensate private individuals and public institutions for the costs of past crime. These are valid provincial objects.⁴¹

The weaknesses in the Court's analysis of the statute's purpose were two-fold. And although not addressed by the court, based on many of the same arguments advanced below, the generalized matter of "forfeiture" cannot be qualified as hav-

³⁹ See *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3 at para. 27 and following. See also *Reference re Firearms Act* (Can.), [2000] 1 S.C.R. 783 at para 17 and following [*Firearms Reference*].

⁴⁰ It is also noteworthy that when the legislation was initially enacted, it operated under a different name: *Remedies for Organized Crime and Other Unlawful Activities Act*. The very title of the legislation contemplated its purpose as an anti-crime measure, which should have signalled to the Court that the legislation was in relation to the criminal law and not property and civil rights.

⁴¹ *Chatterjee*, *supra* note 6 at para.4.

ing a “double aspect” over which both the federal and the provincial legislatures are competent to legislate.

First, while the preamble portrays the Act as a crime-suppression, victim-compensating, and injury-preventing piece of legislation,⁴² courts are not bound by the stated purposes for their analysis of a law’s validity.⁴³ Although the Supreme Court of Canada has repeatedly stated that the government need not establish the efficacy of the legislation, an analysis of the efficacy of the legislation is both *relevant* and *required* when the legislature can be shown to be acting with a colourable motive.⁴⁴

Even though this is a high threshold to meet (arguably given the need for institutional separation between courts and legislatures), even at this threshold the Court should have taken a closer look at the veritable purposes of the forfeiture regime. The Court in *Chatterjee* had no evidence before it that the *Civil Remedies Act, 2001* (or any other form of civil forfeiture legislation) actually reduces or prevents crime. As discussed in the introductory chapter, the contrary proposition may actually prove true.⁴⁵ While it is undeniable that the provincial legislation has resulted in some compensation to victims, given that these victims are identifiable, they had no need for a civil forfeiture statute to obtain compensation. Private law and public agencies (including victim compensation boards) allow victims to seek compensation for their injuries as a result of crime.

Second, the Supreme Court of Canada has itself suggested that forfeiture statutes serve an alternative, inherently punitive purpose, making forfeiture gener-

⁴² *Civil Remedies Act, 2001*, *supra* note 17, s. 1.

⁴³ *Morgentaler (1993)*, *supra* note 38 at 482-485

⁴⁴ *Firearms Reference*, *supra* note 39 at para. 12.

⁴⁵ See Introduction, footnote 12.

ally a matter of the criminal law. In *Chatterjee*, however, the Court did not distinguish between remedial purposes, which lie properly within the property power (such as licensing schemes), and punitive ones, which fall properly under the criminal law.

In *Canada v. Industrial Acceptance Corp. Ltd.*,⁴⁶ a drug dealer was arrested, charged, and convicted pursuant to *The Opium and Narcotic Drug Act*.⁴⁷ The trial court ordered the dealer's car forfeited to the Crown, having been used to transport drugs. The appellant was the owner of the car and had no knowledge that it was being used in a drug deal. The dealer contested the validity of the forfeiture law on the grounds that the law pertained to property and civil rights and not the criminal law. The Supreme Court of Canada, however, rejected the application. Justice Patrick Kerwin noted that forfeiture of instruments of criminal activity is, in pith and substance, criminal law.⁴⁸ Justice Ivan Rand's language was even more pronounced. He noted that forfeiture is an extension of the state's power to punish and suppress the conditions of crime. "The absolute forfeiture", Rand concluded, "is an inseparable accompaniment of *punitive action*, and the administration of the law would be seriously impeded were any obstacles to prompt and conclusive action placed in the way of its enforcement."⁴⁹

The Court in *Chatterjee* also mistakenly interpreted Justice Kerwin's holding in *Industrial Acceptance* as not excluding the provinces from enacting forfeiture legislation. Again, this reflects a failure to recognize the underlying punitive nature of the provincial regime as established by the *Civil Remedies Act, 2001* and

⁴⁶ *Canada v. Industrial Acceptance Corp. Ltd.*, [1953] 2 S.C.R. 273 [*Industrial Acceptance*]

⁴⁷ *The Opium and Narcotic Drug Act*, S.C. 1929, c. 49 [now repealed].

⁴⁸ *Industrial Acceptance*, *supra* note 46 at 275.

⁴⁹ *Ibid.* at 278 [Emphasis added]. See also *R. v. Lavigne*, [2006] 1 S.C.R. 392 at para. 16.

its sibling statutes. As is discussed in greater depth in Chapter 4, forfeiture regimes can have multiple purposes. Under a purely remedial regime, the state will pursue forfeiture of any wrongful gains associated with criminal conduct. This best approximates the civil law, where a plaintiff can sue a defendant for damages that arise from a breach of a legal duty. More punitive regimes (i.e., regimes that jeopardize more of a person's property for forfeiture), such as the scheme set down by the *Civil Remedies Act, 2001*, will include provisions that strip a person of capital, or even future property, even when the property is not used exclusively for criminal ends.⁵⁰ The Court did not explain how the forfeiture of this property, which is often not inherently dangerous, serves a "remedial" purpose.⁵¹

The Supreme Court of the United States came to a similar conclusion in *Austin v. United States*.⁵² In that case, following a conviction and seven-year sentence for one count of possession of with intent to distribute two grams of cocaine, the government instituted civil forfeiture proceedings against Richard Austin's house and business. The Supreme Court, however, rejected the government's claim that the purpose of forfeiture was remedial, noting that the forfeited property was not inherently dangerous or inherently illegal.⁵³ It dismissed the government's forfeiture claim as disproportionate to the underlying act.

The Court in *Chatterjee* correctly noted that while the *Constitution Act, 1867* does not preclude the provinces from enacting legislation with punitive effects – particularly when that legislation contains an enforcement provision⁵⁴ –

⁵⁰ See Klein, Susan "Redrawing the Criminal-Civil Boundary" (1999) 2 Buff. Crim. L. Rev. 679 at 708.

⁵¹ Contrast a gun and a sum of money.

⁵² *Austin v. United States*, 509 U.S. 602 (1993).

⁵³ *Ibid.* at 621. See also Klein, *supra* note 50 at 697.

⁵⁴ See e.g. *Smith v. The Queen*, [1960] S.C.R. 776.

punishment cannot be an end unto itself, but rather must be incidental to the exercise of another provincial power.⁵⁵ The Court's reliance on the cases involving the removal of a license as a result of the commission of an unlawful act supports that proposition. The Supreme Court of Canada in *Chatterjee*, however, relied on those cases to support a broader proposition that the provinces can impose *any* civil penalty for *any* unlawful act. Traditionally, the Court has allowed the imposition of punitive civil sanctions only as incidental to the exercise of another provincial power, such as health⁵⁶ or the regulation of highways.⁵⁷ The provincial legislatures could otherwise rely on their property and civil rights power to accomplish purposes outside of their competence.⁵⁸

The only instance in which the Supreme Court of Canada has validated a law that imposes civil consequence for an unlawful act under a statute enacted under the property and civil rights power was in *Bédard v. Dawson*, a decision from 1923 cited approvingly in *Chatterjee*.⁵⁹ In the *Bédard* case, a landlord petitioned the court for an injunction to remove a tenant from his premises for continuing to operate a “disorderly house”.

The S.C.C. considered *Bédard* to be relevant because “[t]he legislation impugned seems to be aimed at suppressing conditions calculated to favour the development of crime rather than at the punishment of crime.”⁶⁰ The *Bédard* decision is inapplicable in this context. Whereas *Chatterjee* concerned the forfei-

⁵⁵ *Chatterjee*, *supra* note 6 at para. 40.

⁵⁶ See e.g. *Schneider v. British Columbia*, [1982] 2 S.C.R. 112.

⁵⁷ See e.g. *Prince Edward Island (Secretary) v. Egan*, [1941] S.C.R. 396.

⁵⁸ Consider *R. v. Westendorp*, [1983] 1 S.C.R. 43. Consider also *Nova Scotia (Board of Censors) v. McNeil*, [1978] 2 S.C.R. 662.

⁵⁹ *Bédard v. Dawson*, [1923] S.C.R. 681 [*Bédard*].

⁶⁰ *Chatterjee*, *supra* note 6 at para. 26.

ture of property to the public treasury, *Bédard* concerned a private action, because the statute merely expanded who may bring the (nuisance) claim to include non-abutting and non-affected property holders. Any restraint on the building was temporary, meaning no physical property was forfeited *per se*.⁶¹ The Court's endorsement of *Bédard* to support a move from a temporary restraint in a private action to crime suppression to recognizing all forms of civil consequences for unlawful acts to validating civil forfeiture as a valid exercise of provincial powers was, therefore, unsupported and illogical.

Turning to the issue of double aspect, although this section argues that the Court's finding that the matter of the *Civil Remedies Act, 2001* was incorrectly characterized as falling validly within provincial legislation, the characterization of this legislation as addressing a matter with a double aspect does not meet the standard set out in the jurisprudence either.⁶² In some respects, forfeiture may have a double aspect (criminal law purposes and property and civil rights purposes). However, in finding a double aspect, the relative importance of the two features must not be so sharp,⁶³ i.e., it is not clear where one zone of authority ends and another begins.⁶⁴ With regard to the *Civil Remedies Act, 2001*, however (and unlike overlaps of one or two provisions of larger schemes),⁶⁵ the statute completely overlaps with the *Criminal Code* provisions, with the exception of for-

⁶¹ The right to use and enjoy the building (as set out in the lease) was extinguished for a period of time not exceeding one year.

⁶² For a discussion of the "double aspect doctrine" see Hogg, Peter, *Constitutional Law of Canada*, 5th ed. (Toronto: Carswell, 2007) at 15-12 – 15-13.

⁶³ *Ibid.*, citing Lederman, W.R., "Continuing Canadian Constitutional Dilemmas" (Toronto: Butterworths, 1981) at 244.

⁶⁴ Consider the matter of the environment, see *R. v. Crown Zellerbach*, [1988] 1 S.C.R. 401.

⁶⁵ Consider *Multiple Access v. McCutcheon*, [1982] 2 S.C.R. 161.

feiture for breaches of provincial offences. This is not a case of overlap at the margins. The issue of conflict is discussed further in Chapter 3.

No Resemblance to Civil Law

Even when the legislature enacts the law for a proper purpose, the second stage of the analysis requires that courts consider whether the matter addressed by the legislation falls within the enacting legislature's constitutional authority.⁶⁶ Although the Supreme Court of Canada characterized the procedural provisions of the *Civil Remedies Act, 2001* as "civil" in nature, few of the provisions actually resemble conventional civil procedures. The Court accepted the AG's civil characterization:

... civil mechanisms include the seizure as forfeit of goods and conveyances;

... the CRA in a sense operates as a substitute for civil litigation by victims against criminal offenders, a notoriously difficult and costly exercise;

the dominant feature of the CRA is property and civil rights.⁶⁷

It is because forfeiture legislation is directed at purported criminals and alleged unlawful conduct that the state has departed from traditional civil procedures. Failure to recognize this constituted the Court's second analytical error.

⁶⁶ *Supra* note 39.

⁶⁷ *Chatterjee*, *supra* note 6 at paras, 25, 28-29.

Neither the *in rem* nature (what the Court called a “property-based authority”) of the proceeding, nor the civil standard of proof is determinative of a “civil” procedure, as both concepts are found in the criminal law as well. At least one American legal scholar has noted that the *in rem* characterization of the proceeding is simply a holdover from maritime claims when the state did not have territorial jurisdiction over the defendants.⁶⁸ The *Criminal Code* also relies on *in rem* forfeiture when, for example, the person from whom property was seized has died or absconded.⁶⁹ Even so, the exercise of *in rem* jurisdiction is unnecessary and anachronistic, as Canadian courts could exercise *in personam* jurisdiction over the owner or possessor of the implicated property, without having to worry about recourse to a foreign court. The civil standard of proof is also neither indicative nor determinative of the civil nature of the proceeding. Under the *Criminal Code*, courts will order forfeiture of property tainted by crime on the balance of probabilities following a conviction.⁷⁰

While the statute imposes a civil standard of proof, apart from the application form, that is the only “civil law” procedural element incorporated into the statute. It does not deploy other tools of the civil law to mitigate the punitive effects of the provisions, a discoverability rule or a mitigation principle. Consider a hypothetical situation in which a person profited from an illegal transaction that occurred over a decade ago, but instead of pursuing a life of crime, she reinvested the property into a business.⁷¹ The statute would permit the AG to confiscate the

⁶⁸ See Piety, Tamara, “Scorched Earth: How Expansion of Civil Forfeiture Doctrine Has Laid Waste to Due Process” (1991) 45 U. Miami L. Rev. 911 at 935-942. Piety notes that even in maritime law, the use of *in rem* proceedings has fallen into disrepute.

⁶⁹ *Criminal Code*, *supra* note 2, s. 462.38(1).

⁷⁰ *Ibid.*, s. 462.37.

⁷¹ Minson, Jeffrey, “Civil Prudence, Sovereignty and Citizenship in the Justification of Civil Forfeiture” (2006) 29 U.N.S.W.L.J. 61 at 61.

business as the traceable proceeds of the crime. The provincial statutes provide no framework to implement less severe or temporary remedies, such as a lien on the property or a mandatory reporting requirement, which may be appropriate when the deleterious consequences of forfeiture exceed the gains by the state.

Furthermore, the legislation allows for forfeiture of the proceeds of crime, which includes the capital property or instruments used in the commission of the unlawful act. Forfeiture, therefore, is not limited to the profits of crime or wrongful gains, as in a conventional civil action for damages. The forfeiture of instruments of unlawful activity allows the court to impose a crude form of tracing which does not allow a respondent to preserve a claim to the capital property or the instrument.⁷² The provincial legislation provides no mechanism to assess the degree to which a piece of property had been used for unlawful ends.

The procedures that permit the pre-hearing restraint of property do not resemble the procedures contained in the civil law either, largely because the respondent is an alleged criminal or wrongdoer. The departure from traditional civil procedure is attributable to the nature of the defendant as a purported wrongdoer.

In private litigation, the plaintiff may petition a court *ex parte* prior to the trial for a *Mareva* injunction to restrain the defendant's property to prevent the defendant from removing the property from the jurisdiction when removal would render the final judgment unenforceable in practice.⁷³ *Mareva* injunctions are often referred to as exceptional remedies, because the issuing court's decision will

⁷² Boudreaux, Donald, and Pritchard, Adam, "Civil Forfeiture and the War on Drugs: Lessons from Economics and History" (1996) 33 San Diego L. Rev. 79 at 124.

⁷³ See *Mareva Compania Naviera SA v International Bulk Carriers SA*, [1980] 1 All E.R. 213.

prejudice the defendant before the conclusion of the trial.⁷⁴ According to the Supreme Court of Canada in *Aetna Financial Services v. Feigelman*, before a judge can issue an injunction effectively freezing the assets of a defendant, “the applicant must persuade the court ... that the defendant is removing or there is a real risk that he is about to remove his assets from the jurisdiction to avoid the possibility of a judgment.”⁷⁵ The applicant can also satisfy its burden by proving that “the defendant is otherwise dissipating or disposing of his assets, in a manner clearly distinct from his usual or ordinary course of business or living, so as to render the possibility of future tracing of the assets remote, if not impossible in fact or in law.”⁷⁶ Given the *ex parte* nature of the proceeding, the plaintiff must demonstrate a strong *prima facie* case on its merits. Since an injunction will result in the restraint of the defendant’s assets without giving him the right to be heard, the defendant will have occasion to challenge the injunction shortly after its issue.⁷⁷

The restraint orders codified under the provincial civil forfeiture regimes put the AG in a favourable position compared with conventional plaintiffs who petition civil court for *Mareva* injunctions. The AG need not establish a strong *prima facie* case as a condition of receiving the order. All that the AG must prove is that there is reasonable cause to believe that the property is proceeds of crime. The fact that the property could be proceeds satisfies the AG’s burden that the property could easily be dissipated.

⁷⁴ *Aetna Financial Services v. Feigelman*, [1985] 1 S.C.R. 2. The facts of that case are not relevant other than to say that the parties were involved in a contentious dispute and the defendant moved funds between its offices in several Canadian provinces.

⁷⁵ *Ibid.* at para. 29, citing *Chitel v. Rothbart* (1982), 39 O.R. (2d) 513 (C.A.) at 532-33, per MacKinnon A.C.J.O.

⁷⁶ *Ibid.*

⁷⁷ *Ibid.* at paras. 27, 30.

The provincial forfeiture schemes do not provide the same protections to the property-holder compared to private litigation. None of the statutes provide a mechanism for immediate review of the order. None compel the AG to provide immediate notice to the owner, possessor, or occupier of the property until well after the court issues the interim order. Usually, the notice period is thirty days, but in some jurisdictions, a court can extend that period.⁷⁸ This means that the AG can obtain the interim order and wait until it develops its case for the ultimate forfeiture of the property in question. Not only does that give the AG a considerable tactical advantage in the civil proceeding, but also it can operate unfairly if, upon receiving notice of the restraint order, the defendant is already in a position to dispose of the property and the AG does not proceed with its case.

If the standard for *ex parte* applications pertaining to restraints in criminal matters is applicable (e.g. a warrant), the AG could also sustain restraint orders on an exceptionally low standard including on the basis of unreliable and untested evidence (such as uncorroborated hearsay evidence).⁷⁹ The AG is under no *prima facie* duty to justify the restraint other than to establish that the property in issue could reasonably be proceeds of crime. Consider what might happen if police officers encounter “suspicious” property after executing a warrant for an innocuous offence. The discovery of the property, therefore, becomes self-justificatory grounds for the restraint. Instead of having to investigate the source of the property or the likelihood of dissipation, as a private plaintiff would do, the AG can benefit from criminal law enforcement powers to provide the grounds to substantiate the restraint pursuant to civil forfeiture legislation.

⁷⁸ For example, under the Saskatchewan statute, a court can extend the no-notice period “where there are exceptional circumstances”. *Seizure of Criminal Property Act*, 2009, S.S. 2009, c. S-46.002, s. 6(a)(ii).

⁷⁹ See Coughlan, Stephen, *Criminal Procedure* (Toronto: Irwin Law, 2008) at 67.

If the provincial restraint provisions truly represent civil procedure, then one ought to question why they depart so markedly from existing civil law. The simple answer is that civil forfeiture procedures are not conventional civil actions. While the civil courts can issue *Mareva* injunctions in a variety of civil cases (with a range of possible plaintiffs and defendants), civil forfeiture proceedings always involve the AG as plaintiff and a purported “criminal” as defendant. The rules confer an added advantage to the AG, such that it does not have to establish a risk of dissipation of the assets, nor that the balance of convenience is in its favour. The implication of criminality seems to justify the alleviation of the burden.

No Inquiry as to the Material Effects on the Criminal Law

Even when the purpose and effects of legislation fall under the authority of an enacting legislature, the legislation is nevertheless invalid when the effects on the authority of the other level of government are more than incidental.⁸⁰ As the Court noted in the *Firearms Reference*:

... overlap of legislation is to be expected and accommodated in a federal state”. Laws mainly in relation to the jurisdiction of one level of government may overflow into, or have “incidental effects” upon, the jurisdiction of the other level of government. It is a matter of balance and of federalism: no one level of government

⁸⁰ *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641 at 670. It is noteworthy that the Court has continued to reiterate that the legislature need not establish that its legislation is actually *effective*. See e.g. *Firearms Reference*, *supra* note 39 at para. 40. I accept for the purpose of argument that this legislation is indeed effective, although as was suggested in Chapter 1, criminologists and economists doubt the effectiveness of this regime as a crime-control measure. While the Court stated that “[t]he practical (and intended) effect is also to take the profit out of crime and to deter its present and would-be perpetrators,” the AG of Ontario presented no evidence on the effectiveness of its forfeiture regimes. *Chatterjee*, *supra* note 6 at para. 23.

is isolated from the other, nor can it usurp the functions of the other”⁸¹

In *Chatterjee*, the Court failed to recognize several significant implications of provincial civil forfeiture laws on the criminal law and the criminal justice system. This constituted a third analytical error.

Blumenson and Nilson explain that civil asset forfeiture regimes distort law enforcement objectives by targeting criminal assets rather than criminal conduct.⁸² They observe that in the U.S., a prosecution does not accompany most asset seizures. Furthermore, the authors note that prosecutors are inclined to accept forfeiture in lieu of prosecuting the underlying act.⁸³ While admittedly, the provincial statutes depart from their U.S. counterparts by not giving law enforcement agencies a direct share of the proceeds of crime, provincial law enforcement agencies still benefit financially from the confiscation of assets. The economic incentives may not have been obvious to the Court when the *Chatterjee* decision was made; however, as provincial law enforcement becomes more adept at identifying large assets susceptible to forfeiture, they may in turn receive a greater share of the recovered assets.

By allowing the provinces to regulate forfeiture, they can realign their law enforcement priorities to focus more effort on forfeiture and less on conventional law enforcement.⁸⁴ In several U.S. states for example, where forfeiture gains are paid directly to law enforcement and prosecutorial coffers, there is a direct incen-

⁸¹ *Firearms Reference*, *supra* note 39 at para. 26.

⁸² Blumenson, Eric, and Nilson, Eva, “Policing for Profit: The Drug War’s Hidden Economic Agenda” (1998) 65 U. Chi. L. Rev. 35 at 40, 77.

⁸³ *Ibid.* at 50.

⁸⁴ Blumenson and Nilson, *ibid.*, at 88.

tive for police and district attorneys to pursue more lucrative crimes, as opposed to non-financial crimes.⁸⁵ While Canadian provincial statutes do not remit forfeited funds back to law enforcement accounts directly, the success of a police force in confiscating property could still influence policy decisions regarding the emphasis placed on the enforcement of particular crimes (e.g., drug crimes) and the allocation of funding for certain units of the police forces. Although the issue of how the money is allocated is not determinative of the statute's constitutionality, it is certainly relevant to an effects analysis.

Civil forfeiture also waters down the role of the presumption of innocence in protecting a person from the stigma of criminal or quasi-criminal liability for two reasons. The presumption of innocence undeniably lies at the core of the criminal law.

First, the stigma or social consequences of a forfeiture proceeding may have harsher effects than a criminal proceeding, for example, when the forfeiture involves a family home, business, or possibly even a license (professional or otherwise).⁸⁶ In some situations, the consequences of forfeiture may be as severe as, or even worse than, the punishment for the crime.

Second, while the Supreme Court of Canada carved out an exception to the presumption of innocence in *R. v. Wholesale Travel Inc.* by not requiring that the AG prove *mens rea* or mental culpability beyond reasonable doubt in regulatory matters, those considerations do not apply in the context of forfeiture. In

⁸⁵ See Torny, Michael, "Forfeiture Laws, Practices and Controversies in the US" (1997) 5 Eur. J. Crime, Crim. L. & Crim. Just. 294 at 305. See also Krzystek, Marcel, "The Recent Congressional Reforms of Federal Civil Forfeitures" (2000) 9 Kan. J.L. & Pub. Pol'y 669 at 672.

⁸⁶ *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154 at 185 [*Wholesale Travel*] (in which the Court discussed the stigma that attaches to the offence of false or misleading advertising, as opposed to the offence of theft).

Wholesale Travel the underlying offence of false advertising was based on carelessness (and not dishonesty), and therefore, proof of *mens rea* was not constitutionally required to meet the standard of a deprivation of liberty in accordance with the principles of fundamental justice.⁸⁷ The underlying acts leading to forfeiture could very well include morally blameworthy conduct, and therefore, it is incongruous that a person be punished by the state for those same acts on a different standard of proof, simply because the punishment does not involve imprisonment.

In addition, second and third generation civil forfeiture statutes adopted in foreign states have imposed reverse onus requirements on persons proven to have engaged in certain unlawful acts within a prescribed period to prove that they did not acquire their property through these acts (so called criminal lifestyle provisions).⁸⁸ While Canadian provincial forfeiture statutes do not go that far yet, they nevertheless abate the AGs' burden of having to prove that the property was tainted by a particular offence.⁸⁹ While the degree of severity of the underlying acts and the prescription periods will differ among these statutes, by conceiving these statutes as civil remedies legislation, courts will not scrutinize the unfairness to the person subject to the forfeiture order. One Australian state court of appeal went so far as to state, "[t]o the extent that the operation of the Act is or remains unfair that is a matter for Parliament to remedy."⁹⁰

Civil forfeiture also places into question the finality of the criminal process. The Court in *Chatterjee* did not consider the possible threat of forfeiture by

⁸⁷ *Ibid.* at 185.

⁸⁸ See e.g. *New South Wales Crime Commission v. Kelaita*, [2008] NSWCA 284.

⁸⁹ *Chatterjee*, *supra* note 6 at para. 47.

⁹⁰ *Ibid.* at para. 60.

the provincial Crown post-conviction, when the sentencing judge does not address the issue of forfeiture in his or her judgment. As noted by the intervening Criminal Lawyers' Association in the hearing before the Ontario Court of Appeal in *Chatterjee*, the continued threat of a civil forfeiture procedure lingering post-conviction will complicate plea bargaining.⁹¹ As a matter of trial practice, therefore, criminal defence lawyers should ensure that plea bargains negotiated for their clients contain an acknowledgement that the sentencing judge considered, but denied forfeiture (or imposed a \$1 forfeiture order), in order to prevent the provincial AG from initiating collateral proceedings. An order as to forfeiture would be *res judicata* and the issue estoppel doctrine would preclude a further hearing on this matter.

Implied Rights as Limits on Government Authority

Finally, the Court in *Chatterjee* failed to consider the possibility that the provincial forfeiture regimes could exceed the limits of their forfeiture powers under the “implied bill of rights” doctrine. The Court did not ask whether the provincial power to impose any civil consequence for any unlawful act is constitutionally valid. Another way of rephrasing the question is: given the threat to a person’s ability to own, receive, and transfer property, does the *Civil Remedies Act, 2001* exceed the property and civil rights power of the provincial government under the *Constitution Act, 1867* (and not under the *Canadian Charter of Rights and Freedoms*)?⁹² Granted, the implied bill of rights was not argued before the Court. But had the doctrine been properly considered, the Court might have determined that

⁹¹ *Ontario (Attorney General) v. Chatterjee*, 2007 ONCA 406 at para. 35.

⁹² *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Canadian Charter of Rights and Freedoms*].

certain aspects of the forfeiture power lie outside the provincial power over property and civil rights (and perhaps other aspects lie outside the jurisdiction of both levels of government altogether).

This aspect of the pith and substance analysis remains controversial for two reasons. First, the source of the inquiry derives from largely from the preamble of the *Constitution Act, 1867* expressing the similarity between the Canadian and U.K. constitutions.⁹³ Second, if the implied bill of rights doctrine is pushed to its furthest extreme, meaning that there are some matters that possibly could fall completely outside the jurisdiction of either level of government, the inquiry would seemingly conflict with the language of section 91 (providing that Parliament has jurisdiction over all matters not coming within the classes of subjects assigned exclusively to the legislatures of the provinces) and the doctrine of Parliamentary supremacy. However, during the 1950s and 1960s,⁹⁴ the Supreme Court of Canada had considered the implied bill of rights as a legitimate restraint on the legislative authority of the provinces.

In the implied bill of rights cases, the courts considered whether the provincial legislation in issue entrenched on an essential right that predates and is unaffected by the division of powers. The term “essential” captures the characterization given to those rights by the judges of the Court:

⁹³ The preamble states as follows: “Whereas the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, *with a Constitution similar in Principle to that of the United Kingdom...*”. *The Constitution Act, 1867 (The British North America Act, 1867)*, 30 & 31 Vict. c. 3 (U.K.), preamble. Emphasis added.

⁹⁴ See Hogg, *supra* note 62 at 34-9 – 34-13.

This constitutional fact is the political expression of the primary condition of social life, thought and its communication by language. Liberty in this is little less vital to man's mind and spirit than breathing is to his physical existence. As such an inherence in the individual it is embodied in his status of citizenship.⁹⁵

From 1760, therefore, to the present moment religious freedom has, in our legal system, been recognized as a principle of fundamental character; and although we have nothing in the nature of an established church, that the untrammelled affirmations of religious belief and its propagation, personal or institutional, remain as of the greatest constitutional significance throughout the Dominion is unquestionable.⁹⁶

Nevertheless, the implied bill of rights is not a rights-conferring doctrine, but rather it recognizes a zone of liberty or freedom from state authority, thereby indirectly protecting a person's rights. The Court in *Chatterjee* even cited some of the implied bill of rights cases, but failed to turn its mind to how this line of jurisprudence might apply to limit the provinces' power to order forfeiture. It should be noted that the parties in *Chatterjee* did not plead the implied bill of rights.

Certain matters in relation to property and civil rights lie outside the provinces' powers under section 92(13) of the *Constitution Act, 1867*.⁹⁷ In *Switzman v. Elbling*, for example, the majority of the Supreme Court of Canada concluded

⁹⁵ *Switzman v. Elbling*, [1957] S.C.R. 285 at 306-307 [*Switzman*]

⁹⁶ *Saumur v. City of Quebec*, [1953] 2 S.C.R. 299 at 327 [*Saumur*].

⁹⁷ This is not inconsistent with Parliament's own view on pre-existing rights. Despite the impotence of the *Canadian Bill of Rights*, S.C. 1960, c. 44, the statute contains language that references these concepts expressly. For example, the preamble provides that "the Canadian Nation is founded upon principles that acknowledge the supremacy of God, the dignity and worth of the human person and the position of the family in a society of free men and free institutions" and section 1 declares that certain rights, including the right to property, have existed and will continue to exist in Canada.

that a provincial statute that authorized the eviction of persons propagating communism was *ultra vires* as the direct regulation of speech falls outside the scope of the property and civil rights power.⁹⁸ Justice Douglas Abbott held that if any legislature would be empowered to directly limit or control expressive content, Parliament would have that power using the criminal law or its general peace, order, and good government power, although the judgment suggests that censorship law lie outside the powers of the government altogether.⁹⁹

Furthermore, in *Saumur v. City of Quebec*, a majority of the Court struck down a provincial law that required the chief of police to approve the dissemination of pamphlets and other materials. The Court held that because of the direct effects on the exercise of religious belief and expression, these rights might be restrainable using the criminal law.¹⁰⁰ Likewise, the judgment insinuates that legislation enacted with the purpose of suppressing religion might lie altogether beyond the power of the state.

The *Civil Remedies Act, 2001*, if left unchecked, could be used to bankrupt a person or even limit a person's capacity to access future government entitlements, such as welfare or social housing, making that person unable to exercise his or her other constitutional rights.¹⁰¹ All of that is possible without having to prove beyond reasonable doubt that the target of the forfeiture committed a crime. As Susan Klein has noted, courts have difficulty distinguishing between sanctions that are purportedly civil, but which impose severe implications on individual

⁹⁸ *Switzman*, *supra* note 95.

⁹⁹ *Ibid.* at 328, per Abbott J.

¹⁰⁰ *Saumur v. City of Quebec*, [1953] 2 S.C.R. 299 at 370, per Locke J., concurring.

¹⁰¹ The analysis in this sub-section, while focused on human persons, is not necessarily limited to said persons. It is conceivable that civil forfeiture legislation could affect the present (and possibly future) rights and entitlements of legal persons as well.

rights.¹⁰² What would stop the legislatures from enacting legislation that compels forfeiture of future earnings on the basis of pure civil liability or from barring people from engaging in a particular type of trade?

Like the implied bill of rights cases discussed above involving political expression, religious freedom, rights associated with participation in the democratic process, the *Civil Remedies Act, 2001* and its sibling statutes could also impact a pre-existing right. In the context in this particular discussion, that right is the “civil capacities of citizenship”.¹⁰³

It is strongly arguable that included in (or closely related to) the concept of the civil capacities of citizenship is the right to be a *person in commerce*.¹⁰⁴ This would subsume the right to work and to acquire and possess property. This right would not guarantee the right to particular property (although perhaps it might form the basis of a positive entitlement to a minimum standard of living)¹⁰⁵, it would also include the right to own and divest goods both in present and in future. A person who is left impoverished through civil forfeiture legislation could, in all likelihood, be unable to rebuild his or her life (at least in a lawful manner). Any statutory provision that purports to effectively extinguish the right to be a person in commerce would, therefore, offend this constitutional principle. Limitation on the civil capacity of citizenship, therefore, should occur at a minimum through the criminal law or another federal power.

¹⁰² Klein, *supra* note 50 at 708.

¹⁰³ *Switzman v. Elbling*, *supra* note 98 at 303.

¹⁰⁴ Art. 1 of the *Civil Code of Québec*, S.Q. 1991, c. 64 defines this term as a “juridical personality”.

¹⁰⁵ This issue is canvassed in more detail in Chapter 7.

Justice Rand's decision in *Winner v. S.M.T. (Eastern) Ltd.* supports that very proposition.¹⁰⁶ The respondent, S.M.T., complained that the plaintiff, Winner, was in breach of his carrier license after he had allowed passengers to board and disembark from buses that he operated in New Brunswick. The Supreme Court of Canada accepted the plaintiff's argument that the applicable provincial law was *ultra vires* as it related to an interprovincial undertaking. Rand also held that the province is not constitutionally permitted to regulate property and civil rights so as to deprive a person of the capacity to remain in the province and work there. Rand placed the capacity for civil citizenship alongside the freedom of speech and religion as falling outside the regulatory powers of the state.¹⁰⁷

Courts have also linked the right to work and to own property to civil citizenship in cases that involved prohibitions by provincial legislatures impacting Chinese and Japanese immigrants to Canada. In *Union Colliery Co. v. Bryden*, for example, the Privy Council struck down provincial legislation that prohibited mining companies from employing persons of Chinese descent, including naturalized citizens.¹⁰⁸ While other courts, notably the Supreme Court of Canada in *R. v. Quong Wing*,¹⁰⁹ limited the scope of the Privy Council's holding by distinguishing the facts of the cases, the *Union Colliery* case did impact the decisions of other courts by leading to the invalidation of several anti-immigrant statutory provisions involving restrictive conditions on a person's economic affairs.¹¹⁰

¹⁰⁶ *Winner v. S.M.T. (Eastern) Ltd.*, [1951] S.C.R. 887, var'd [1954] A.C. 541 (U.K.P.C.).

¹⁰⁷ Lajoie, Andree, "The Implied Bill of Rights, the Charter and the Role of the Judiciary" (1995) 44 U.N.B.L.J. 337 at 337.

¹⁰⁸ *Union Colliery Co. of British Columbia v. Bryden*, [1899] A.C. 580 (U.K.P.C.).

¹⁰⁹ *R. v. Quong Wing*, [1914] S.C.R. 440.

¹¹⁰ See e.g. *Reference re: Act to validate and confirm orders in council and provisions relating to the employment of persons on Crown property (British Columbia)*, [1922] S.C.R. 293.

Even the infamous case of *Roncarelli v. Duplessis* reflects the notion that the exercise of a provincial power cannot civilly incapacitate a person.¹¹¹ In that case, the then AG of Quebec Maurice Duplessis revoked Frank Roncarelli's liquor license in response to Roncarelli's conduct as a surety for fellow Jehovah's Witnesses who had been arrested in Montreal for distributing religious material. Although Roncarelli's lawyer, and famous Canadian constitutional law scholar, Frank Reginald Scott, argued the case on administrative law grounds, the judges in the majority who rebuked Duplessis' conduct, used the same language as in the implied bill of rights cases. Justice Rand held, for example, "This [action] purports to divest his citizenship status of its incident of membership in the class of those of the public to whom such a privilege could be extended."¹¹²

Turning back to the effects of civil forfeiture laws on a person's civil capacities for citizenship, it is noteworthy that the consequences of civil asset forfeiture under the provincial statutes can in some cases be more severe than the liquidation of an estate in a bankruptcy proceeding. Although title to nearly all of a bankrupt's property will transfer to the trustee-in-bankruptcy, courts have adopted a policy of avoiding rendering a person functionally destitute and dependent upon state assistance.¹¹³ Furthermore, the *Bankruptcy and Insolvency Act* limits which property can be seized to pay unsecured creditors,¹¹⁴ such as funds in an unpledged Registered Retirement Savings Plan.¹¹⁵ Each province also defines a bare

¹¹¹ *Roncarelli v. Duplessis*, [1959] S.C.R. 122 [*Roncarelli*]. For a discussion of the historical context surrounding the *Roncarelli* and *Switzman* cases, see Djwa, Sandra, *The Politics of the Imagination: A Life of F.R. Scott* (Vancouver, BC: Douglas & McIntyre, 1987) at 297 and following.

¹¹² *Roncarelli*, *ibid.*, at 141.

¹¹³ *Cole (Re)*, [1995] B.C.J. No. 1280, 32 C.B.R. (3d) 213 (S.C.) (QL) at para. 58, citing Fletcher, Ian, *The Law of Insolvency*, 1st ed. (London: Sweet & Maxwell, 1990) at 188.

¹¹⁴ *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, s. 67.

¹¹⁵ *Income Tax Act*, R.S.C. 1985, c. 1 (5th Suppl.), s. 146.

minimum property holding that is exempt from seizure.¹¹⁶ It is noteworthy that the AG could still seek forfeiture of this exempted property if it can establish that the property was an instrument or proceeds of unlawful activity, irrespective of the solvency of the forfeiture target. The language of the civil forfeiture statutes could allow a court to render an individual completely destitute leaving him or her functionally incapable of accumulating wealth in a lawful manner or otherwise completely dependent upon the state.

Before concluding this chapter, it is important to note that in *Attorney General for Canada and Dupond v. City of Montreal* the Supreme Court of Canada endorsed Justice Jean Beetz's view that no right or freedom is beyond the scope of the *Constitution Act, 1867*.¹¹⁷ This conclusion, however, can no longer be supported in light of the Court's endorsement of unwritten constitutional principles in the *Secession Reference*¹¹⁸ and in light of a natural law understanding of rights based on the concept of human dignity,¹¹⁹ which the Court itself has adopted. As Peter Hogg has noted, in *OPSEU v. Ontario*, Justice Beetz seemingly reversed the position he took in *Dupond* holding, "legislative bodies ... must conform to the basic structural considerations [referring to pre-existing rights] and can in no way override them."¹²⁰ Hogg, however, is critical of the continued application of the doctrine in light of the enactment of the *Charter*.¹²¹ While constitutional principles and pre-existing rights were never singularly justiciable

¹¹⁶ For example, in Ontario, a bankrupt is entitled to exempt a motor vehicle valued at up to \$5000 from seizure in a bankruptcy proceeding. *Executions Act*, R.S.O. 1990, c. E-24, s. 2.6.

¹¹⁷ *Attorney General for Canada and Dupond v. City of Montreal*, [1978] 2 S.C.R. 770.

¹¹⁸ *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 [*Secession Reference*].

¹¹⁹ See e.g. *R. v. Oakes*, [1986] 1 S.C.R. 103 at 136.

¹²⁰ Hogg, *supra* note 62 at 34-12, citing *OPSEU v. Ontario*, [1987] 2 S.C.R. 2 at 57.

¹²¹ *Ibid.* at 34-13.

grounds to invalidate legislation, they can nevertheless inform a constitutional interpretation of legislation on the basis of a recognized ground, such as the division of powers.

Conclusion

In conclusion, this chapter reviewed the policy reasons and legal bases for the move by the provincial legislatures to the enactment of civil forfeiture regimes. It then critiqued the Supreme Court of Canada's affirmation of their constitutionality on division of powers grounds by unpacking the Court's conclusions and by examining the relationship between constitutional powers and rights. The next chapter will focus in more detail on the interplay between the federal and provincial regimes, highlighting how the provincial regimes allow for the exercise of extensive uncontrolled discretion on the part of the provincial AGs.

Abjectly characterizing forfeiture as a civil process invites competition between lawmakers to enact more draconian legislation. This is exactly what has happened in Australia, as state legislatures continue to enact and amended these laws which broaden the scope of police powers, enlarge the scope of restraint and forfeiture, broaden management provisions, and reduce procedural safeguards.¹²²

Furthermore, without having to establish that legislation actually reduces or prevents crime, it is possible to recast almost any piece of legislation as "crime control". The Supreme Court of Canada has already recognized a multitude of different measures as crime control laws, including for example, preventative de-

¹²² Consider *Criminal Assets Recovery Act* 1990 (N.S.W.); *Crime (Confiscation of Profits Act)* 1993 (Tas.); *Compensation Act* 1997 (Vict.) as amended 5 December 2008; *Criminal Property Confiscation Act* 2000 (West. Aus.); *Criminal Proceeds Confiscation Act* 2002 (Queens.); *Criminal Property Forfeiture Act* 2002 (N. Terr.); *Criminal Assets Confiscation Act*, 2005 (S. Austr.).

tention for drug-addicted people¹²³ and the suppression of peaceful protests.¹²⁴ By allowing civil regulation of crime control, the courts have permitted the provinces to hinder a person's autonomy without having to justify the infringement with a criminal law standard.

Several American authors have suggested that courts recognize a category of hybrid actions to resolve some these very tensions.¹²⁵ The recognition of a hybrid category would be consistent with the Supreme Court of Canada's jurisprudence that recognized strict liability offences, which transfer the burden of proving fault to the defendant. As in the regulatory context, when the punishment for particular conduct becomes more severe, the protections afforded by the state successively increase. The starting point, however, should be the criminal law, with reductions in evidentiary and procedural protections on an "as justified" basis, not as the default position. Applied to forfeiture, when the degree of forfeiture increases, so should the degree of procedural and evidentiary protection. This would do well to ensure that the presumption of innocence is not undermined simply by using generic dichotomies to categories legal problems.

¹²³ *Schneider v. The Queen*, [1982] 2 S.C.R. 112

¹²⁴ *Dupond*, *supra* note 117.

¹²⁵ See Klein, *supra* note 50 at 720; See also Mann, Kenneth, "Punitive Civil Sanctions: The Middleground between Criminal and Civil Law" (1992) 101 Yale L.J. 1795 at 1813 and following; See also Slobogan, Christopher, "The Civilization of the Criminal Law" (2005) 58 Vand. L. Rev. 121 at 122.

Chapter 3

Paramountcy, Liberty, and the Restraint of Property

This chapter explores whether the presence of two valid sets of forfeiture laws – one provincial, the other federal – can operate concurrently. It also discusses the consequences of allowing a broader provincial scheme to operate, notwithstanding greater restrictions imposed on the powers of the federal and provincial Attorneys General (“AG”)¹ to pursue, and on the courts to order, forfeiture under the federal scheme as set out in the *Criminal Code*.²

By not looking more closely into the paramountcy issue in *Chatterjee v. Ontario (Attorney General)*, particularly the restraint order provisions of the legislation, the Supreme Court of Canada upheld a provincial scheme that confers nearly untrammelled discretion on the AG of Ontario to try to restrain and forfeit a person’s property, even without proof of an underlying criminal act beyond reasonable doubt.³ The Court failed to apply its own approach to the paramountcy doctrine correctly by not recognizing that the provincial regime effectively rendered the forfeiture provisions in the *Criminal Code* useless, including the protections afforded to respondents through these provisions and through the criminal law generally. The *Chatterjee* decision renders questionable whether paramountcy will continue to be a viable ground to restrain government authority and help pre-

¹ Unless otherwise stated, “AG” refers to both the AG of Canada and the provincial AGs.

² *Criminal Code*, R.S.C. 1985, c. C-46.

³ *Chatterjee v. Ontario (Attorney General)*, [2009] 1 S.C.R. 624 [*Chatterjee*].

serve a domain of liberty or freedom left unregulated by federal law.⁴ The idea that paramountcy works to preserve a space free of federal regulation is one that is developed more fully in the chapter below.

The first section of the chapter places the provincial and federal regimes in juxtaposition to show how the provisions of the provincial regimes have expanded the provinces' and the courts' authority to restrain and forfeit property. The civil forfeiture regimes enacted by provinces have bifurcated the process for confiscating property used in the commission of an offence or obtained as proceeds of one. The comparison focuses particularly on the restraint order provisions, in order to show more comprehensively how the provincial regimes were designed to work around the restraints imposed by the criminal law, apart from simply lowering the burden of proof and relaxing the rules of evidence on forfeiture (which were discussed in Chapter 2). The analysis could be repeated for the forfeiture provisions as well, but the analysis of the restraint order provisions presents a clearer picture of the issue.

The second section then outlines the legal framework for the paramountcy doctrine, which provides the legal ground to support the claim that the provincial regimes ought not to operate in this context and that litigants should get the benefit of the stricter procedural and evidentiary rules set out in the criminal law. That section also applies the three different approaches to resolving paramountcy problems developed by the Supreme Court of Canada to the situation at hand to demonstrate that, without a deeper consideration of the purposes of each regime and

⁴ Although one case might be considered to be an "outlier", given the few recent pronouncements by the Court on the paramountcy doctrine, each case imports a greater degree of significance. Furthermore, since *Chatterjee* represents such a significant departure from previous jurisprudence, for that reason alone it merits serious consideration as a "re-aligning" case in this area of constitutional law.

jurisprudential development of the paramountcy doctrine itself, the Court was easily swayed by the argument that no conflict between the two regimes exists. The Court derived a generalized principle of detaching civil consequences from unlawful acts from a set of paramountcy cases that do not stand for such a broad proposition of law.

The third section discusses the analytical errors in the Court's application of the contemporary approach for paramountcy in *Chatterjee* and then it outlines the implications of those errors on individuals. As further explored in this section, a narrow conceptualization of the paramountcy doctrine is incompatible with other constitutional principles such as the rule of law and the control of discretion. The chapter concludes with a brief discussion of policy recommendations and places the arguments in this chapter within the larger intellectual project developed in this text.

Comparing the Two Regimes

Federal regulation over forfeiture is inescapable. The criminal law must deal with property matters that arise throughout the criminal process, if only to manage what happens to evidence following the conclusion of a criminal trial. Parliament has included measures in the *Criminal Code* since 1892 that pertain to the forfeiture of property tainted by crime.⁵ As discussed in Chapter 1, Parliament has also

⁵ *Criminal Code, 1892*, S.C. 1893, c. 32, s. 569. Furthermore, Parliament has committed itself by treaty to implement measures to restrain and confiscate property tainted by crime. See also *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* (1988 Vienna Convention), 1583 UNTS, CTS 1990/42, online: <http://www.unodc.org/pdf/convention_1988_en.pdf>.

amended the Code on several occasions to expand and define the forfeiture regime.

Generalized provincial regimes that regulate the forfeiture of tainted property are novel to Canadian law. As shown in Figure 2 below, the newly enacted provincial civil forfeiture schemes have extended the scope of the provincial AGs' authority to restrain and confiscate property beyond the powers conferred to those AGs by the *Criminal Code*.

The comparison in this section will provide additional focus on the restraint order and property management rules, which were discussed only summarily in the previous chapters. It is through the comparison of the restraint provisions that the scope of interference on a person's liberty and property rights truly becomes apparent. The provincial regimes allow the provincial AGs to freeze a much larger array of property, with a lower standard of proof, and without the same degree of responsibility for the property as set out in the *Criminal Code*.

It is important to recall that since 1989, the *Criminal Code* has included provisions allowing courts to order that property be restrained until a hearing occurs to determine its disposition.⁶ In money-laundering cases, for example, the provincial AGs can petition a court to freeze property "in respect of which there are reasonable grounds to believe that an order of forfeiture may be made."⁷ Provincial forfeiture legislation also includes restraint and management provisions. Although as Figure 2 demonstrates, there are notable differences between the fed-

⁶ *Criminal Code*, *supra* note 2, s. 462.33. See also *Proceeds of Crime Act*, S.C. 1988, c. 51. It is important to note that restraint orders do not always involve the transfer of physical custody of the object to the Crown. Courts have the discretion to place legal encumbrances on the property that restrict the owner or possessor's ability to transfer the property to third parties or to use the property as collateral for a loan.

⁷ *Ibid.*

eral and provincial regimes. The facility with which the AG can obtain a restraint order and seek the confiscation of property under the provincial scheme effectively makes the federal scheme moot.

Before proceeding to analyze the differences in the regimes, it is important to understand who the relevant decision-makers are. Except for the prosecution of crimes under federal statutes and certain special provisions of the *Criminal Code*, the provincial AGs are responsible for prosecuting crimes and administering the federal and provincial forfeiture regimes.⁸ Some provincial governments have created special agencies, such as the Civil Remedies for Illicit Activities (“CRIA”) office in Ontario, to specifically administer the provincial forfeiture regimes.⁹ Every province with civil remedies legislation has a special agency responsible for the administration of that legislation. In each case, the agency reports to the provincial AG or Minister of Justice.

When a person faces prosecution, its property could become subject to two restraint or forfeiture orders, one issued under the *Criminal Code* and another issued under provincial legislation where applicable. That situation is more likely to occur when the AG of Canada (through the Public Prosecution Service of Canada) exercises jurisdiction over the prosecution. In cases where the provincial AGs conduct both the prosecution and the forfeiture, they can elect the desired regime

⁸ *Criminal Law Amendment Act, 1968-1969*, S.C 1969, c. 38, s. 2, amending *Criminal Code*, S.C. 1954, c. 51, s. 2. See also Canada, Department of Justice, *Federal Prosecution Service Deskbook*, ch. 2, online: <<http://www.justice.gc.ca/eng/dept-min/pub/fps-sfp/fpd/ch02.html>>, retrieved 6 April 2010; *The Constitution Act, 1867 (The British North America Act, 1867)*, 30 & 31 Vict. c. 3 (U.K.), s. 92(14).

⁹ See Ontario, Ministry of the Attorney General, “Backgrounder” (17 May 2007), online: <<http://www.attorneygeneral.jus.gov.on.ca/english/news/2007/20070517-cria-bg.asp>>, retrieved 24 March 2010.

under which to institute forfeiture proceedings. In that situation, collateral proceedings are more easily avoided.

Figure 2 - Comparison of the Important Restraint and Confiscation Provisions of the Criminal Code and Civil Remedies Act, 2001 (Ont.)

Process	<i>Criminal Code</i>	<i>Civil Remedies Act, 2001 (Ont.)</i>
Property subject to restraint	Any property, benefit or advantage, within or outside Canada, obtained or derived directly or indirectly as a result of the commission in Canada or elsewhere of an indictable offence (s. 462.3 (1)) Any property, within or outside Canada, that is used or intended to be used that is used in any manner in connection with the commission of an indictable offence (s. 2)	Real or personal property, and includes any interest in property acquired, directly or indirectly, in whole or in part, as a result of an offence under an Act of Canada, Ontario or another province or territory of Canada, or elsewhere (s. 2)
When restraint can occur	Reasonable grounds to believe that there exists any property in respect of which an order of forfeiture may be made, in respect of a designated offence alleged to have been committed within the province in which the judge has jurisdiction (s. 462.33(3))	Reasonable grounds to believe that the property is proceeds of unlawful activity (s. 3(2))
Notice	A judge may require that notice be given and may hear from interested parties before the issuance of the warrant unless that would result in the disappearance, dissipation or reduction in value of the property (s. 462.32(5))	The AG may proceed for 30 days without notice unless this period is extended by the court under exceptional circumstances (s. 4(3))
Limits on powers of interim manager	The interim manager must apply to a court for a destruction order and must give notice of reasonable duration (s. 462.331(4)) The owner may be permitted to examine property subject to such terms as appear to the judge to be necessary or desirable to	None

ensure that the property is safeguarded and preserved (s. 462.34(3))

The court may require the AG to provide an undertaking for costs or damages as a result of the restraint (s. 462.32(6))

Liability for negligence	The provision imposes a duty to take reasonable care (s. 462.32(4))	The provision grants immunity from liability for good faith conduct (s. 20(1))
Conditions for forfeiture	The provision imposes mandatory forfeiture (ss. 462.37(1), 490.1(1))	The provision imposes mandatory forfeiture unless it would clearly not be in the interests of justice (s. 3(1))
	The court may order the payment of a fine as an alternative to forfeiture (s. 462.37(3))	
	The court must take into account special factors for dwelling-houses (s. 490.41(1))	
Standard of proof for forfeiture	If convicted, then it is proof on a balance of probabilities that property is proceeds of crime, otherwise it is proof beyond a reasonable doubt (s. 462.37(1)-(2))	The balance of probabilities applies to all proceedings (s. 16)
Provisions for legal fees and other expenses	Fees may be taken from the impugned property but only as a last resort (s. 462.34(4))	Fees may be taken from the impugned property but only as a last resort (s. 5(2)(b))
	The court may grant reasonable living expenses and allow for business expenses as well.	

As Figure 2 illustrates, the design of the provincial regimes negates the need to apply the more restrictive *Criminal Code* provisions.¹⁰ The provincial

¹⁰ It is noteworthy that when the Standing Committee on Justice and Social Policy of the Ontario Legislature conducted its line-by-line review of the Ontario civil forfeiture statute, one of the observations made on record was that police departments in Ontario use the *Criminal Code* provi-

scheme, for example, confers powers on the courts to grant restraint orders for property, located anywhere in Canada, where it would be reasonable to believe that the property is proceeds or an instrument of crime. The *Criminal Code*, however, limits both the jurisdiction of the judge to restrain property and confines the scope of potentially restrainable property to proceeds and instruments of crime in relation to indictable offences.¹¹

The provincial or federal AG requesting a restraint order under the *Criminal Code* is subject to a more stringent standard of proof. A judge must be convinced that there are reasonable grounds to support a conviction beyond reasonable doubt and that, on the balance of probabilities, the property in issue is proceeds of crime. If the judge is not so convinced he or she may still grant the order where there are reasonable grounds to support a conclusion that, beyond reasonable doubt, the property is proceeds of crime. The reason for the two standards is straightforward. When police officers, or other law enforcement agents, execute a search warrant, they may have cause to believe that certain property is proceeds of

sions far less often than law enforcement personnel in other jurisdictions. Ontario, Standing Committee on Justice and Social Policy, "Committee Transcripts - Bill 30, Remedies for Organized Crime and Other Unlawful Activities Act, 2001" (22 October 2001, 16:10), Hon. Michael Bryant:

That means that if the province of Ontario is already using the federal Criminal Code tools less, it is probably going to be using them even less, I guess. In turn, I don't know where the money is going to come from to use these civil remedies, because of course if these laws aren't being enforced, then they're rendered a dead letter.

¹¹ The maximum penalty for summary conviction offences is a fine of up to five-thousand dollars and six months incarceration, unless specified otherwise. See *Criminal Code, ibid.*, s. 787(1). Furthermore, a person convicted of a summary offence is eligible for a pardon three years after having completed his sentence (as opposed to five years for indictable offences). See *Criminal Records Act*, R.S.C. 1985, c. C-47, s. 4.

crime even though the search warrant does not list that property. Otherwise, the police would be compelled to turn a blind eye to property seemingly tainted by crime.

The standard of proof to obtain a restraint order under the provincial forfeiture statutes is considerably more lenient than under the *Criminal Code*. The Ontario statute, for example, requires a judge to grant the order “if the court is satisfied that there are reasonable grounds to believe that the property is proceeds of unlawful activity.”¹² Two key differences are worth noting regarding the standard of proof. First, unlike the Code, the statute compels courts to act, leaving room for discretion only when the “interests of justice” so require, which is generally a limited restraint on judicial discretion.¹³ The statute does not define when those interests would arise and in no reported case has a court refused to grant a restraint order on that basis. Second, the provincial AG need only set out reasonable grounds to believe that the property is an instrument or proceeds of any unlawful activity.¹⁴

A comparison of the two regimes reveals other notable differences. In all instances, the provincial regime confers procedural advantages, including immunizing the provincial AG and its agents from liability for misconduct. For example, both the *Criminal Code* and several provincial regimes authorize the appointee to sell, or even dispose of, perishable property or property that has little or

¹² *Civil Remedies Act, 2001*, S.O. 2001, c. 28, s. 4(2) [formerly, *Remedies for Organized Crime and other Unlawful Activities Act*].

¹³ See e.g. *McKinlay Transport Ltd. v. Motor Transport Industrial Relations Bureau*, [1995] O.J. No. 123 (S.C.J.) at para. 15; See also *Ahmad v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 279, [2005] F.C.J. No. 359 at para. 20.

¹⁴ It is noteworthy that in the state of South Australia, the legislature adopted an even more relaxed standard: reasonable grounds to suspect that the property is an instrument or proceeds of unlawful activity. *Criminal Assets Confiscation Act, 2005*, c. 19 (S. Austr.), s. 24(1)(c).

no value. Under the Code, in the event of the destruction of property, the appointee must give notice in a manner directed by a court to allow those persons who would seek to preserve the property the opportunity to come forward.¹⁵ None of the provincial civil forfeiture regimes creates the same obligation.¹⁶ Furthermore, under at least one provincial statute (Alberta), courts may allow the provincial AG, or a person acting on his behalf, to dispose of restrained property because the property is depreciating in value or would be difficult to manage.¹⁷ No notice to the owners is required.

Another difference between the two sets of restraint provisions is the duty placed on the AG by the *Criminal Code* to provide an undertaking in damages in case the AG ultimately fails to meet its burden of proof at the forfeiture hearing. That undertaking tests the seriousness of the AG's case and provides some comfort to the court and to opposing parties that compensation will be paid should the AG's case ultimately fall through. The various provincial statutes do not contain similar provisions, but in fact several confer immunity on the provincial AG for damages arising from the restraint and management of the property in case of negligence. Only in cases of gross negligence or severe mismanagement would a property holder have any recourse against the provincial AG.

Lower standards under provincial regimes provide an incentive for law enforcement agencies and prosecutors to work under those regimes, as opposed to the stricter *Criminal Code* rules. Eric Blumenson and Eva Nilson have observed

¹⁵ *Criminal Code*, *supra* note 2, s. 462.331(6).

¹⁶ Under both regimes, for example, the court can appoint a person to manage the restrained property. The powers of management are quite extensive. Yet, unlike private managers or trustees, managers appointed by the court do not have the obligation to increase the property's value. In essence, they do not have to exercise the duties of management that a private investor would expect of his fund manager.

¹⁷ *Victims Restitution and Compensation Payment Act*, S.A. 2001, c. V-3.5, s. 5(1)(a)(iii).

that in the United States (“U.S.”), the ability to choose the applicable forfeiture regime has had a significant impact on law enforcement in that country.¹⁸ They noted that state law enforcement officials will defer to federal jurisdiction to rely both upon the lower standards of proof and asset-distribution rules more favourable to law enforcement (that is, a higher percentage of the “spoils” will go to the police). Anecdotal evidence suggests that similar arrangements are being made in Ontario. Where the lower standard of proof and relaxed procedures would facilitate a finding in favour of the Crown, cases are being referred to CRIA for prosecution.

Paramountcy: The Legal Framework

Paramountcy is the claim that a valid provincial law should not operate because it directly conflicts with valid federal law.¹⁹ Litigants that advance a paramountcy claim seek to preserve an advantage (a right, liberty, privilege, or immunity) in the face of provincial legislation that eliminates or curtails that advantage. In the context of forfeiture, that advantage is the right to property (or, as was discussed in Chapter 2, possibly even the right to acquire property). In order to successfully advance their paramountcy claim, litigants must cast their claim in constitutional terms. In particular, a litigant must establish that the joint operation of the two re-

¹⁸ Blumenson, Eric, and Nilsen, Eva, “Policing for Profit: The Drug War’s Hidden Economic Agenda” (1998) 65 U. Chi. L. Rev. 35 at 55.

¹⁹ Hogg, Peter, *Constitutional Law of Canada*, 5th ed. (Toronto: Carswell, 2007) at 16-2 – 16-3. See *Rio Hotel Ltd. v. New Brunswick (Liquor Licensing Board)*, [1987] 2 S.C.R. 59 at 5.

gimes offends the principle of the rule of law, because the litigant ought not to comply with both the federal and provincial law at the same time.²⁰

Paramountcy differs from an analysis of a law's validity, because litigants and courts start from the proposition that both the federal and provincial laws in issue are validly enacted.²¹ Therefore, even if a court accepts a litigant's paramountcy claim, both laws will remain in force; however, until either law is repealed, only one will operate (which, in Canada, is the federal law).²²

Unlike the Australian constitution, for example, the *Constitution Act, 1867* does not include an express provision that prescribes paramountcy.²³ It is a judicially developed concept in Canada largely based upon the need to resolve irreconcilable conflicts between laws.

The remainder of this section will discuss why litigants resort to the paramountcy doctrine and how the courts assess paramountcy claims. From Confederation until the present, the courts have applied three different approaches to evaluate paramountcy claims: the "covering the legislative field" approach, the "express conflict" or "impossibility of dual compliance" approach, and the "frustration of legislative purpose" approach. While only the latter of the three approaches generally applies today, the section will consider how the other two approaches would resolve a paramountcy claim in the context of civil asset forfeiture.

²⁰ As discussed below, the courts have moved from an "ought not" standard to a "cannot" standard, back to an "ought not" standard, when compliance with the provincial statute would frustrate the legislative purpose of the federal scheme. See *Hall, infra* note 48.

²¹ *Ibid.* at 16-2.

²² *Ibid.* at 16-9.

²³ *Commonwealth of Australia Constitution Act*, 63 & 64 Vict., s. 109.

Litigants had no need to make claims on the basis of paramountcy in the early days of the Canadian dominion. When discontent arose over the operation of particular provincial legislation, litigants could seek recourse to the federal Cabinet to invoke its constitutional power of disallowance to strike down that legislation.²⁴ Between 1867 and approximately 1905, Sir John A. Macdonald and successive prime ministers frequently invoked this power on grounds that provincial legislatures prejudiced the property interests of landowners. Due, in large measure, to the political success of provincial rights advocates, the disallowance power was discredited as an illegitimate exercise of political authority.²⁵ Anyone claiming that provincial legislation infringed too severely on a right or liberty (or denied a privilege or immunity) was compelled to seek judicial intervention. Paramountcy, therefore, remained one of only a few legal instruments in which federal legislative authority could supersede provincial authority.²⁶

²⁴ It is noteworthy that section 56 of *The Constitution Act, 1867 (The British North America Act, 1867)*, 30 & 31 Vict. c. 3 (U.K.), confers an absolute power on the Governor General (exercised through Cabinet) to disallow any provincial legislation. Sir John A. Macdonald exercised that power in regard to the *Rivers and Streams Act* passed by the Ontario legislature. Despite the fact that Macdonald's exercise of the disallowance power protected the rights of waterway owners, provincial autonomists viewed the use of the disallowance power as an attack on their sovereignty over the power to legislate in matters of property and civil rights. While disallowance remains entrenched in the written constitution, the public outcry over its use has rendered that power illegitimate and obsolete. Instead, judicial review of legislation became the prevailing forum for constitutional challenges to exercises of jurisdiction. See generally Vipond, Robert, "Alternative Past: Legal Liberalism and the Demise of the Disallowance Power" (1990) 39 U.N.B.L.J. 126.

²⁵ See generally Vipond, *ibid.*; See also Kennedy, *infra* note 27 at 429. See also Scott, Francis, *Civil Liberties and Canadian Federalism* (Toronto: University of Toronto Press, 1959) at 23. See also Layman (Anonymous), "A Serious Question: The New Doctrine of Provincial Rights" (Pamphlet, 1 September 1909) at 11, in which the author expressed concern that provincial legislation jeopardized not only the individual rights of Canadians, but also prejudiced the climate for British foreign investment in Canada.

²⁶ The others being the doctrines of validity (or *ultra vires*) and interjurisdictional immunity. For an explanation of interjurisdictional immunity, see *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3 at paras. 33-68 [*Canadian Western Bank*].

The reality that, in a federal system, both the federal and provincial levels of government are sovereign makes the role of the courts in resolving jurisdictional disputes indispensable.²⁷ In cases of irreconcilable conflict between a federal and provincial law, however, the courts have determined that federal legislation prevails over provincial laws.²⁸ The inconsistency of laws is seen as problematic because inconsistent laws cannot inform subjects of the law about the appropriate standard of conduct.

Before proceeding with a discussion of the different approach to paramountcy, it is important to mention why the federal law may be held paramount over provincial law, as opposed to the reverse. The reason is more historical, than legal. In the *Local Prohibition* decision, the Privy Council ruled that enactments of Parliament must override overlapping provincial laws in cases of conflict.²⁹ The Privy Council's approach, however, simply mirrored the practice that enactments of the British Parliament can render the laws of British dominions and

²⁷ See *Mitchell v. Canada (Minister of National Revenue - M.N.R.)*, [2001] 1 S.C.R. 911 at para. 130, citing Canada, Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples, vol. 2, Restructuring the Relationship* (Ottawa: The Commission, 1996) at 240-241. Vipond notes that political leadership in the provinces during the late nineteenth and early twentieth centuries drove the pursuit of jurisdictional sovereignty and legislative autonomy of these political entities. See Vipond, Robert, *Liberty & Community: Canadian Federalism and the Failure of the Constitution* (Albany, NY: State University of New York Press, 1991) at 151 and following. See also Kennedy, William, *The Constitution of Canada: An Introduction to its Development and Law* (Toronto: Oxford University Press, 1922) at 406-407 citing *R. v. Hodge* (1883), 9 A.C. 117 (U.K.P.C.).

²⁸ See generally Hogg, *supra* note 19 at 16-2 – 16-3.

²⁹ *Ontario (Attorney General) v. Canada (Attorney General) (Local Prohibition)*, [1896] A.C. 348 (U.K.P.C.) at paras. 22-26 [*Local Prohibition*] (where the court ruled a provincial statute imposing a lower permissible maximum of lawfully stored liquor inoperative where the federal statute provided for a higher maximum).

colonies inoperative in cases of conflict or overlap.³⁰ This is the accepted practice in other Anglo-American constitutional systems as well.³¹

Since the *Local Prohibition* decision, the courts have used three different approaches to consider whether the paramountcy doctrine applies to render the provincial law inoperative.³² Between 1867 and 1960, the courts relied on the “occupying” or “covering the legislative field” approach to resolve an apparent legislative conflict. That approach renders the largest scope of provincial legislation inoperative because once Parliament legislates on a particular matter it excludes the provinces from doing so even when the provincial legislation is enacted pursuant to a valid provincial purpose.³³ The covering the field approach favours paramountcy claimants more than the other approaches discussed below, because once Parliament legislates on a matter, any provincial legislation touching upon that field is rendered inoperative.

To establish that Parliament has covered the field, a litigant was only required to demonstrate that Parliament legislated on a given matter for the provincial law on the same matter to be rendered inoperative.³⁴ In *Reference re: An Act to amend the Railway Act, 1903 (Can.)* (“Grand Trunk”), Lord Dunedin held that should federal and provincial legislation meet, the federal legislation must pre-

³⁰ See e.g. Siebrasse, Norman, “The Doctrinal Origin of Judicial Review and the Colonial Laws Validity Act” (1994) 1 Rev. Const. Stud. 75 at 91.

³¹ Gilbert, Christopher, *Australian and Canadian Federalism 1867-1984: A Study of Judicial Techniques* (Carlton, Australia: Melbourne University Press, 1986) at 137 and following. See also Hogg, *supra* note 19 at 16-3.

³² Laskin, Bora, “Occupying the Field: Paramountcy in Penal Legislation” (1963) 41 Can. Bar Rev. 234 at 243.

³³ By contrast, the stricter the courts’ view on paramountcy, the wider the latitude given to legislatures. Abel, Albert, *Laskin’s Canadian Constitutional Law*, 4th ed. (Toronto: Carswell, 1975) at 27.

³⁴ See e.g. *R. v. Cooper*, [1925] 2 W.W.R. 778, 44 C.C.C. 314 (B.C.C.A.).

vail.³⁵ In that case, the Judicial Committee of the Privy Council determined that Parliament could immune railway companies from liability for injuries suffered by their employees, despite parallel provincial tort legislation.

In *R. v. Dickie*, the Alberta Supreme Court rendered inoperative a provision of that province's *Vehicles and Highway Traffic Act* that punished a person for driving without a license.³⁶ The basis for rendering the provision inoperative was that it replicated the corresponding provision in the *Criminal Code*. As the Court noted, "[t]he similarity constitutes the very reason for the clash or conflict."³⁷

By 1960, the Supreme Court of Canada had turned away from the covering the field approach and adopted the "express contradiction" or "impossibility of dual compliance" approach.³⁸ The express contradiction approach is least useful for paramountcy claimants, because it requires that the litigants show that it is otherwise impossible to comply with both laws. In effect, the only laws that could

³⁵ *Reference re: An Act to amend the Railway Act, 1903 (Can.)*, [1907] A.C. 65 at 68 (U.K.P.C.) ["Grand Trunk"].

³⁶ *R. v. Dickie*, [1955] 2 D.L.R. 757, 13 W.W.R. (N.S.) 545 (Alta. Supr. Ct.) [*Dickie*], striking down *Vehicles and Highway Traffic Act*, R.S.A. 1942, c. 275, s. 111. The *Dickie* decision provides a useful summary of the leading paramountcy decisions up to 1955.

³⁷ *Dickie*, *ibid.*, at para. 61 (cited to QL).

³⁸ *O'Grady v. Sparling*, [1960] S.C.R. 804 [*O'Grady*]. In that case, the applicant was charged with driving without due care and attention under the Manitoba *Highway Traffic Act*, R.S.M. 1954, c. 112, s. 55(1). The applicant moved for a prohibition order (effectively, a stay of proceedings) on the basis that the *Criminal Code* provided for an offence of criminal negligence in the operation of a motor vehicle. *Criminal Code*, S.C. 1954, c. 51, s. 221 Finding that both laws were validly enacted, the majority of the Court determined that no conflict existed, as the provisions "differed both in legislative purpose and legal and practical effect." (at 812) It would be possible to comply with each law without resulting in a breach of the other, said the majority.

The dissenting judges noted that, despite the validity of both the provincial and federal purposes behind the prohibition, once Parliament legislated in the area of the negligent operation of a vehicle the provincial law would no longer have effect. For those dissenting judges, Parliament had covered the legislative field, leaving no room for provincial laws to operate.

be rendered inoperative would be when a provincial law imposes a duty and the federal law imposed a sanction. Where, for example, the federal law confers a right, benefit, privilege or immunity, and the provincial law takes it away, no express contradiction will occur. The change in approach reflected the view that, following World War II, both levels of government increased their use of legislation and regulations to effect policy change, and the courts shifted their approach from boundary-delineation to the recognition of jurisdictional overlap.³⁹

Because paramountcy has a power-limiting function, a broad application of this technique conflicts with an understanding of federalism that regards both levels of government as sovereign with respectively important roles in the law-making function of government. The covering the field approach is less consistent with the view that “governmental regulation in Canada operates through a complex web of federal and provincial legislation”.⁴⁰ Consonant with the move away from a boundary-maintenance role (preserving the “watertight compartments”) for courts, they would rather leave the business of working out the allocation of legislative prerogatives to the legislators.⁴¹

The decision in *Ross v. Registrar of Motor Vehicles et al.* highlights the stringency of the express contradiction approach.⁴² In *Ross*, the applicant was convicted of impaired driving and the sentencing judge limited his right to drive to working hours only. The Ontario *Highway Traffic Act* imposed an automatic

³⁹ See generally Ryder, Bruce, “The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations” (1991) 36 McGill L.J. 309. See also Risk, R.C.B., *A History of Canadian Legal Thought* (Aurora, Ont.: University of Toronto Press, 2006) at 403-427.

⁴⁰ *Husky Oil Operations Ltd. v. Canada (Minister of National Revenue - M.N.R.)*, [1995] 3 S.C.R. 453 at para. 121.

⁴¹ See Ryder, *supra* note 39 at 324-326.

⁴² *Ross v. Ontario (Registrar of Motor Vehicles)*, [1975] 1 S.C.R. 5 [*Ross*].

suspension of a license for persons convicted of that offence, which effectively negated the sentence that was tailored to the applicant's circumstances.⁴³ Nevertheless, the Supreme Court of Canada dismissed the applicant's paramountcy claim in that case. The majority in *Ross* concluded that the suspension was an exercise of a valid provincial purpose and that the *Criminal Code* did not "deal generally with the right to drive a motor vehicle after conviction for certain offences."⁴⁴ While the application of the federal law left room for the defendant to exercise his right to drive, by operation of the provincial law, the courts suspended that right.

The Court affirmed the express conflict approach in *Multiple Access Ltd. v. McCutcheon*.⁴⁵ In *Multiple Access*, the Court considered whether nearly identical federal and provincial anti-insider trading causes of action were in conflict. The very similarity in substance of the provisions (both in purpose and in effect) supported the Court's view that allowing the two provisions to operate concurrently would not render the laws inconsistent, even though by virtue of the operation of the provincial statute, the federal statute could be made to be redundant. Unlike in *Dickie*, the Court, in agreement with Peter Hogg, considered the overlap between the legislation to represent "the ultimate in harmony".⁴⁶ Justice Brian Dickson, however, made a careful assessment noting that it was important for the Court to consider whether there was "no scope for the other [law] to have operational effect", though that consideration did not ultimately sway the Court.⁴⁷

⁴³ *Highway Traffic Act*, R.S.O. 1970, c. 202.

⁴⁴ *Ross*, *supra* note 42, at 15, per Pigeon J.

⁴⁵ *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161 [*Multiple Access*].

⁴⁶ *Ibid.* at 188, citing Hogg, Peter, *Constitutional Law of Canada*, 1st ed. (Toronto: Carswell, 1975) at 110 [Hogg, 1st ed.].

⁴⁷ *Multiple Access*, *ibid.* at 189.

The Court adopted a third approach in *Bank of Montreal v. Hall*, by adding an ancillary consideration to the express contradiction test.⁴⁸ In *Bank of Montreal*, a bank seized its borrower's farm equipment after the borrower defaulted on a loan. To defend against the seizure, the borrower argued that the Bank was required to comply with a provincial law that conferred on debtors the right to an additional notice period and the right to a hearing, which would have had the effect of delaying the Bank's seizure in that case.⁴⁹ Although it would have been possible for the parties to comply with both laws, as the Bank could have exercised its rights subject to the narrower conditions set out by the provincial statute, the Court found in favour of the Bank.

Despite the possibility of dual compliance, the Court considered whether compliance with the provincial law "frustrates Parliament's legislative purpose".⁵⁰ By first considering the impossibility of complying with both laws, then examining the issue of frustration of purpose, the Court appeared to have struck a middle ground between the covering the field and express contradiction approaches.⁵¹

If one were to apply the three approaches to analyze the overlap of the federal and provincial forfeiture regimes, the results would vary as between the approaches. Under the classic formulation of the covering the field approach, the courts could have rendered provincial forfeiture regimes inoperative, because Parliament had already legislated extensively in the field of forfeiture. This reflects the broad-brush, generalized approach to paramountcy discussed in *Local Prohi-*

⁴⁸ *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121 [*Bank of Montreal*].

⁴⁹ *Limitation of Civil Rights Act*, R.S.S. 1978, c. L-16.

⁵⁰ *Bank of Montreal v. Hall*, *supra* note 50 at para. 61. The Court also endorsed this view in *Law Society of British Columbia v. Mangat*, [2001] 3 S.C.R. 113 [*Mangat*].

⁵¹ Consider *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, [2005] 1 S.C.R. 188 at paras. 22-26 [*Rothmans*].

bition, Grand Trunk, and Dickie. On a more narrower conception of the field (e.g., crimes or criminal prosecutions), perhaps the application of the covering the field approach would have left some room for provincial laws to operate with regard to provincial legislation, such as violations of the *Securities Act*,⁵² because the federal forfeiture laws do not address forfeiture for provincial offences. As Hogg has noted, “the doctrine will not affect the operation of those parts of the provincial law which are not inconsistent with the federal law”.⁵³ As noted above, however, the covering the field approach is no longer good law.

Under the express contradiction approach, a court would be hard-pressed to find a conflict between the two schemes. The provinces carefully crafted the *operation* of their forfeiture legislation so as not to conflict, notwithstanding differences in the other elements of the schemes, such as the nature of the property, the standard of proof, and the rules of evidence and procedure. Since it is generally the same administrative agent, the provincial AGs, who will apply both laws, the AGs can elect which law to apply. In all instances, the AGs could choose to pursue forfeiture under the more favourable provincial regime, making it easier to restrain property and ultimately seek its confiscation.

The only conflict that could arise would occur when the forfeiture is pursued under both the *Criminal Code* and a provincial forfeiture statute. In that instance, the courts will resolve the conflict using the bar against collateral proceedings (abuse of process), like what the court did in *Ontario (Attorney General) v. Cole-Watson*.⁵⁴ Again, the express contradiction approach is no longer applied.

⁵² *Securities Act*, R.S.O. 1990, c. S.5.

⁵³ Hogg, *supra* note 19 at 16-19.

⁵⁴ *Ontario (Attorney General) v. Cole-Watson*, [2007] O.J. No. 1742 (Sup. Ct.) (QL) [*Cole-Watson*].

Finally, the Court actually applied the frustration of the legislative purpose approach in *Chatterjee*. Although the Court articulated the test consistently with prior cases, it considered only the purpose of the specific terms of the *Criminal Code* forfeiture provisions, regarding them as incidental to the sentencing process.⁵⁵ The Court held that because the provincial regimes target property not necessarily attached to an owner or even linked to a specific crime, the forfeiture regimes do not frustrate Parliament's purpose.⁵⁶

The section below critiques the Court's approach to the paramountcy analysis in *Chatterjee* and discusses the implications on forfeiture law in Canada. As it is exceptional for property not to attach to an owner or possessor, the Court's conclusion that the provincial regime does not conflict with the provisions of the *Criminal Code* was wrong. In the context of a forfeiture involving the property of an identified or identifiable person (as was the case in *Chatterjee*), the provincial regimes essentially act as a work-around of the presumption of innocence, because they negate the protections afforded by the criminal law.

***Chatterjee* and the Decline of the Paramountcy Doctrine**

The Court in *Chatterjee* did not accept the appellant's paramountcy claim, noting that the legislation in issue did not frustrate the federal purpose underlying the forfeiture provisions of the *Criminal Code*. Without hearing sufficient argument on the issue, the Court concluded:

⁵⁵ *Chatterjee*, *supra* note 3 at para. 46.

⁵⁶ *Ibid.* at para. 47.

Parliament's legislative authority to bring about property consequences that are *not* directly connected with the offence for which an accused is being sentenced is not before the Court. I do not suggest any infirmity with any aspect of *Criminal Code* forfeiture. I say only that we have heard no argument on these provisions.⁵⁷

By concluding as it did, the Court departed from previous jurisprudence in its analysis of the paramountcy issue in four respects. First, the Court neglected first to consider whether the *Criminal Code* forfeiture provisions constitute a “complete code”, which is a surviving remnant of the covering the field approach (although this analysis could be recast as a variant to the frustration of the legislative purpose test). Second, the Court did not address whether the operation of the provincial schemes effectively nullified the operation of the federal one. Third, the Court failed to address the impact of its decision on the control of administrative discretion. Finally, the Court erred in its understanding of the juristic purpose of the federal forfeiture regime, which is arguably inherently tied to the purpose of the *Criminal Code*.

A Comprehensive Code

Although the Supreme Court of Canada has not, since 1960, accepted the covering the field approach as the proper test to assess a paramountcy claim, the rejection of this approach by the Court occurred in a narrow set of highway traffic

⁵⁷ *Ibid.* at para. 45.

cases. Arguably, the Court applied a variant of that rule in *Bank of Montreal*,⁵⁸ when it held that Parliament enacted a complete code or comprehensive scheme.⁵⁹

The Court did not address whether the *Criminal Code* comprehensively addresses the question of forfeiture (at least with regard to criminal offences), an argument advanced by the appellant before the Supreme Court of Canada in *Chatterjee*. In the context of forfeiture, the *Criminal Code* provides a comprehensive scheme for managing property from its restraint until confiscation post-trial.⁶⁰ For example, the *Code* regulates: forfeiture in the absence of a trial (s. 490); forfeiture upon conviction or acquittal (s. 462.37); civil forfeiture for terrorist property (s. 83.14); and forfeiture in respect of dangerous and obscene materials (ss. 117.05 and 164). While admittedly the scheme does not address the seizure of ownerless property unrelated to a criminal investigation, these situations are truly exceptional and are sufficiently detached from the criminal law (meaning that provincial law would be appropriate to address this matter). Furthermore, that was not the factual context in which the *Chatterjee* case arose, because the purported owner of the property was readily identifiable. As further discussed below, it would not be problematic had the Ontario Legislature limited the application and

⁵⁸ *Bank of Montreal*, *supra* note 48 at 155.

⁵⁹ In *obiter* remarks in *Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 749 at para. 332, Justice Jean Beetz would have also rendered a provincial health and safety scheme inoperative with regard to federally-incorporated companies, in light of functional incompatibilities that arose due to the different procedural mechanisms, the different rights conferred under the two schemes, and the different types of danger that circumstances that give rise to the procedure.

⁶⁰ Ruth Sullivan discusses the standard of comprehensiveness in light of statutory displacement of the common law. In the context of civil forfeiture, however, the *Criminal Code*, *supra* note 2, provisions were added at different times. While the *Criminal Code* provisions may lack the coherence of a single statutory regime, each component part addresses a different aspect of forfeiture (restraint, administration of property, and confiscation). See Sullivan, Ruth, *Sullivan on the Construction of Statutes*, 5th ed. (Markham, Ont.: LexisNexis, 2008) at 434-438.

operation of the *Civil Remedies Act, 2001* to proceeds and instruments related to provincial offences only.

Distortion of the Criminal Law

The Court did not consider whether the operation of the provincial scheme nullified the effect of the federal one, as it had done in the *Johnson* case, discussed above. Judicial sentiment regarding the scope of paramountcy with regard to provincial schemes that “weaken or confuse [the] enforcement of legislation of Parliament”, especially in the area of criminal law, have been subject to greater scrutiny by the Court.⁶¹ In some contexts, by accepting that provincial legislation can impose stricter controls or supplement federal legislation, the standard of what is appropriate conduct becomes blurred.

In *Johnson v. Alberta (Attorney General)*, for example, Justice Ivan Rand held that a provincial law that criminalized the possession of slot machines or similar devices was inoperative, because the *Criminal Code* already addressed that matter.⁶² Rand observed that “[c]riminality is primarily personal and sanctions are intended not only to serve as deterrents but to mark a personal delinquency.”⁶³ He held that the provincial statute not only went further than the *Criminal Code* in its definition of the impugned conduct, it nullified the effect of the codal provision. Rand regarded the provincial law as supplementing punish-

⁶¹ *R. v. Chiasson* (1982), 135 D.L.R. (3d) 499, [1982] N.B.J. No. 176 (N.B.C.A.), aff’d [1984] 1 S.C.R. 266, at para. 22, per LaForest J.A. (as he then was) (cited to QL), citing *R. v. Beach* (1948), 5 C.R. 294 (N.B. Co. Ct.), *R. v. Smith* (1942), 3 D.L.R. 764 (Ont. C.A.).

⁶² *Johnson v. Alberta (Attorney General)*, [1954] S.C.R. 127 at 138.

⁶³ *Ibid.*

ment and although the purpose was to prevent crime (in that case gambling) the legislation reached beyond what Parliament had intended: “An additional process of forfeiture by the province would both duplicate the sanctions of the Code and introduce an interference with the administration of its provisions.”⁶⁴

A similar argument could be made in the case of forfeiture. Parliament could have intended to limit the scope of the restraint and forfeiture regimes to indictable offences, and by negative implication, forfeiture in relation to other acts was excluded.⁶⁵ Parliament enacted the legislation as provisions of the *Criminal Code*, indicating that the criminal law, with its procedural and evidentiary safeguards, applies. Although the Supreme Court of Canada has not approved the negative implication test in any recent paramountcy decision,⁶⁶ as Hogg and others have noted, cases of negative implication and frustration of Parliament’s legislative purpose are not readily distinguishable.⁶⁷

The overlap in the present context is not a one of mere duplication of legislative provisions as was the case in *Multiple Access*. The obsolescence of the federal cause of action at issue in *Multiple Access* is different from the purported obsolescence of the *Criminal Code* provisions in the situation at hand for three reasons. While litigants may choose not to invoke the federal cause of action for insider trading, the choice in the present context lies with the provincial AG. Given the procedural benefits conferred by the provincial regime, the provincial

⁶⁴ *Ibid.*

⁶⁵ See e.g. *O’Grady*, *supra* note 38 at 818, per Cartwright J., dissenting.

⁶⁶ Consider *Ross*, *supra* note 42; *Prince Edward Island v. Egan*, [1941] S.C.R. 396; *Robinson v. Countrywide Factors*, [1977] 2 S.C.R. 753; *Canadian Western Bank*, *supra* note 26.

⁶⁷ Hogg, *supra* note 19 at 16-14. See also Elliot, Robin, “Safeguarding Provincial Autonomy from the Supreme Court’s New Federal Paramountcy Doctrine: A Constructive Role for the Intention to Cover the Field Test” (2007) 38 Sup. Ct. L. Rev. (2d) 629.

AG will not need to use the federal regime, and it would generally be more prudent not to do so.

Furthermore, unlike in *Multiple Access* where there were no material implications for the choice of regime, in the present context, significant implications for the target follow from the choice. Unlike the federal provision in *Multiple Access* forfeiture, which was appended incidentally to the statute, the federal forfeiture regime is a core aspect of the criminal law. By allowing provincial AGs the choice of forfeiture regime, they will effectively extinguish a core aspect of the criminal law power, because there is no incentive to rely on the procedures set out in the *Criminal Code*.

While the then Professor Bora Laskin noted that Parliament should “speak clearly” if it demands paramountcy for its policies, this conclusion is unsatisfying.⁶⁸ Parliament does not generally articulate the types of conduct that are not prohibited by law, and it should not have to in a liberal society where non-prohibited conduct is unconditionally permissible. Furthermore Laskin’s conclusion begs two other questions: If Parliament is expected to use express language how express must Parliament be? Also, what happens when the AG of Canada has incentives not to rely on the stricter terms set out in the *Criminal Code*?

Those questions become especially problematic when the AG of Canada supports the provincial AG’s position and does not assert sovereignty over a particular subject matter.⁶⁹ As the case law demonstrates, there appears to be a political bias (and perhaps, an economic one) in favour of non-intervention by the AG of Canada when the overlap pertains to morality issues, such as negligent driving,

⁶⁸ Laskin, *supra* note 32 at 263.

⁶⁹ *Chatterjee*, *supra* note 3, Memorandum of Fact and Law of the Intervener, the Attorney General of Canada, at 10.

proceeds of crime, and cigarette sales,⁷⁰ as opposed to immigration matters⁷¹ or banking regulation.⁷² While the AG of Canada is certainly under no legal obligation to intervene in a constitutional case to uphold the operability of Parliament's legislation, it would seem that there is a moral obligation to do so.

Controlling Discretion

The Court also failed to address the problem of administrative discretion created by allowing the provincial AGs to choose the applicable forfeiture regime in a given factual context. This argument is simply an extension of the argument raised in the previous paragraphs. As Laskin noted, by rejecting paramountcy claims regarding matters that approximate criminal law, the result generates "legally uncontrollable administrative discretion" because different administrators (in this case, the AGs) could each exercise their discretion to sanction conduct differently.⁷³

⁷⁰ *Rothmans*, *supra* note 51.

⁷¹ See *Law Society of British Columbia v. Mangat*, [2001] 3 S.C.R. 113 [*Mangat*]. In *Law Society of British Columbia v. Mangat*, for example, the Supreme Court of Canada determined that an operational conflict existed between the federal *Immigration Act*, R.S.C. 1985, c. I-2, as amended, and the British Columbia *Legal Profession Act*, S.B.C. 1987, c. 25 [now S.B.C. 1998, c. 9]. While the *Immigration Act* permitted representatives to appear on behalf of persons engaged in immigration proceedings for a fee, the *Legal Profession Act* precluded non-lawyers from doing so. While it would have been possible to comply with both acts by not charging a fee, the Court concluded that that analysis was "superficial" and that in practice, the provincial legislation would defeat Parliament's objective of "establishing an informal, accessible (in financial, cultural, and linguistic terms), and expeditious process, peculiar to administrative tribunals."⁷¹

⁷² *Bank of Montreal*, *supra* note 48. See also *Alberta (Attorney-General) v. Atlas Lumber Co.*, [1941] S.C.R. 87 (where the Court rendered a provision of provincial statute inoperative that precluded a creditor from enforcing a promissory note issued pursuant to a federal statute).

⁷³ Laskin, *supra* note 32 at 260.

In one scenario, a provincial AG could apply for a restraint or forfeiture order under a provincial scheme even after a person has been found not guilty of a crime. A dismissal of a charge based on reasonable doubt does not automatically preclude the possibility of proving the existence of an unlawful act on the balance of probabilities. In an alternative scenario, the provincial AG could choose not to pursue the criminal matter at all and simply restrain and seize the property of a target, on the basis that the civil remedy serves the public interest.⁷⁴

While the Court noted in *Chatterjee* that it might be an abuse of process if the provincial AG relied on the provincial regime to “re-litigate” sentencing,⁷⁵ the Court did not expressly prohibit a provincial AG from dealing with forfeiture post-sentence under the provincial statutes, effectively “splitting its case”.⁷⁶ In that regard, the provincial AG could avoid raising forfeiture as an issue in the sentencing hearing, only to leave that issue for a separate case to be decided under the civil remedies legislation of the province. Indeed, if the Court’s conclusion that the federal and provincial regimes serve different purposes and if indeed *Ross* applies (which the Court in *Chatterjee* held that it did), then splitting the case is not an abuse of process in the eyes of the Court. Drawing on Justice Judson’s dissenting opinion in *Ross*, however, any sentencing considerations tailored to the

⁷⁴ See *Deskbook*, *supra* note 8 at Chapter 15.

⁷⁵ *Chatterjee*, *supra* note 3 at para. 51.

⁷⁶ In contrast to the sentencing provisions in the *Criminal Code*, the provincial forfeiture schemes do not include a list of considerations or factors to be used to determine whether property should be restrained or seized or to assess the extent of a prospective forfeiture. Compare *Criminal Code*, *supra* note 2, s. 712 and following.

individual offender would be negated when the provinces pursue forfeiture after an accused has been sentenced.⁷⁷

Furthermore, unlike the licensing cases, the forfeiture regimes are not part of a specialized administrative or licensing scheme, such as the regulation of highway traffic. In those situations, the provinces have a particular interest in maintaining the integrity of that particular scheme, and therefore, the multiplicity of proceedings is acceptable.⁷⁸ As discussed in Chapter 1, provincial forfeiture laws are schemes of general application and should never be used post-sentence. The provincial and federal AGs should have to make out their entire forfeiture cases within the criminal process itself.

Reconsidering the Purpose of the Federal Regime

The above noted considerations lead into the fourth critique of the Court's approach to the question of paramountcy. The Court failed to properly assess the "federal legislative purpose" of the forfeiture regime and assumed that the purposes would be the same. As discussed in Chapter 2 on the issue of the validity of the scheme, civil and criminal forfeiture could not have the same purposes in a federal system that divides the regulation of property and civil rights and the administration of the criminal law.

The Court failed to consider whether forfeiture, as set out in the *Criminal Code*, should be regarded not simply as an end unto itself, but instead as a means

⁷⁷ See e.g. *Ontario (Attorney General) v. 746064 Township Road #4 Blandford-Blenheim Township R.R. #5 Woodstock, Ontario (PIN: 00266-0080 (R)) (In Rem)*, [2008] O.J. No. 446 (Sup. Ct.) (QL).

⁷⁸ Hogg, 1st ed., *supra* note 46 at 27.

to achieve justice through the criminal law. That approach is based on statutory interpretation and would likely have greater merit should the issue ever get re-litigated before the Supreme Court of Canada. In *Bank of Montreal*, the Supreme Court of Canada recognized that despite the possibility of dual compliance, courts could render a provincial law inoperative when the law “frustrates Parliament’s legislative purpose”. The Court, however, does not provide guidance as to how narrowly or broadly courts should read a federal purpose. The issue is thus one of statutory interpretation.

While both the provincial and federal schemes have as their purpose the restraint and confiscation of property, the purposes of the regimes diverge at a more general level. The provincial regimes are designed to compensate victims of crime, prevent crime, and prevent injury to the public.⁷⁹ In addition to those purposes, the *Criminal Code* serves three other purposes. The Code structures the criminal law so that a person knows what types of conduct deserve the full brunt of state sanction, it renders foreseeable that sanction, and most importantly, it also provides mechanisms to ensure that an accused receives a fair trial.⁸⁰ The former President of the Supreme Court of Israel, and an expert on statutory interpretation, Aharon Barak, has noted that when interpreting the purpose of a criminal statute, “judges should accord significant weight to the civil rights of the accused in balancing the purposes to arrive at ultimate purpose.”⁸¹ And as the Canadian Bar Association Task Force Report explained in its report on the *Criminal Code*, the provisions of the Code are designed to set out the standards of acceptable conduct

⁷⁹ *Civil Remedies Act, 2001*, *supra* note 12, s. 1.

⁸⁰ *R. v. Wood* (1991), 3 O.R. (3d) 504, 64 C.C.C. (3d) 330 (Gen. Div.) at para. 16.

⁸¹ Barak, Aharon, *Purposive Interpretation in Law* (Princeton, NJ: Princeton University Press, 2005) at 203. For a critique of Barak’s approach, see Fish, Stanley, “Intention Is All There Is: A Critical Analysis of Aharon Barak’s Purposive Interpretation in Law” (2008) 29 *Cardozo L. Rev.* 1109.

in a manner that least interferes with the rights of individuals.⁸² The choice of interpretation should also be governed by *Charter* values.⁸³ In that light, a purposive interpretation of the *Criminal Code* generally, and its provisions on forfeiture in particular, would include an understanding that the provincial AG should pursue the restraint and confiscation of property in a manner that balances the rights of the target with the objectives of the regime.

Arguably, if the provincial AG commences proceedings under the provincial forfeiture laws before the criminal trial process, the former proceedings can interfere significantly in latter.⁸⁴ Under the provincial forfeiture regimes, a person whose property is subject to a restraint order would be required to pay his or her legal expenses out of the unrestrained funds first and could only gain access to the restrained funds once the former property is depleted. Where the defendant has a family, or operates a business, a restraint order could operate harshly. That person could end up depleting personal assets and then face criminal trial for the underlying crime afterward. That consequence is an affront to the presumption of inno-

⁸² Canadian Bar Association, *Principles of Criminal Liability: Proposals for a New General Part of the Criminal Code* (1992) at 15. See also Canada, House of Commons, *Minutes of Proceedings and Evidence of the Sub-Committee on the Recodification of the General Part of the Criminal Code of the Standing Committee on Justice and the Solicitor General* (2 November 1992).

⁸³ It would have been more consistent with other constitutional values and principles for the Court in *Chatterjee* to have adopted a broader understanding of the purpose of the federal forfeiture regime. The purpose of the federal regime is not simply to secure title to tainted property, but to do so not at the expense of the target's innocence, or procedural and property rights. That approach would be consistent with the Supreme Court of Canada's position in *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559 where Justice Frank Iacobucci, speaking for the Court, held that when there is a possibility of veritable disagreement over the interpretation of a statute, courts should look to external sources to ground the interpretation, including the *Canadian Charter*. In the forfeiture context, an interpretation based upon "*Charter* values" would favour an expansive scope of operation for the federal regime, as, unlike its provincial counterpart, this would not diminish the presumption of innocence or other rights.

⁸⁴ The *Chatterjee* decision did not consider whether the initiation of a civil forfeiture proceeding in advance of a criminal trial would constitute an abuse of process. *Chatterjee*, *supra* note 3.

cence. By contrast, the *Criminal Code* allows a person facing forfeiture under that statute to use some of the restrained funds for living expenses.⁸⁵

Although section 13 of the *Canadian Charter* excludes the introduction of self-incriminating evidence from a civil hearing into a criminal proceeding for the truth of its contents, the provincial AG can test the evidence in advance of the criminal process and secure confessions that could further a criminal investigation.⁸⁶ By trying to preserve his or her property, an owner may prejudice his or her case in a subsequent criminal trial. Whereas the *U.S. Code* contains a provision that enables the parties to invoke a stay of the civil proceedings until after the criminal matter is resolved, provincial forfeiture legislation includes no such provision.⁸⁷

Furthermore, the provincial rules negate the protections afforded by the criminal law in general. For example, the provincial AG acting under provincial law is not bound by the more restrictive rules of evidence (the prohibitions against the admission of character evidence and similar fact evidence, for example).⁸⁸ The

⁸⁵ *Criminal Code*, *supra* note 2, s. 462.34(4)(c)(i).

⁸⁶ The Crown may tender self-incriminating evidence to weaken the credibility of a witness or to support charges of perjury. See e.g. *R. v. Dubois*, [1985] 2 S.C.R. 350;

⁸⁷ 21 U.S.C. §§ 881(i), 981(g). It is also noteworthy that the prejudice does not only affect a property owner or an interested third party. By using a civil process to resolve forfeiture disputes, a defendant in a criminal trial can gain access to Crown witnesses through the discovery process. Discovery does not generally occur in criminal trials and the delays caused by discovery could trigger a stay of proceedings on the basis of unreasonable delay in prosecution under section 11(b) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Canadian Charter or Charter*].

Furthermore, in Canada, a party in a civil action is not entitled to a stay of proceedings in the civil matter as of right. A stay of proceedings is issued only under exceptional circumstances. See e.g. *Obadia c. Sam Levy & associés inc.*, 1997 CanLII 10483, 1 C.B.R. (4e) 110 (Que. C.A.).

⁸⁸ Furthermore, the admission of hearsay evidence in a criminal matter can be more prejudicial than in a civil matter when (1) the evidence is only considered by judge alone and (2) the defendant's liberty interest is not at stake.

provincial AG could, therefore, ground a *prima facie* case to restrain property on evidence otherwise inadmissible in a criminal proceeding. Given the *ex parte* nature of the process, the evidence would not be testable by cross-examination until the notice period expires or, in some cases, until the forfeiture hearing several months later.

The provincial rules also are not sufficiently precise to provide adequate guidance to the courts when dealing with instances when tainted property is mixed with untainted property. That issue is particularly problematic when courts deal with intangible property, such as bank accounts. It is also of concern when the definition of what constitutes an underlying act could capture any breach of a provincial or federal law, no matter how minor. If a court, for example, were to restrain the shares of a corporation from being sold, then it could preclude a company's board of directors from authorizing a merger or acquisition of the corporation.⁸⁹

In one case in the U.K., a court maintained a restraining order that placed the defendant's business into receivership after the prosecution had alleged that a "substantial" property asset was acquired using tainted funds.⁹⁰ "Substantiality" is an inherently indefinable term and could be subject to considerable discretion in the exercise of forfeiture powers. By detaching forfeiture from criminality, legislatures expose businesses and individuals to severe risk that enterprises may become too difficult to operate if the restraint conditions imposed limit the ability of managers to dispose of property, or to transfer control of the property to an interim receiver, where those managers would have no control over it. That state of

⁸⁹ See generally MacFarlane, Bruce, "Confiscating the Fruits of Crime" (1985) 27 Crim. L. Q. 408 at 430.

⁹⁰ See *Director of the Assets Recovery Agency v. McGleenan and another*, [2006] NIQB 35 (U.K.) at para. 12.

affairs could result in severe damage to a company through a decline in stock prices, thus affecting the interests of innocent third parties.⁹¹

Finally, problems with the restraint provisions could be exacerbated in the future should the provinces' forfeiture regimes become more ambitious in their scope.⁹² Under the federal forfeiture law of Australia, for example, courts automatically order forfeiture of property under a restraining order after six months on satisfaction that the property is proceeds of crime.⁹³ That is why the inclusion of adequate notice requirements is essential, so that a person's property is not automatically transferred to the state without the opportunity to be heard.

Conclusions and Recommendations

This chapter compared the structure of the federal and provincial forfeiture regimes and revealed that the relaxed rules of procedure and evidence promote the application of the provincial regime to the detriment of the federal one. The chapter also discussed how, despite the concurrent operation of a federal regime, the narrow application of the paramountcy rule likely will not benefit forfeiture targets by rendering the more expansive provincial regime inoperative. Nevertheless, the chapter also explored justifications for rethinking this narrow application of

⁹¹ The mere investigation or inquiry into a corporation's activities can translate into severe declines in stock prices. See generally Larson, Virgil, "InfoUSA hits low", *Omaha World - Herald* (Omaha, Neb.: 22 Nov 2007) at D1. See also Bernard, Stephen, "Countrywide CEO may face probe; Stock sales eyed | Mortgage fundings plunged 44 percent last month" *Seattle Times* (Seattle, Wash.: 12 Oct, 2007) at E2.

⁹² Australian federal, state, and territorial forfeiture laws have been under constant amendment for the past decade, as law-makers adopt new legal mechanism to restrain and confiscate property without as many restrictions or rights-protections.

⁹³ *Criminal Assets Confiscation Act, 2005*, c. 19 (S. Austr.), s. 47.

the paramountcy doctrine. If paramountcy is to have any meaningful role in Canadian constitutional law both in terms of its rule-of-law aspects and liberty-protecting aspects (which have lingered in the background since the *Local Prohibition* decision in 1896) then the provincial regimes should not be allowed to continue to operate unless they accord with the standards set out by Parliament in the *Criminal Code*.

From a practical or policy perspective, even if one accepts that there is residual room for the provincial regimes to operate in the criminal law context, then the provincial AG should not be able to elect between the federal and provincial schemes to select the one most favourable to its case.⁹⁴ Should a case involve a matter prosecutable as an indictable offence under the *Criminal Code* or another federal statute, the provincial AG should be precluded from proceeding under the provincial civil forfeiture regime.⁹⁵ That way, if the provincial AG is serious about restraining, and ultimately forfeiting proceeds of crime or instruments of criminal activity, it can bring its case under the *Criminal Code* provisions while safeguarding the rights of the property owners; although admittedly, this might create a measure of absurdity if, in a particular case, the forfeiture rules for a provincial offence would result in harsher consequences than for an indictable one.

Where the courts have pronounced on sentence for an indictable offence, the provincial AG should not be entitled to seek a further forfeiture order using the provincial scheme. Contrary to the position of the Supreme Court of Canada, forfeiture is not associated with a particular regulatory regime.⁹⁶ It is a regime of general application that relies on civil procedure to achieve criminal law ends.

⁹⁴ That would include summary conviction offences and provincial offences.

⁹⁵ That would include hybrid offences as well.

⁹⁶ Consider *Martineau v. M.N.R.*, [2004] 3 S.C.R. 737.

Chapter 4

Property, Proportionality, and Instruments of Crime

What is the impact that the absence of a constitutionally-entrenched property right has had on the development of civil forfeiture legislation in Canada? The lack of substantive constitutional protection of property rights means that the legislatures need not, and that courts will not, consider whether the interference with a person's enjoyment of his or her property by a provision of a forfeiture statute is proportionate to its purpose; that is, they need not proffer a justification for their regime in a court of law. This becomes particularly problematic in cases involving the forfeiture of alleged instruments of crime.¹ Under the current state of the law in some provinces, the provincial Attorney General ("AG"), having only to prove a nexus between the property and an unlawful act on the balance of probabilities, could authorize the wholesale restraint and confiscation of a person's property, both present and future, without considering the forfeiture target's property rights in the impugned objects.²

A constitutionally entrenched property right, subject to reasonable limits, will not negate the enactment of a forfeiture regime. However, pursuant to section 1 of the *Canadian Charter*, the government would be compelled to justify

¹ No one would contest that a person should be stripped of his or her gains attributed to unlawful acts (profits of crime); however, even in that context, proportionality should govern the design of the restraint and forfeiture schemes.

² See *Ontario (Attorney General) v. 746064 Township Road #4 Blandford-Blenheim Township R.R. #5 Woodstock, Ontario (PIN: 00266-0080 (R)) (In Rem)*, [2008] O.J. No. 446 (Sup. Ct.) (QL) at para. 59 [746064 Township Road]. In Saskatchewan, the AG can rely on certain statutory presumptions, which can reverse the burden of proof. See *Seizure of Criminal Property Act, 2009*, S.S. 2009, c. S-46.002, ss. 14-17.

how it tailored the means used in light of the purposes advanced both at the level of the enactment and at the level of each forfeiture target's case.³ That is the importance of the discussion in this chapter, more so than the entrenchment of the property right for its own sake. To elaborate, the AG would have to advance a proper purpose, which as discussed in Chapter 2, must fall under one of the enumerated provincial heads of power.⁴ Further to the decision in *R. v. Oakes* the AG must also establish:

First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective.

Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question.

Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance."⁵

Not only would such an analysis affirm the importance of the property right, it would serve to legitimize the forfeiture regime by reducing the appearance of arbitrariness in forfeiture cases.

The first section of this chapter briefly reviews the status of property rights protection in the Canadian constitutional framework. The second section exam-

³ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11, s. 1 [*Canadian Charter or Charter*]. See generally *R. v. Oakes*, [1986] 1 S.C.R. 103 at paras. 70-71.

⁴ *Irwin Toy Ltd. v. Québec (Attorney General)*, [1989] 1 S.C.R. 927 at para. 48, per Dickson C.J. and Lamer and Wilson JJ.

⁵ *Oakes*, *supra* note 3 at 138.

ines property rights protections in other modern constitutional states, specifically Germany, South Africa, and the United States (U.S.), by focussing on how courts have understood the property right in light of forfeiture regimes. It reveals that, in Germany and South Africa, where constitutional law in general and the property right in particular emphasize the balancing of competing private and public interests, the forfeiture regimes in those countries are markedly different. By contrast, while the U.S. *Bill of Rights* protects property, because the protection is focused only on due process, rather than the substance of the right, the balancing or proportionality derives from other sources in the constitution.⁶ The conclusion that can be drawn from this analysis is that there is no global convergence toward civil forfeiture regimes and in fact, Germany and South Africa are able to achieve their policy objectives, without wholly negating the right to property.

The third section considers whether other constitutional protections can achieve the same result, ultimately arguing that the absence of a property right in Canada's constitution is a cause for concern with regard to the potential magnitude of the impact of civil forfeiture on Canadians. The chapter concludes with a few brief comments about the implications of this analysis for the future of Canadian constitutional law.

Property Rights in Canadian Constitutional Law

The focus on property in Canadian constitutional law has traditionally centred on the question of legislative authority over this matter. Section 92(13) of *The Constitution Act, 1867* confers jurisdiction on the provinces to legislate on matters of property and civil rights.⁷ The conferral of this jurisdiction was a product of nego-

⁶ U.S. Const., *Bill of Rights* (1791).

⁷ *The Constitution Act, 1867* (*The British North America Act, 1867*) 30 & 31 Vict. c. 3 (U.K.), s. 92(13).

tiations between the leaders of the Canadian colonies, particularly the leadership in Lower Canada (now Quebec), and the proponents of a federal government at the Confederation conferences.⁸

Historically, the legislatures of the individual Canadian colonies had controlled the development of private law in their respective territories and they wanted to maintain this authority after Confederation. This was especially apparent in Lower Canada, which following the Seven Years' War and the subsequent *Treaty of Paris* of 1763, was permitted to maintain its system of private law based upon French civil law.⁹ Legislative control over property rights allows the provinces to privilege certain property claims over others. In addition, provincial legislatures can expropriate property by statute even without paying compensation to the affected parties, provided the legislature's intention to do so is clear.¹⁰

Despite the importance that the struggle for the constitutional protection of property has played in British constitutional history, property *rights* are not constitutionally protected in Canada.¹¹ Among modern constitutional democracies, Canada stands apart due to the silence of its constitution on the protection of a

⁸ See generally Valcke, Catherine, "Quebec Civil Law and Canadian Federalism" (1996) 21 *Yale J. Int'l L.* 67 at 88-91. See also Gaudreault, Marie-Claude, "Canadian Legislative Bijuralism: An Expression of Legal Duality" (2006) 32 *Comm. L. Bul.* 205 at 206-209.

⁹ *The Quebec Act, 1774*, 14 George III, c. 83 (Eng.). See also Canada, *Report of the Royal Commission on Dominion-Provincial Relations, Book 1, Canada: 1867-1939* (1940) at 35.

¹⁰ *Authorson v. Canada (Attorney General)*, [2003] 2 S.C.R. 40 at para. 52 [*Authorson*].

¹¹ The struggle for the protection of private property from arbitrary deprivation formed part of the British constitutional tradition dating back to the *Magna Carta* and is a recurring theme in British constitutional history. *Magna Carta*, 1297, c. 9 (Eng.). See generally Clark, David, "The Icon of Liberty: The Status and Role of Magna Carta in Australian and New Zealand Law" (2000) 24 *Melb. U. L. Rev.* 866 at 887. Property rights played an important role as a cause of the English Civil War that led to the enactment of the English *Bill of Rights* 1689, c. 2 (Eng.).

The importance of private property for political participation also carried over to the British North American colonies. During the colonial period, landholding was a requirement for suffrage. Canada, Elections Canada, "A History of the Vote in Canada", online: <<http://www.elections.ca/content.asp?section=gen&document=chap1&dir=his&lang=e>>, retrieved 21 October 2009. Even to this day, *The Constitution Act, 1867* fixes a minimum property holding requirement for nomination to the Senate. *The Constitution Act, 1867 (The British North America Act, 1867)*, 30 & 31 Vict. c. 3 (U.K.), s. 23(4).

right to property. The trend in post-World War II constitutions has been to include a protection for property rights, subject to limits set by law in light of other social and democratic values of modern constitutional states.

In 1960, Parliament passed the *Canadian Bill of Rights* to recognize the existence of individual rights in Canada, including the right to property.¹² However, the *Canadian Bill of Rights* was not subject to frequent litigation largely because the rights were affirmed in an ordinary statute and because Parliament could limit its application to other laws.¹³ Furthermore, Parliament could deprive a person of the right to property in accordance with due process of law. In interpreting the provision, the courts conferred no new procedural or substantive protections.¹⁴ While the common law requires the state to provide notice and an opportunity to be heard when it purports to limit a property right, the law does not require said notice when the legislature extinguishes a property right by legislative enactment. Although the common law presumes that the state will pay compensation for expropriated property, the legislature can legislate expressly that compensation not be paid.¹⁵

In one notable case, *Harrison v. Carswell*, however, the Supreme Court of Canada did privilege the protection of private property over freedom of expression.¹⁶ In that case, an employee of a shopping centre was convicted of trespass after she picketed along the private sidewalk in front of the premises. The majority of the Court upheld her conviction on the basis that the owner of the shopping centre exercised sufficient control over his property that the protest was an unlaw-

¹² *Canadian Bill of Rights*, S.C. 1960, c. 44.

¹³ *Authorson*, *supra* note 10 at para. 31.

¹⁴ *Ibid.* at paras. 44, 48-50. See also *Curr v. The Queen*, [1972] S.C.R. 889 at 902, per Laskin J., suggesting that the Court be very cautious when reading in substantive protections that could limit Parliamentary supremacy.

¹⁵ *Manitoba Fisheries Ltd. v. The Queen*, [1979] 1 S.C.R. 101 at 109, citing *Attorney-General v. De Keyser's Royal Hotel Ltd*, [1920] A.C. 508 at 542 (U.K.H.L.), per Atkin L.J.

¹⁶ *Harrison v. Carswell*, [1976] 2 S.C.R. 200.

ful interference with his rights. While the majority decision seemed to have invited further exposition of a protected property right, given the suppression of another constitutional value, freedom of expression, the decision lacked constitutional muster or persuasive force. At least one of the judges who sided with the property-owner later modified his views on the subject, and became one of Canada's leading judicial protectors of constitutional rights.¹⁷

The exclusion of the property right from the final version of the *Canadian Charter* has seen surprisingly little academic debate or critical scholarship in Canada. In February 1979, the initial draft text proposed at the following articulation of the property right:

[The r]ight to use and enjoyment of property by individuals or groups, and [the] right not to be deprived thereof except in accordance with law that is fair and just.¹⁸

While the right was drafted in a large and liberal manner, it is noteworthy that the provision also included its own limitation clause, which read as follows:

Laws which control or restrict [the] use of property in [the] public interest of for the collection of taxes and penalties.

Laws which are justifiable in a free and democratic society in the interests of national security[,] public safety, order, health, or morals.

The draft text remained relatively unchanged up until its removal from the draft *Charter* in September 1980.¹⁹

¹⁷ See generally Sharpe, Robert, and Roach, Kent, *Brian Dickson: A Judge's Journey* (Aurora, Ont.: University of Toronto Press, 2003) at 152. See also Sharpe, Robert, "The Constitutional Legacy of Chief Justice Brian Dickson" (2000) 38 *Osgoode Hall L. J.* 189 ay 207-209.

¹⁸ Canada, Federal-Provincial Conference of First Ministers on the Constitution, "Federal Draft Proposals Discussed by First Ministers" (5-6 February 1979), document: 900-010/037.

The drafters quickly abandoned plans to include property rights, principally on objection from the premiers of several provinces over the potential impact of an entrenched property right on public works projects.²⁰ The property right was, therefore, removed by early September 1980²¹ to secure the consent of Saskatchewan's New Democratic Party ("NDP") premier.²² Sujit Choudry has explained that the drafters of the *Charter* were conscious of the American experience in what has become known as the *Lochner* era, in which the U.S. Supreme Court struck down several pieces of social welfare legislation on the grounds that these laws unduly restricted freedom of contract.²³ When looking at the draft text,

¹⁹ In July 1980, the draft provision read as follows:

9. (1) Everyone has the right to the use and enjoyment of property, individually or in association with others, and the right not to be deprived thereof except in accordance with law and for reasonable compensation.

(2) Nothing in this section precludes the enactment of or renders invalid laws controlling or restricting the use of property in the public interest or securing against property the payment of taxes or duties or other levies or penalties.

See Canada, Meeting of the Continuing Committee of Ministers on the Constitution (8-11 July 1980), document: 830-81/027.

²⁰ See generally Alvaro, Alexander, "Why Property Rights Were Excluded from the Canadian Charter of Rights and Freedoms" (1991) 24 Can. J. Pol. Sc. 309 at 319. See also McBean, Jean, "The Implications of Entrenching Property Rights in Section 7 of the Charter of Rights" (1998) 26 Alta. L. Rev. 548. See also Axworthy, Tom, "PM's aide 'sets the record straight' on property rights" (19 August 1983) *The Globe and Mail*, P.7.

²¹ See Canada, Federal-Provincial Conference of the First Ministers on the Constitution, "Revised Discussion Draft of September 3, 1980: The Charter of Rights and Freedoms" (3 September 1980). See also Johansen, David, "Property Rights and the Constitution", online: Treasury Board Secretariat <<http://dsp-psd.pwgsc.gc.ca/Collection-R/LoPBdP/BP/bp268-e.htm>>, retrieved 19 October 2009.

²² See also Sallot, Jeff, "No fence-sitting over property rights" (16 May 1983) *The Globe and Mail*, P.9.

²³ See generally Choudry, Sujit, "The *Lochner* Era and Comparative Constitutionalism" (2004) 2 Int'l J. Const. L. 1 at 16-27. For a general discussion of the impact and the U.S. Supreme Court decision in *Lochner v. New York*, 198 U.S. 45 (1905), see generally Bernstein, David, "Lochner Era Revisionism, Revised: *Lochner* and the Origins of Fundamental Rights Constitutionalism" (2004) 92 Geo. L.J. 1. See also Sunstein, Cass, "Lochner's Legacy" (1987) 87 Colum. L. Rev. 873.

however, it would have seemed unlikely that the property right, with an internal limitations clause, and being subject to reasonable and justifiable limits imposed by section 1, would have led to the same effects following the decision in *Lochner*.

The debate over the inclusion of a property right post-*Charter* also ended quickly due to concerns from Canada's socially liberal political parties and organizations. The federal NDP, for example, raised other perceived implications of an entrenched property right, which included a possible defence for environmental polluters and a barrier for provincial regulation of Indian reserve land.²⁴ The Canadian Civil Liberties Association also expressed "serious reservations" about the amendment.²⁵

Several attempts were made to introduce property into the *Charter* framework after its enactment, but lawmakers continued to oppose this proposal on grounds that an entrenched property right would impact the government's ability to legislate social policy and would adversely affect women and the disadvantaged, because it was felt that those laws could be struck down for unduly interfering with property right.²⁶ The courts have also chosen not to extend the protection of other *Charter* rights, namely sections 7 and 8, to include the protection of property.²⁷

Property, Proportionality & Civil Forfeiture Abroad

This section reviews the impact of a constitutionally protected property right on the development of forfeiture regimes in three countries: Germany, South Africa, and the U.S. While this section could explore property rights across the modern

²⁴ See Sallot, Jeff, "Liberals defeat property rights motion" (3 May 1983) *The Globe and Mail*, P.1.

²⁵ See Sallot, *supra* note 22.

²⁶ See Choudry, *supra* note 22 at 26-27.

²⁷ See e.g. *R. v. Becker* (1983), 148 D.L.R. (3d) 539 (Alta. C.A.).

constitutional world, the comparison between these three countries is more than sufficient to highlight the impact of the constitutional lacuna at issue in this chapter.²⁸

As a result not only of an entrenched property right, but predominately as a function of justified limitations on rights (proportionality), the German and South African forfeiture laws are more sophisticated. That is, the forfeiture laws in those countries ensure that the state, in their exercise of its forfeiture powers, does not eviscerate a person's entire patrimony or estate without sufficient justification. Those jurisdictions have tailored the provisions of their forfeiture laws to the defined purposes. As a result, the proportionality analysis allows the state to justify robust forfeiture measures without compromising the legitimacy of the forfeiture regime.

U.S. courts, by contrast, do not consider whether the forfeiture is tailored, only whether the value of the property seized is grossly disproportionate to the severity of the underlying act. Academic commentators have described this approach as "arbitrary" and one that does little to enhance the legitimacy of the U.S. forfeiture regime.²⁹

Germany

Unlike the *Canadian Charter*, the German *Basic Law* contains a clause that guarantees the protection of property rights.³⁰ Article 14 of the *Basic Law* reads as follows:

²⁸ See e.g. *Basic Law: Human Dignity and Liberty* (Israel), as promulgated on 17 March 1992, s. 3; See also *Constitution of Italy*, as promulgated on 22 December 1947, s. 42.

²⁹ See generally Johnson, Barry, "Purging the Cruel and Unusual: The Autonomous Excessive Fines Clause and Desert-Based Constitutional Limits on Forfeiture after *United States v. Bajakajian*" (2000) U. Ill. L. Rev. 461 at 504.

³⁰ *Basic Law for the Federal Republic of Germany (Grundgesetz, GG)*, as promulgated on 23 May 1949, art. 14.

14. (1) Property and the right of inheritance shall be guaranteed. Their content and limits shall be defined by the laws.

(2) Property entails obligations. Its use shall also serve the public good.

(3) Expropriation shall only be permissible for the public good. It may only be ordered by or pursuant to a law that determines the nature and extent of compensation. Such compensation shall be determined by establishing an equitable balance between the public interest and the interests of those affected. In case of dispute respecting the amount of compensation, recourse may be had to the ordinary courts.

Leading American constitutional scholar on the constitutional law of Germany, Donald Kommers, has noted that while the *Basic Law* guarantees protection for property, several principled constraints on property rights are built into the section.³¹ Property rights necessarily have a public aspect, as the rights must be exercised in the public good and cannot be used to hinder the public good. Kommers has commented, however, that any limitations on the right to property cannot extend so far to interfere with the “essence of the right”.³²

The essence of the property right, as the German constitutional court explained in the *Hamburg Flood Control* case, is the preservation of a field of economic liberty. The right to have property is a necessary aspect toward a self-governing or autonomous life.

Other constitutional scholars that have commented on Article 14 of the *Basic Law* have made similar observations.³³ As Gregory Alexander has noted,

³¹ Kommers, Donald, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 2d ed. (London, U.K.: Duke, 1997) at 257.

³² *Ibid.*

³³ See Schuppert, Gunnar, “The Right to Property” in Karpen, Ulrich, ed., *The Constitution of the Federal Republic of Germany* (Baden-Baden, Ger. FR.: Auflage, 1988) 107 at 114-115. See also Michalowski, Sabine and Woods, Lorna, *German Constitutional Law: The Protection of Civil Liberties* (Brookfield, VT: Ashgate: 1999) at 319 and following.

German constitutional law clearly recognizes that “[p]roperty is a necessary condition for autonomous individuals to experience control over their own lives. Without property, they lack the material means necessary for a full and healthy development of their personality.”³⁴ The property right, therefore, intersects with other rights, values, and principles, such as “human dignity, personality, and equality”.

In the context of the law of forfeiture, the property right intersects with the guilt principle to circumscribe the scope of the state’s forfeiture laws. German courts have established, for example, that for every situation involving a prospective forfeiture, the state must establish the commission of an unlawful act beyond reasonable doubt.³⁵ Otherwise, the deprivation would be considered arbitrary and the regime would be unconstitutional.

While forfeiture has formed part of the legal framework in Germany for over a century, in the post-war period, the provisions of the *Basic Law* have precluded German legislatures from enacting purely “civil” asset forfeiture regimes comparable to the Canadian provincial forfeiture statutes.³⁶ The German *Criminal Code* sets out that country’s forfeiture regime, which is neither wholly civil nor wholly criminal in nature.³⁷ While the state can pursue the confiscation of property of those implicated in the underlying criminal act, the Code provides for for-

³⁴ Alexander, Gregory, “Property as a Fundamental Constitutional Right? The German Example” (2003) 88 Cornell L. Rev. 733 at 735, citing Krotoszynski Jr., Ronald, “Fundamental Property Rights” (1997) 85 Geo. L.J. 55 at 746-747. See also *Hamburg Flood Control Case* (1968), 24 BVerfGE 367 (Const. Ct.).

³⁵ See generally Benseler, Justus, “Forfeiture Legislation in Germany: Legal Basis and Prosecution Practice” (1997) 5 European Journal of Crime, Criminal Law and Criminal Justice 203 at 207, citing (1995) NJW 48 (Supr. Ct.) at 470.

³⁶ See generally Maxeiner, James, “Constitutionalizing Forfeiture Law - The German Example” (1979) 27 Am. J. Comp. L. 635 at 639. The German *Criminal Code* has included a forfeiture provision since 1871.

³⁷ German *Criminal Code* (*Strafgesetzbuch, StGB*), as promulgated on 13 November 1998, ss. 73-76. Like the Canadian provincial forfeiture statutes, however, the German *Criminal Code* has separate rules for the confiscation of instruments of crime and the forfeiture of proceeds of crime.

feiture of property belonging to third parties in cases of gross negligence on the part of the apathetic owner. Unlike Canada, the state does not have to establish a lack of knowledge and consent on the part of the third party, because of the preventative purpose of the regime. A conviction is also not a pre-condition for forfeiture in Canada.

In interpreting the *Criminal Code* forfeiture provisions, the Constitutional Court, which sits at the apex of the German legal system in constitutional matters, determined that the state does not have to prove that the owner of the property committed the unlawful act, only that the person was a principal or secondary participant in the act. Though proof of the offender's identity beyond reasonable doubt is in all cases a requirement for conviction, identity need not be proven in the forfeiture context. While it may seem odd that a court will require proof of *an* underlying offence beyond reasonable doubt, it is no different than the abstract criteria of an unlawful act at the core of Canadian provincial civil forfeiture legislation.³⁸ The major difference between the two standards is the level of certainty required to order forfeiture.

The German courts will also consider the proportionality of a prospective forfeiture in particular instances. The factors resemble the criteria associated with the proportionality inquiry later developed by the Supreme Court of Canada in *Oakes*.³⁹ In a 1965 decision of the German Supreme Court, the Court found the preventative purpose of the forfeiture was justified. It then considered whether the forfeiture was suitable for the purpose (*Geeignetheit*); whether it was necessary for that purpose (*Erforderlichkeit*); and, whether the benefits to the state exceeded

³⁸ The detachment of forfeiture of instruments or proceeds of criminal activity from the attribution of a criminal offence to the target of the forfeiture has been the subject of critique in Germany. See Kilchling, Michael, "Organised Crime Policies in Germany" in Fijnaut, Cyrille, and Paoli, Letizia, eds., *Organised Crime in Europe: Concepts, Patterns and Control Policies in the European Union and Beyond* (Dordrecht, Neth.: Springer, 2004) 717 at 726.

³⁹ See *Oakes*, *supra* note 3.

the impact on the forfeiture target's rights (*Verhältnismäßigkeit*).⁴⁰ The Court denied the state's forfeiture application for the target's typewriter, even though the underlying act was treason. The forfeiture was unnecessary to prevent future danger. The proposed forfeiture order would have been needlessly retributive, which the Court held was not a legitimate purpose of the regime.

In light of the proportionality analysis, a German court considering forfeiture, especially the forfeiture of instruments of criminal activity, must do so as a last resort and only if it is necessary to accomplish the legislative purpose, which in Germany, is focused on crime prevention, rather than on punishment. While that approach places a more onerous burden on the state seeking confiscation, it also invites the state to pursue a much broader inquiry into the assets of the respondent. Once the state establishes that an unlawful act has been committed, it can pursue forfeiture of the purported perpetrator or accessory's property "if the circumstances justify the assumption that these objects were acquired as a result of unlawful acts, or for the purpose of committing them."⁴¹ The unlawful acts need not be tied to the initial act, thereby giving courts the authority to strip a person of his or her unlawfully held property.

That approach also means that once the state has met its burden, a court can invoke the "gross principle" in relation to the seized item, meaning that it will preclude the purported owner from claiming that expenses or costs be deducted from the forfeited value. Nevertheless, courts are entitled to tailor their orders to mitigate the harsh effects of forfeiture in light of a codified proportionality requirement.⁴² While the Constitutional Court has recognized that the forfeiture regime may not have been designed specifically to mitigate the conditions for future crimes, the gross principle signals the preventative purpose of the regime, and

⁴⁰ Maxeiner, *supra* note 36 at 649 citing 20 BGHSt 253 at 255-256 (16 July 1965) (Supr. Ct.).

⁴¹ *Strafgesetzbuch*, *supra* note 37, s. 73d.

⁴² *Ibid.*, s. 74b.

also reinforces that the regime is designed to create strong disincentives not to use property to commit crime.⁴³ The focus on general deterrence, however, is incidental to the crime-prevention purpose of the statute, since the state is required to consider prosecution as a first-order response to situations that involve tainted property.⁴⁴

South Africa

Like the German *Basic Law*, the South African *Bill of Rights*⁴⁵ also contains a provision that protects the right to property.⁴⁶ The first clause of Article 25 reads:

25. (1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

Unlike the German *Basic Law*, however, the property provisions in the South African *Bill of Rights* focus extensively on land reform and on addressing inequalities in land ownership.⁴⁷ For the purposes of the analysis in this chapter, however, the focus will lie squarely with the first clause.

As AJ van der Walt has noted, the first clause of the property provision confirms the existence of property rights, but also recognizes that they are subject to lawfully imposed limits, that is, limits which do not amount to arbitrary or ca-

⁴³ 110 BVerfGE 1 (2004) (Const. Ct.) at para. 70.

⁴⁴ *Strafgesetzbuch*, *supra* note 37, art. 76a.

⁴⁵ *Bill of Rights*, being Chapter 2 of the *Constitution of the Republic of South Africa*, 1996 (Rep. S. Afr.).

⁴⁶ A comparison of property rights in the two jurisdictions can be found at: Kleyn, DG, “The Constitutional Protection of Property: A Comparison between the German and the South African Approach” (1996) 11 S.A. Pub. L. 402.

⁴⁷ See van de Walt, AJ, *Constitutional Property Law* (Cape Town, Rep. S. Afr.: Juta & Co, 2005) at 284 and following.

precious deprivations of property.⁴⁸ He has contended that the provision does not confer a positive right to entitle a person to receive property from the state. Rather, it simply guarantees that a person's rights are preserved,⁴⁹ but does not go so far as to empower the courts to engage in substantive review of social policy legislation or "Lochner-like judicial review."⁵⁰ By elevating property rights to constitutional status, however, the courts can strike down state laws and state action that impose limitations on property rights that implicate a person's personality or liberty.⁵¹

Having enacted civil forfeiture legislation in 1998, South Africa was one of the first democratic states to have passed a comprehensive forfeiture regime apart from the U.S. While South Africa introduced its first asset forfeiture legislation in 1992,⁵² Raylene Keightley⁵³ has noted that little practical implementation of forfeiture laws occurred until the enactment of the *Prevention of Organised Crime Act* six years later.⁵⁴ Like its Canadian counterparts, the *Prevention of Organised Crime Act* provides for the restraint of property as well as for its ultimate forfeiture to the state using a civil process.

The issue of the constitutionality of civil forfeiture has made its way to the South African Constitutional Court, which, as in Germany, is the country's high-

⁴⁸ *Ibid.*, at 13.

⁴⁹ *Ibid.*, at 27.

⁵⁰ *Ibid.*, at 28.

⁵¹ *Ibid.*, at 73.

⁵² *Drugs and Drug Trafficking Act*, No. 140 of 1992 (Rep. S. Afr.), ch. 5 [now repealed].

⁵³ See Keightley, Raylene, "Asset Forfeiture in South Africa under the Prevention of Organised Crime Act 121 of 1998" in Simon Young, ed., *Civil Forfeiture of Criminal Property: Legal Measures for Targeting the Proceeds of Crime* (Northampton: MA, 2009) 93 at 94.

⁵⁴ *Prevention of Organised Crime Act*, No. 121 of 1998 (Rep. S. Afr.). See also Van der Walt, A.J., "Civil forfeiture of instrumentalities and Proceeds of Crime and the Constitutional Property Clause" (2000) 16 S. Afr. J. Hum. Rts. 1 at 32 and following.

est court in constitutional matters.⁵⁵ In *Monhunram and another v. National Director of Public Prosecutions and another*, that Court considered whether the provisions of the *Prevention of Organised Crime Act* violated the text and spirit of the property clause in the South African *Bill of Rights*. Speaking for the concurring majority judges, Justice Belinda Van Heerden noted that the purpose of the protection was “to establish a just and equitable balance between the protection of private property and the promotion of the public interest.”⁵⁶ The purpose of the right was not to insulate private property from state interference, but to ensure that the deprivation of property does not occur in an arbitrary manner. While claims that a statute applies arbitrarily are often associated with the absence of due process, in the context of South African jurisprudence, courts will consider both procedural and substantive elements to the claim.⁵⁷ Not only must a court ensure procedural fairness (such as requiring that the rights-holders receive notice and a hearing), but it must also provide a sufficient cause for the deprivation of particular property.

Unlike in Germany, the South African Constitutional Court recognized that the regime has a punitive purpose, but in keeping with the framework of justified limitation on rights, the Court incorporated a proportionality analysis to its assessment of the validity of the scheme and its effect in individual cases.⁵⁸

⁵⁵ South Africa, Constitutional Court, “About the Court”, online <<http://www.constitutionalcourt.org.za/site/thecourt/role.htm>>, retrieved 22 October 2009.

⁵⁶ *Monhunram and another v. National Director of Public Prosecutions and another*, 2007 (2) SACR 145 (Rep. S. Afr.) at 170 [*Monhunram*]. The majority decision was authored by two concurring groups of judges. For a further discussion of the interpretation of property rights by the South African Constitutional Court see Cheadle, Halton, *et al.*, *South African Constitutional Law: The Bill of Rights* (Durban, Rep. S. Afr.: Butterworths, 2002) at 429-472. It is noteworthy the Constitutional Court has considered very few property rights cases. The authors note that the inclusion of land reform provisions in the *Bill of Rights* may spawn future litigation regarding that constitutional right.

⁵⁷ *Prophet v. National Director of Public Prosecutions*, 2006(2) SACR 525 at 549 [*Prophet*].

⁵⁸ *Monhunram*, *supra* note 56 at 168. It is important to note that the South African Constitutional Court has yet to affirm the constitutionality of the entire forfeiture scheme as applicants in all of the cases failed to dispute this issue before the lower tribunals, which is required under that coun-

In considering whether the forfeiture of property is proportionate, the Constitutional Court held that the lower courts must assess “whether the property is integral to the commission of the crime”.⁵⁹ In addition, a court should evaluate whether and to what extent “the forfeiture would prevent the further commission of the offence and its social consequences, the ‘innocent owner’ defence would be available to the respondent, the nature and use of the property and the effect on the respondent of the forfeiture of the property.”⁶⁰ Courts also must take into consideration other penalties imposed on a respondent so as to ensure the punishment as a whole is proportionate to the underlying offence.

A justifiable limitation on the right to property will only occur if the deprivation is not “disproportionate” to the purpose of the forfeiture. While the Constitutional Court used the term “disproportionality”, the choice of the negative connotation as opposed to the positive (“proportionality”) does not appear to have impacted the standard since, in any event the burden of proving non-disproportionality lies with the state.⁶¹

It is noteworthy that the entrenchment of property rights does not provide blanket protection against the interference with other constitutional rights in the forfeiture context. In the *Prophet* decision, the Constitutional Court ordered for-

try’s appellate procedure. Nevertheless, in light of the Court’s conclusions with regard to the inclusion of a proportionality analysis for individual cases, it seems unlikely that the Court would strike down the entire scheme for violating the property protection under section 25 of the *Bill of Rights*.

⁵⁹ *Ibid.* at 171. The court in *Prophet* noted other factors as well including “the relationship between the purpose of the deprivation and the person whose property is affected, the property affected, and the extent of the deprivation.” See *Prophet*, *supra* note 57 at 171.

⁶⁰ *Ibid.*

⁶¹ *Monhunram*, *supra* note 56 at 174. The respondent does bear an evidentiary burden in the event that the discoverable facts otherwise justify forfeiture. The issue of property rights has informed the Constitutional Court’s analysis in issues incidental, but nevertheless important, to the forfeiture regime. In *Fraser v. Absa Bank Ltd. (National Director of Public Prosecutions as Amicus Curiae)*, 2007(3) SA 484, the Constitutional Court affirmed that a lower court may grant intervenor status to a third-party creditor in a proceeding relating to the use of seized assets to fund legal representation. Otherwise, a person could deplete the seized assets, frustrating the interests of his creditors.

feiture of immovable property on the basis that the property was the site of a methamphetamine lab. The respondents were acquitted at the criminal trial because the Court found that the search of the premises was unconstitutional and excluded the evidence obtained from the search. Nevertheless, the Constitutional Court admitted the evidence of the search for the purposes of the forfeiture proceeding. It is noteworthy that had the police not obtained the invalid warrant, the forfeiture proceeding likely would not have occurred since the facts giving rise to the forfeiture would have been undiscoverable.

United States

The American courts' position on the subject of property and proportionality lies in stark contrast to the approaches of the German and South African courts. Unlike the German or South African constitutions, the U.S. Constitution does not protect the *substance* of the property right (e.g., the objects being forfeited).⁶² Rather, the Constitution simply confers a right to due process when a person risks losing property to the state.⁶³ Furthermore, without a justified limitation clause,

⁶² While the Supreme Court of the United States has interpreted the term "property" broadly to include intangible assets and government benefits, the focus of the constitutional analysis concentrates on the process surrounding the deprivation, not on whether there is a substantive constitutional right to the impugned property itself. See e.g. *Mathews, Secretary Of Health, Education, and Welfare v. Eldridge*, 424 U.S. 319 (1976) at 333 (where the Court upheld that a program to review the disability status of a benefit program provided sufficient due process so as not to violate the Fifth Amendment).

⁶³ See e.g. In *U.S. v. James Daniel Good Real Property* (1993), 510 U.S. 43 (1993) [*James Daniel Good*]. In that case, the Supreme Court of the United States refused to read substantive property protections into the forfeiture process. In that case, the court ordered forfeiture of a home over four years after its owner had been convicted of a narcotics offence. The only rights protections conferred to the owner of the property were notice of the forfeiture hearing and the right to be heard. The right to be heard does not necessarily confer the full moniker of protection afforded to a defendant in a criminal trial, nor does it include a review of the nature of the forfeiture as an act in and unto itself (*i.e.*, a substantive review). In effect, the Court has segregated civil forfeiture from questions of expropriation, protecting the latter, but not the former.

like section 1 of the *Canadian Charter*, the U.S. courts had to look elsewhere if they were to undertake a proportionality analysis in a forfeiture case.

Despite the fact that civil forfeiture has been a component of U.S. federal law since 1984,⁶⁴ it was not until 1998 that the Supreme Court of the United States addressed the issue of proportionality in a forfeiture case.⁶⁵ The Court did so not in the context of the property right, but it relied instead on the Eighth Amendment of the Constitution, which prohibits the imposition of excessive fines. Reliance on that constitutional provision represents a stopgap remedy clear cases of injustice.

The inclusion of this form of proportionality analysis arose in the context of the decision in *U.S. v. Bajakajian*.⁶⁶ In that case, the respondent attempted to leave the country without declaring over \$300,000 in cash in his possession. The maximum fine for the offence was \$15,000. The U.S. Supreme Court agreed with the respondent that forfeiture of the entire sum constituted an excessive fine (despite the government's arguments that the purpose of the regime was restorative and deterrent) and the Court concluded that the forfeiture of the entire sum was grossly disproportionate to the underlying act.

The Court did not engage in a proportionality inquiry in the "constitutional" sense, which one traditionally associates with a balancing of rights with the legislative purpose and means to assess the validity of the legislative scheme or the constitutionality of its application in the particular case.⁶⁷ The Court simply

⁶⁴ *Comprehensive Crime Control Act of 1984*, Pub. L. No. 98-473 (U.S.).

⁶⁵ *United States v. Bajakajian*, 521 U.S. 321 (1998).

⁶⁶ *Ibid.*

⁶⁷ American scholarship on proportionality does not regard this concept as part of a larger scheme involving the relationship between rights and the limitation on rights. See generally Weinrib, Lorraine "The Supreme Court of Canada and Section One of the Charter" (1988) 10 *Sup. Ct. L. Rev.* 469 at 471, 495. American legal scholars treat proportionality as something external to be imposed on the forfeiture regime, rather than a necessary element of the analysis. See generally Pollock, Stacy, "Proportionality in Civil Forfeiture: Toward a Remedial Solution" (1994) 62 *Geo. Wash. L. Rev.* 456 at 479 and following.

compared the value of the object seized with the severity of the underlying act to determine whether the forfeiture was excessive. Any consideration as to the nature of the property, the relationship between the possessor and the property, implications for third parties and the like was absent from, and was seemingly irrelevant to, the Court's analysis.⁶⁸

In a previous Supreme Court decision, *Bennis v. Michigan*, the Court also had occasion to determine whether the constitution would require that the state apply its forfeiture rules in a proportionate manner.⁶⁹ In that case, the Court upheld a lower court's order for the forfeiture of a jointly held automobile used by the petitioner's husband to have sex with a prostitute. Unwilling to overturn seventy-five years of jurisprudence noting the punitive *and* deterrent purposes of civil forfeiture, the Court declined to grant any substantive protection to the petitioner vis-à-vis her interest in the jointly-owned vehicle.⁷⁰ While Justice John Paul Stevens, speaking in dissent, noted that the facts in *Bennis* "establish that the seizure constituted an arbitrary deprivation of property without due process of law,"⁷¹ the petitioner was not deprived of due process, but rather the substantive protection of her right in the property.

The mere conferral of due process protections when the state is pursuing asset forfeiture leaves owners and possessors of property vulnerable, especially when the property in issue is material to the target's livelihood or wellbeing. For example, Jack Yoskowitz has noted that the U.S. government has used civil for-

⁶⁸ See Pollock, *ibid.*, at 476, referring to Justice Antonin Scalia's concurring opinion in *Austin v. United States.*, 509 U.S. 602 (1993). The analysis is comparable to the forfeiture provisions in the sentencing rules located within Canada's *Criminal Code*. *Criminal Code*, R.S.C. 1985, c. C-46, s. 490.1 and following.

⁶⁹ *Bennis v. Michigan*, 516 U.S. 442 (1996) [*Bennis*].

⁷⁰ For critiques of the U.S. Supreme Court's approach to the issues in *Bennis*, *ibid.*, see generally Boudreaux, and Pritchard, Adam, "Innocence Lost: *Bennis v. Michigan* and the Forfeiture Tradition" (1996) 61 Mo. L. Rev. 593; See also Wagner, M. Kathryn, "Forfeiting the Foundation of American Jurisprudence: *Bennis v. Michigan*" (1998) 66 U. Cin. L. Rev. 317.

⁷¹ *Bennis*, *ibid.* at 469.

feiture mechanisms to evict drug users from public housing essentially leaving them and their families homeless.⁷² If the leasehold interest in public housing is restrained in advance of the forfeiture hearing, if the tenants are then evicted, and if it turns out that the government fails to make its case, the forfeiture target and his or her family may face prolonged homelessness due to difficulty in finding suitable replacement housing, despite no finding of criminal liability. Without constitutional protection of these rights, Canadian beneficiaries of social housing are equally vulnerable and the provinces or municipalities could use civil forfeiture legislation to evict large numbers of people, possibly for motives apart from crime-control.⁷³ Furthermore, as many of the definitions of “instruments of criminal activity” include property likely to be used for unlawful purposes, provinces may seek to use civil forfeiture to curtail welfare benefits from those who use these benefits to acquire drugs.

The property clauses codified under the Fifth and Fourteenth Amendments offer no substantive protections of the objects of the right to property themselves. They simply protect procedural fairness in an expropriation transaction by ensuring just compensation. Forfeiture targets, particularly innocent owners, are vulnerable to the arbitrary confiscation of their property. Without a protection of the substantive rights or a “means-ends-like” proportionality analysis, the persons whose property is at stake cannot hold the government to account for the purposes

⁷² Yoskowitz, Jack, “The War on the Poor: Civil Forfeiture of Public Housing” (1992) 25 Colum. J.L. & Soc. Probs. 567 at 593-598.

⁷³ The current state of social housing problems in Canada has been the subject of numerous scholarly and media critiques. See e.g. Dorvil, Henri, *et al.*, “L’actualité du logement social : entrevue avec François Saillant” (2001) 14(1) *Nouvelles pratiques sociales* 8 at 10 (for a discussion of the state of social housing in Quebec); See also Owen, Michelle, and Watters Colleen, “Housing for Assisted Living in Inner-City Winnipeg: A Social Analysis of Housing Options for People with Disabilities” (2006) 15 *Can. J. Urban Research* 1 at 9 (for a discussion of the difficulties facing persons with disabilities in finding appropriate social housing).

The Ontario government enacted the *Residential Tenancies Act*, S.O. 2006, c. 17, s. 84, which allows landlords to evict tenants under an expedited eviction order on the basis of an illegal act, trade, business or occupation. See also Ontario, Landlord and Tenant Board, “Notice to Terminate a Tenancy Early: Illegal Act or Misrepresentation of Income”, online: <http://www.ltb.gov.on.ca/graphics/stel02_111569.pdf>.

of the regime that it invokes (punishment, prevention, and denunciation) or establish a contextual foundation regarding their exigency. All that those persons can claim is that the forfeiture is grossly disproportionate to the underlying act. In this light, the absence of a property right from the Canadian constitution raises significant concerns.

Proportionality without a Property Right?

Since the *Canadian Charter* does not include a property right (or even an excessive fines clause), courts are not obliged to subject the provincial forfeiture legislation to a proportionality analysis. Despite the mandatory language contained in the provincial forfeiture statutes compelling forfeiture of tainted property, in a few Canadian cases, courts have attempted to introduce proportionality, by relying on stopgap or exception clauses found in forfeiture legislation, when the result of the proposed forfeiture in concrete cases would result in unduly harsh consequences for the respondent.⁷⁴

The Ontario statute, for example, includes the words “except where it would clearly not be in the interests of justice” not to make an order for forfeiture.⁷⁵ It is not obvious from that language that the legislature intended the courts to introduce proportionality. In the rare instances, however, in which a court engages in such an inquiry, it has applied some of the same considerations identified by the South African Constitutional Court regarding the forfeiture of instru-

⁷⁴ Section 3(1) of the *Civil Remedies Act, 2001*, S.O. 2001, c. 28. Not all provincial statutes include such clauses. See e.g. *An Act respecting the forfeiture, administration and appropriation of proceeds and instruments of unlawful activity*, R.S.Q. c. C-52.2.

⁷⁵ *Ibid.*

ments.⁷⁶ The courts could, however, adopt a stricter standard of gross disproportionality, like the U.S. courts have done.

One notable case that applied the exceptional clause occurred in a decision of the Ontario Superior Court in 2008.⁷⁷ In that case, the police investigated the family home of two Ontario residents after receiving a tip that they were growing marijuana. The police executed a search warrant and discovered that the homeowner, John Nock, was growing marijuana in and around his family home. The police discovered sixty-six marijuana plants growing outside, as well as a room in the basement containing scales and baggies typically used to pack marijuana. The room also was equipped with light shields and fixtures and was vented to the outside. Nock pleaded guilty to unlawful production of a controlled substance and received a conditional sentence. It is also noteworthy that there was scant evidence that he sold the illegal drugs and that any trafficking would be prospective.

Despite obtaining a penal sanction and despite the sentencing judge's conclusion that forfeiture was not justified in this case, the province pursued forfeiture of the Nocks' home anyway. In denying the forfeiture, the Court considered the interests of the family members: Nock; his wife; and their daughter, who lived with them in the family home. While the evidence spoke to the fact that Nock likely would have engaged in drug trafficking in the future, the Court meted out its punishment in the criminal context and deemed him to be a low risk to reoffend. Neither Nock, nor others, benefited financially from the production activities, yet the province sought forfeiture of the home bought using lawfully earned funds.

The forfeiture application brought by the AG omitted any consideration of the interests of the child, who lived in the family home, and it dismissed Mrs.

⁷⁶ 746064 *Township Road*, *supra* note 2. See also *Ontario (Attorney General) v. 1140 Aubin Road, Windsor and 3142 Halpin Road, Windsor (In Rem)*, [2008] O.J. No. 5209 (Sup. Ct.)(QL).

⁷⁷ 746064 *Township Road*, *ibid.*

Nock's lack of culpability in her husband's crime. The provincial forfeiture statute did not require that a court give consideration to those issues; it was only the Court's discretion that prevented the forfeiture in that case. Had the law been subject to scrutiny on the basis of a constitutional right, the state would have been compelled not only to advance the policy interest in issue, but also to present evidence and argument regarding the means chosen, the necessity of those means, and a weighing of costs and benefits. Instead, the court exercised discretionary "justice", or as Markus Dubber has described, household justice, not on the basis of legal rules, but on the basis of economic management of a social problem.⁷⁸

Notwithstanding judicial intervention in certain forfeiture cases, there is no constitutional norm that will preclude provincial governments from removing even the crude form of proportionality from the courts' analytical framework.⁷⁹ Furthermore, the constitution cannot prevent the provinces from legislating so as to deprive persons of future property rights (such as welfare benefits, licenses, for example) on the grounds that this property is likely to be used as an instrument of crime. Indeed, as Alan Nicgorski has argued, proportionality considerations negate the deterrent and denunciatory value of the forfeiture regime.⁸⁰ If the provin-

⁷⁸ See Dubber, Markus, "'An Extraordinarily Beautiful Document': Jefferson's *Bill for Proportioning Crimes and Punishments* and the Challenge of Republican Punishment," in Dubber, Markus, and Farmer, Lindsay, eds., *Modern Histories of Crime and Punishment* (Stanford, CA: Stanford University Press, 2007) 115 at 122.

⁷⁹ In a similar example in the U.S. context, the Supreme Court noted that due to the *in rem* nature of the forfeiture proceeding, and due to the application of the relation-back doctrine, the common law does not confer the right on innocent third parties to maintain their rights in the forfeited object. The forfeiture legislation must include an express provision to confer said rights on third parties. See *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974) at 686 [*Calero-Toledo*]. The statute in issue in that case did not include an innocent owner provision. In Australia's Northern Territory, the civil forfeiture statute does not include a provision governing proportionality. By contrast the relevant provision states that the court must order forfeiture if it is more likely than not that the property was used for the commission of a crime or proceeds of criminal activity. *Criminal Property Forfeiture Act 2002* (N. Terr.), ss. 96-97. See also *DPP v. Green*, [2009] NTSC 21 (N. Terr.) at paras. 11-12.

⁸⁰ See generally Nicgorski, Alan, "The Continuing Saga of Civil Forfeiture, the 'War on Drugs,' and the Constitution: Determining the Constitutional Excessiveness of Civil Forfeitures" (1997) 91 Nw. U L. Rev. 374 at 402-410.

cial legislatures adopt the view that people should be responsible for their property (and not use it or allow it to be used to further criminal ends) then the provinces can shift more responsibility for crime control to the public. That was the view of the U.S. Supreme Court in *Calero-Toledo v. Pearson Yacht Leasing Co.*,⁸¹ and remains the view of British courts.⁸²

As in Germany or South Africa, a constitutionally entrenched property right subject to a limitation clause would compel a proportionality requirement at two levels of analysis.⁸³ As has been highlighted repeatedly in this chapter, the value for the target is not so much in the entrenched property right itself, but rather in the structured application of a proportionality inquiry.

First, at the more general level of the scheme or a provision's validity, the government would be required to state the purpose of the scheme or a provision and demonstrate how the government has tailored its design to achieve that purpose.⁸⁴ One of the particular strengths of this form of analysis is that it compels the government to actually state the purpose of the legislation, which can then be used to circumscribe the degree of interference on rights. A proportionality analysis would also compel the government to present evidence of the seriousness of the problem that necessitated the enactment of the legislation. Furthermore, in a proportionality analysis under Canadian law, courts will hold the government to that purpose, by preventing it from shifting the purpose to conform to the facts of the case or context.⁸⁵

⁸¹ *Calero-Toledo, ibid.*

⁸² See generally *R. (Director of the Assets Recovery Agency) v. He & Chen*, [2004] EWHC 3021 (Admin.).

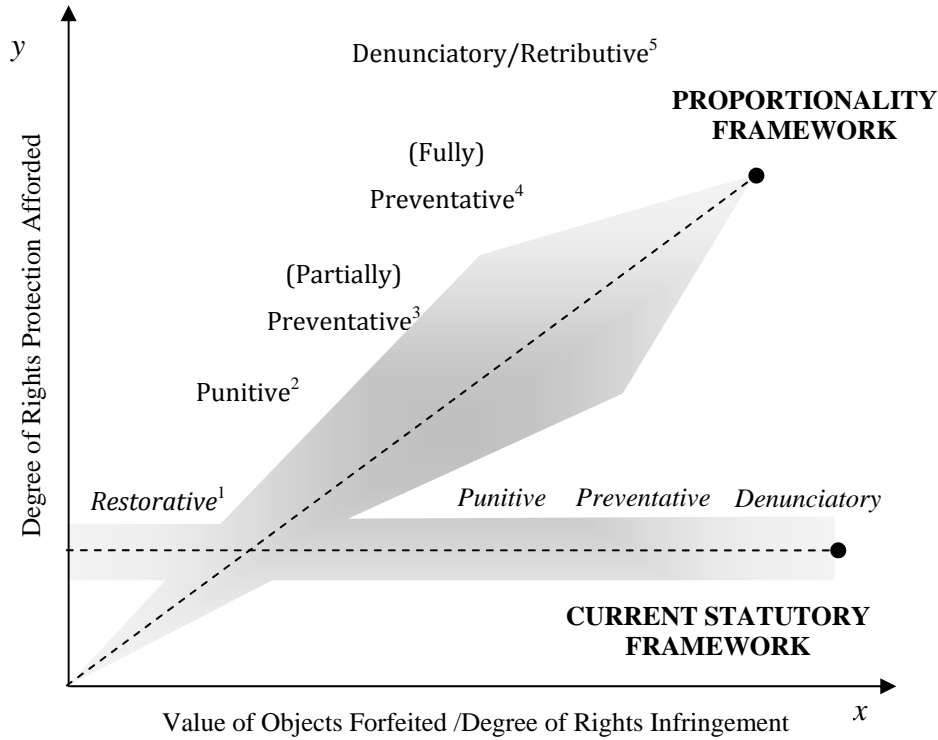
⁸³ Van der Walt, *supra* note 54 at 43.

⁸⁴ See generally Barak, Aharon, "Proportional Effect: The Israeli Experience" (2007) U.T.L.J. 369 at 370-372.

⁸⁵ *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295 at 335-336. In the case of forfeiture, the shift might be from a crime-prevention purpose at the division of powers stage of the analysis to a punitive purpose for the *Charter* analysis.

Had the *Canadian Charter* included a right to property, a proportionality inquiry would force provincial governments to identify at least one of four possible purposes for the regime (or for a particular component of the regime, such as the forfeiture of property held by potentially innocent owners), and then justify the tailoring of the means accordingly. Figure 3 illustrates how a proportionality inquiry would lead to the tailoring of means to purposes in the context of civil forfeiture. As the purposes shift from restorative/remedial to retributive/denunciatory more property would become subject to restraint and forfeiture (the “x” axis). The gradient along the dotted lines represents a measure of deference to policy choices on the part both the legislature and the courts in terms of which property is in issue in a forfeiture matter and what protections are afforded to the respondent (the “y” axis).

Figure 3 – Two Proportionality Models: The Current Statutory Framework and the Proportionality Framework



- ¹ Profits only
- ² Proceeds and instruments tailored to the severity of the act
- ³ Proceeds and instruments with some remedial flexibility
- ⁴ Proceeds and instruments without remedial flexibility
- ⁵ Proceeds, instruments, and any future entitlements

Under a proportionality framework, the gradient is thinnest at both ends of the line-of-best-fit because no tailoring is left to do at those points. Where forfeiture is restorative, the value of the property is determined by a calculation of gain by the target. It is simply a transfer of profit and the court should order forfeiture only to remove the gains attributable to the wrongful conduct.⁸⁶ At the other end

⁸⁶ There is little room for discretion, since the concept of profit is easily definable as revenue less costs. Only evidentiary questions pertaining to the quantification of revenues and costs would arise in a particular fact context.

of the line, the government would pursue all present property as well as future entitlements. Since the forfeiture would be so extensive, no residual room is left over. The room for discretion, however, lies in the middle.

As in South Africa, if the purpose is punitive, then a court must consider whether underlying acts justify forfeiture.⁸⁷ Innocent third parties should have their rights protected in the impugned property or they should be fairly compensated in the event of restraint or forfeiture, where appropriate.⁸⁸ If, as in Germany, the purpose is preventative, then the court should only order forfeiture (or other restrictions) for that property which is necessary to mitigate the likelihood of a future unlawful act.⁸⁹ It is noteworthy that, in light of the discussion in Chapter 2, the division of powers in the *Constitution Act, 1867*, would preclude the provinces from enacting a forfeiture regime for a punitive purpose, although Parliament could do so under its criminal law power.

As Figure 3 illustrates, as the purpose shifts from restorative to denunciatory and as the degree of interference in a person's property rights becomes more severe, a proper proportionality analysis would require the state to justify this interference, either by conferring greater procedural and substantive protections or by demonstrating the gravity of the problem. In the current regime, however, the

⁸⁷ It is noteworthy that a court cannot unilaterally impose forfeiture of a residence upon conviction of production of drugs (as an instrument of crime) unless the court determines that the residence is proceeds of crime. See *Criminal Code*, R.S.C. 1985, c. C-46, s. 462.3. Perhaps this is an indication that Parliament ought to consider amending the *Criminal Code* to allow judges to order the forfeiture of residences used for the production of drugs as part of the sentencing process.

Furthermore, in reading this analysis back into the discussion in Chapters 2 and 3, it is noteworthy that the provinces are constitutionally precluded from using civil forfeiture for punitive purposes, as this would be an infringement on the criminal law power. Yet, when the courts weigh the severity of the crime against the value of the property, in a crude proportionality analysis, they appear to be exercise a power similar to that of a sentencing judge, leaving the responding party at the mercy of the court.

⁸⁸ See e.g. *Proceeds of Crime Act 2002* (Cth.), ss. 77-79.

⁸⁹ It may not always be necessary to order the forfeiture of property if the purpose is preventative. Temporary restrictions on the use or disposition of property also may serve this purpose. Subjecting the forfeiture scheme or a particular case of forfeiture to a minimal impairment test could lead to this conclusion.

degree of rights-protection remains constant notwithstanding the nature of the proceeding or the government's legislative objective.

A constitutionally entrenched property right does not guarantee that the state will not enact forfeiture legislation, or that it will not enact rights-invasive legislation. The recognition of the property right, however, compels the state to justify the enactments in light of a social context established by an evidentiary foundation. It is noteworthy that the European Court of Human Rights upheld an Italian forfeiture statute that places the onus on the person facing forfeiture to explain the possession of all his or her property, where the state has established "sufficient circumstantial evidence" that the person is a member of a criminal organization.⁹⁰ Italian courts have recognized the pervasiveness of the organized crime problem in that country and upheld the forfeiture regime in light of that context.⁹¹

Second, at a case-specific level, a property right would require the government to specify in advance the conditions under which property could be restrained and confiscated. It would also require the state to restrict the means used in a particular context where the deprivation of the right would be disproportionate to the harm that the state seeks to mitigate. Rather than a judicially developed *ad hoc* approach, as adopted in the case involving the Nock family, a property right would compel the creation of a legal test to assess the appropriateness of the restraint or forfeiture of property in a given case. For example, courts might have to consider imposing restrictions on the use, enjoyment, and disposition of property

⁹⁰ *Arcuri et al. v. Italy*, No. 54024/99 (5 July 2001) (E.C.H.R.).

⁹¹ Contrast with Germany, which according to the social scientific studies presented by Kinzig and Luczak, does not have the same problem with enmeshed organized crime. Kinzig, Jörg, and Luczak, Anna, "Organised Crime in Germany: A *Passe-Partout* Definition Encompassing Different Phenomena" in Fijnaut, Cyrille, and Paoli, Letizia, eds., *supra* note 35, 333 at 340. The authors note, however, that the data on organized crime is produced almost exclusively from police sources.

before they consider forfeiture.⁹² Perhaps they might also have to consider whether and to what extent the assets are part of a legitimately run enterprise.⁹³

Before concluding this chapter, it is important to recognize that a generous reading of section 7 of the *Canadian Charter*, which protects “the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice,” could prevent courts from depriving a person of substantially all of his property through civil forfeiture.⁹⁴ In *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, the Supreme Court of Canada recognized that in a Ministerial application for child custody, a parent was entitled to state-funded counsel.⁹⁵ In determining the scope of the appellant’s constitutional right to security of the person, the Court noted that the right extends beyond the criminal context and into the civil context, particularly when a person is engaged in an adversarial process involving the state on a matter that involves a “gross intrusion into a private and intimate sphere”.⁹⁶ The Court extended its interpretation of the term “security of the person” to include the preservation of legal relationships that, if severed, would undermine this right. It also recognized an entitlement to property in support of that right, namely funding for legal counsel.

While a complainant could advance a similar claim in the context of a civil forfeiture proceeding, the circumstances facing that complainant would have to be grave in order for the claim to resonate with a court. The prospective forfeiture would likely have to leave a person homeless or destitute to reach the level of

⁹² In a case similar to the Nock decision, a judge might have considered attaching a lien on the house for a particular period of time, whereby if Nock reoffended using the house, then it would be subject to forfeiture.

⁹³ See Minson, Jeffrey, “Civil Prudence, Sovereignty and Citizenship in the Justification of Civil Forfeiture” (2006) 29 U.N.S.W.L.J. 61 at 61.

⁹⁴ *Canadian Charter*, *supra* note 3, s. 7.

⁹⁵ *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46.

⁹⁶ *Ibid.* at para. 61.

section 7 *Charter* scrutiny. Alternatively, the forfeiture would leave a person's financial wellbeing in such poor state of affairs that he would be unable to secure legal counsel for the civil trial itself, or for the subsequent criminal prosecution. However, the rights protected under section 7 of the *Charter* would not impose a proportionality inquiry similar to the one developed in Germany or South Africa, when, for example, the forfeiture is grossly disproportionate to the underlying act. Without judicial intervention to redefine the "liberty" right in a manner that includes substantive protections of property, any constitutional protection would likely be procedural (for example, a hearing, access to counsel, or other procedural protections), because as the law stands today, section 7 does not even guarantee a basic level of subsistence.⁹⁷

Furthermore, reliance on section 7 would not guard against the repeal of the "innocent owner" defence or limit the scope of the provinces' powers of restraint of property in advance of a forfeiture claim. The connection between those issues and the right to life, liberty, and security of the person cannot be made out. Without a constitutionally-entrenched property right, the provinces may choose to pursue more ambitious forfeiture agendas in the future without being subject to *Charter* scrutiny.

Conclusion

The comparative constitutional jurisprudence on property rights reveals that tied to the protection of property is the concern by courts that civil forfeiture legislation can unduly affect human dignity, liberty, and autonomy. While property rights have sometimes been regarded as "secondary" to core rights such as the right to life and liberty,⁹⁸ property rights serve a particularly useful role in enhanc-

⁹⁷ *Gosselin v. Quebec (Attorney General)*, [2002] 4 S.C.R. 429 at paras. 75-84.

⁹⁸ See e.g. Alexander, *supra* note 34 at 735, citing Krotoszynski Jr., Ronald, "Fundamental Property Rights" (1997) 85 Geo. L.J. 55 at 560.

ing core rights protection. The furtherance of core constitutional rights through the protection of property makes a constitutional right to property a key component of a modern constitution. Its notable absence from the Canadian constitution may mean that injustices perpetrated by the state in the pursuit of asset forfeiture will go unremedied.

It may take decades for the political climate in Canada to change so that Parliament and the provinces could debate the inclusion of a property right in the constitution. In 1983, Quebec's separatist premier was unwilling to negotiate the inclusion of a property right without re-examining his province's constitutional status at the same time.⁹⁹ It is doubtful that those attitudes would be much different today.

This chapter explored the role of a constitutionally entrenched property right in the development of civil forfeiture regimes in three countries. It showed how constitutionally entrenched property provisions compel governments to identify proper purposes of rights-infringing statutes inviting courts to engage in a true proportionality exercise that balances purposes and means in light of an evidentiary context.

Looking forward to the future of asset forfeiture, it will be interesting to observe whether the provinces will begin applying forfeiture regimes to corporations where the directors, officers, or employees of those corporations use corporate assets to commit crime, or funnel proceeds of crime through the corporation. At least one of the provincial civil forfeiture statutes allows the AG of that province to pursue forfeiture for conspiracies,¹⁰⁰ usurping the domain of the federal government pursuant to the provisions of the *Competition Act*.¹⁰¹ Corporations are

⁹⁹ See Sheppard, Robert, "Expanding rights at current talks unlikely" (16 March 1983) *The Globe and Mail* P. 10. See also Sheppard, Robert, "Constitutional talks will deal mainly with native rights" (26 February 1983) *The Globe and Mail* P.13.

¹⁰⁰ *Civil Remedies Act, 2001*, *supra* note 74, s. 13.

¹⁰¹ *Competition Act*, R.S. 1985, c. C-34, as amended S.C. 2009, c. 2.

particularly vulnerable to civil asset forfeiture because their legal personalities consist almost entirely of property.

The discussion in this chapter also highlights the provincial interests at stake in resisting the possible entrenchment of a right to property under the *Canadian Charter*. The development of a strong limitations clause under section 1 of the *Charter* would have mitigated many of the concerns of the provincial premiers who resisted the inclusion of a property provision in 1980. The liberal critique against the inclusion of property rights has, ironically, failed to prevent the implementation of civil forfeiture statutes, which can severely affect the disadvantaged members of society: the very people that opponents to the inclusion of a property right thought they were protecting.

With civil forfeiture as a growth industry in Canada, the provinces would certainly resist the entrenchment of a right to property today. If entrenched, the provinces certainly would face constitutional challenges to their civil forfeiture legislation, putting at risk not only the established institutional structures, but a source of considerable revenue as well.

In light of the discussion in this chapter, Canadians must consider whether they share the constitutional vision expressed by Justice Stevens of the U.S. Supreme Court, when he said in *Bennis*, “[t]his case is ultimately a reminder that the Federal Constitution does not prohibit everything that is intensely undesirable.”¹⁰² Unless the courts affirm the principle of proportionality, through an express right, an implied one, or some other means, Canadians must accept that legislatures will take advantage of gaps within Canada’s constitutional framework to pursue ineffective policies that negate the property rights Canadians hold dear.

¹⁰² *Bennis*, *supra* note 69 at 454.

Conclusion

This text began by exploring the historical development of civil forfeiture regimes. Historically, and at present, civil forfeiture regimes are primarily revenue-generating laws, as they have not been proven to reduce crime or provide further additional compensation for victims. As Chapter 2 outlined, courts have looked past the punitive aspect and potential of forfeiture regimes, regarding them as “civil” in nature. These regimes, however, threaten to functionally incapacitate a person from holding and exchanging property even when the person has not been convicted of an underlying offence.

Chapter 3 then discussed the interplay between the overlapping federal and provincial regimes to show how a narrow conception of paramountcy, based predominately on the concept of express conflict or the impossibility of dual compliance has meant that the provincial regimes can effectively render the *Criminal Code* provisions defunct. Although the Supreme Court of Canada and provincial courts of appeal imposed increased standards of proof and required that the AGs adhere to the rules of evidence in criminal law, by operation of the provincial regimes, these protections are negated.

Furthermore, Chapter 4 discussed the impact of the absence of a property right in the *Canadian Charter* on the development and application of civil forfeiture regimes. A comparative analysis with Germany, South Africa, and the U.S. established how such a constitutional right necessitates justifications for its limitations through a proportionality analysis. Without having to define a proper purpose to tailor the means to that purpose, Canadian provincial civil forfeiture laws allow the state to restrain and confiscate property tangentially related to the commission of an unlawful act without having to establish an on-going threat or danger.

Although not discussed in this thesis, there are other implications of civil forfeiture for entrenched rights and freedoms, namely the right to privacy, and the freedoms of religion, expression, and association. Future research could explore these issues in more detail. For example, several provinces also have passed literary proceeds legislation, which strips authors and publishers of the proceeds of sale of works that recount their crimes, including those that were simply alleged, but which were never proven in court.¹ The impact on freedom of expression merits further analysis.² Civil forfeiture regimes also raise questions of constitutional remedies, particularly the return of property, the use of unlawfully seized evidence, and the nullification of invalid legislation. Additional research also could focus on the collection, use, and disposal of evidence in forfeiture matters and the impact of those processes on criminal prosecutions.

Putting these ideas together, one could question whether Canadian constitutional law is a “legal system” with a distinctive organizing and coherent framework, supported by foundational principles and designed to further national values. One could make the ambitious claim that the affirmation of human dignity (or some analogous concept) ought to be the fundamental organizing principle of Canadian constitutional law and fill the textual and interpretative gaps in the constitution.

While supporters of civil forfeiture (like other civil enforcement mechanisms) suggest that such regimes are necessary to make crime-control more efficient and effective, in testimony before the Ontario Provincial Parliament, it was suggested that police officers in Ontario may not be fully aware of their own powers under the *Criminal Code*. Perhaps the legislature should have contemplated better training for law enforcement personnel before implementing such an extensive forfeiture regime.

¹ Consider e.g. *Prohibiting Profiting from Recounting Crimes Act, 2002*, S.O. 2002, c. 2.

² See e.g. *Saskatchewan (Attorney General) v. Thatcher*, 2010 SKQB 109.

The fact that forfeiture has not had a recognized impact on crime rates might also signal the need to move toward a broader shift in regulatory approaches. This is particularly telling in the area of narcotics control. By decriminalizing conduct associated with drugs and shifting regulatory responsibility to the provincial government for its production, sale, and treatment of users, the crime and violence associated with this industry would, in all likelihood, decrease.³

If wholesale changes to Canada's crime and drug laws are politically impracticable, then perhaps lawmakers should consider a more moderate approach to reforming Canada's forfeiture laws first. As discussed in Chapters 2 and 3, the recognition of a hybridized category of forfeiture proceedings, which confer increased protections as the matter becomes more serious, would do more to balance the interests of the state in confiscating veritable proceeds and instruments of crime, but would ensure that a person's innocence and property is not unduly deprived without sufficient justification. Furthermore, lawmakers should consider whether prioritizing civil remedies over conventional law enforcement achieves justice for the community. Forfeiture should complement, not supplement, the criminal process.

Finally, civil forfeiture exposes the incompleteness and unsystematic nature of Canada's constitution. The move toward more severe civil sanctions in response to social problems has meant that the criminal law, with its procedural and evidentiary protections for an accused, will not apply. By regarding civil sanctions as distinct from the unlawful conduct that underlines their use, the courts have permitted the provinces to punish, even when Parliament did not see it

³ See e.g. Vastag, Brian, "5 Years After: Portugal's Drug Decriminalization Policy Shows Positive Results" (7 April 2009), online: Scientific American <<http://www.scientificamerican.com/article.cfm?id=portugal-drug-decriminalization>>, retrieved 26 April 2010. See also Greenwald, Glen, "Drug Decriminalization in Portugal" (2009), online: CATO Institute <http://www.cato.org/pubs/wtpapers/greenwald_whitepaper.pdf>, retrieved 26 April 2010.

fit to do so. By placing the onus on a person facing forfeiture to justify why he or she should, for example, stay in his or her home, demeans that person's dignity and is incongruous with modern constitutional law.

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