

## PERSPECTIVES ON CIVIL FORFEITURE

BY JEFFREY SIMSER<sup>1</sup>

Civil asset forfeiture is a remedial statutory device designed to recover the proceeds of unlawful activity, as well as property used to facilitate unlawful activity. Generally, the state brings a proceeding against property (*in rem*) rather than against individuals. In the case of proceeds of unlawful activity, the court is invited to inquire into the origin of property. If the provenance of the title lies in unlawful activity, and the state proves this to the court, then the court is empowered to transfer title to the state. Property law abhors a void in title. Forfeiture ensures no lacuna by passing title to the state. In the case of property used to facilitate unlawful activity, the court is asked to inquire into the property's usage. Should this property be forfeited to prevent further facilitation of unlawful activity? In general, there are two policy rationales for civil forfeiture. First, gains from unlawful activity ought not to accrue and accumulate in the hands of those who commit unlawful activity. Those individuals ought not to be accorded the rights and privileges normally attendant to civil property law. In cases of fraud and theft, the proceeds ought to be disgorged and distributed back to victims. Second, the state as a matter of policy wants to suppress the conditions that lead to unlawful activities. Drug profits also represent capital for more drug transactions, which can further the harm to society. Leaving property that facilitates unlawful activity in an individual's hands creates a risk that he or she will continue to use that property to commit unlawful activity. In South Africa, the courts have accepted a policy rationale based on the fact that:

*...it is often impossible to bring the leaders of organised crime to book, in view of the fact that they invariably ensure that they are far removed from the overt criminal activity involved.<sup>2</sup>*

An effective organised crime operation ensures that only the eminently replaceable foot soldiers are brought to book. Civil forfeiture allows the gains of an unlawful enterprise to be brought to justice.

There are a number of legal and linguistic terms applied to civil forfeiture depending on the jurisdiction being studied.<sup>3</sup> This chapter refers to civil forfeiture, which in other places can be civil asset forfeiture, non-conviction based forfeiture, asset forfeiture, civil recovery or confiscation. The standard of proof is civil, usually on the balance of probabilities or preponderance of the evidence. Generally, proceedings are brought *in rem*, or against the thing, something made clear by the American style of cause (see *U.S. v. One Assortment of 89 Firearms*,<sup>4</sup> for example). By way of contrast, criminal asset forfeiture is *in personam*, against the person; following conviction, forfeiture is part of the sentencing process.

Most legislative schemes start with a proceeds provision; the underlying definition can be relatively narrow<sup>5</sup> or broad.<sup>6</sup> Under Part II of Ontario's *Civil Remedies Act, 2001*, for example, the Attorney General may commence an *in rem* proceeding against a proceed of unlawful activity. A proceed is any property "acquired directly or indirectly, in whole or in part, as a result of unlawful activity." The statute makes specific provision to protect legitimate owners. The statute permits an interlocutory preservation order; this allows assets to be frozen and held for litigation. In the forfeiture proceeding itself, where the court finds that the property is a proceed of unlawful activity, it shall be forfeited except where it would clearly not be in the interests of justice to do so. The statute has retrospective application. The *in rem* nature of the proceeding offers a viable device to attack difficult problems, particularly for issues such as corruption in the developing world. If the looted money is in Ontario, as long as the corruption (or fraud or outright theft) would have been an offence in Ontario, the courts can take jurisdiction over the property (notwithstanding that the unlawful activity occurred in another country).<sup>7</sup>

Many jurisdictions permit proceedings to be brought against property used to engage in unlawful activity; such property might be referred to as instruments, instrumentalities or facilitating property. Under Part III of the *Civil Remedies Act, 2001*, a proceeding may be brought against instruments. An instrument in property that is "likely to be used to engage in unlawful activity that, in turn, would

be likely or is intended to result in the acquisition of other property or in serious bodily harm.” Provision is made to protect responsible property users. The statute creates a presumption: proof of past use is indicative of future use. To date, the courts have held that a property used to process and package marijuana was an instrument.<sup>8</sup> The process, preservation and forfeiture, is similar to that for proceeds described in the previous paragraph.<sup>9</sup>

Conviction-based forfeiture is an important element of our criminal justice system: forfeiture is part of the sentencing process. Civil forfeiture laws, by contrast, do not create offences, nor do they prohibit any conduct or impose any penalty, fine or imprisonment on an individual. Civil forfeiture has nothing to do with the identification, search, arrest, detention, charging, prosecution or conviction of any person. Civil forfeiture responds to the policy challenge of ensuring that wrongful proprietary gains are disgorged. The state has an interest in ensuring that victims can be effectively compensated; civil forfeiture can meet that policy goal. The state also has an interest in suppressing the conditions likely to favour the commission of crime; removing the instruments and the capital used to commit unlawful activity meets this objective. The *in rem* provisions focus very precisely on these goals by focusing on a specific property that is traced, as a proceed or instrument, of unlawful activity.

The ancient roots of forfeiture can be traced into the word “felony.” The Saxon words ‘fee,’ or landholding, and ‘lon,’ or price, combine to define an act or omission that could result in the loss of property.<sup>10</sup> The concept of forfeiture reaches far back into the ancient history of Saxon and Scandinavian legal thought, survived the Norman invasion of 1066 and played a role in the legal system of feudal England. A man convicted of treason against the King would forfeit not only his life, but also his interest in land and chattels, as well as his ability to pass title to his heirs. Lords with treason on their minds, no doubt on advice from the family lawyer, attempted to circumvent the rules by passing their estate to their heirs prior to being caught. To defeat this, the courts developed a “relation-back” theory, which is still important in U.S. law. Under that theory, the forfeiture relates back to the time of the offence and defeats or knocks out any

intervening property interests (e.g., the “heirs” of the treasonous Lord). Over time, a distinct but related forfeiture concept was developed. *In rem* proceedings were particularly important in admiralty law. In a pre-globalised era, once a ship left the harbour, it could forever remove itself from the jurisdiction of the courts by simply sailing to another country. There was no practical way, outside of an *in rem* order, for domestic courts to follow that ship. The *in rem* order makes the thing, the ship in this case, the defendant. As the great American jurist, Oliver Wendell Holmes, once noted wryly to his students at Harvard, a “ship is the most living of inanimate things.”<sup>11</sup>

In the United States, a form of civil asset forfeiture was passed into law by the first U.S. Congress in 1789. Until the 16<sup>th</sup> Amendment granted the power in 1913 to levy income taxes, forfeiture was a critical tool to protect the fiscal position of the U.S., which relied heavily on the imposition of tariff duties.<sup>12</sup> Civil forfeiture was also an important tool used to protect U.S. shores from piracy. One of the seminal U.S. Supreme Court decisions was rendered in 1827; a ship chartered by the King of Spain, the *Palmyra*, was captured as a pirateering vessel. The ship’s captain argued that, as the King was not culpable, his ship ought not to be forfeited. The court ruled that the *in rem* proceeding was brought against the thing, the ship, and the culpability of the owner was not relevant. The ship, worth \$10,228 in 1827 dollars, was forfeited.<sup>13</sup>

Following the advent of income tax, forfeiture was little used in the U.S. until the 1970s and 1980s, although there were some interesting prohibition cases.<sup>14</sup> In 1970, Congress focused on organised crime with the passage of the well-known *Racketeer Influenced Corrupt Organization Act*; a lesser-known statute was passed at the same time, the *Continuing Criminal Enterprise Act*. However, it was not until 1984, with the passage of the *Comprehensive Crime Control Act*, that civil forfeiture began to be used extensively across the United States. Forfeiture attracts 8<sup>th</sup> Amendment protection which constitutionally prohibits excessive fines;<sup>15</sup> in 2000, this and a number of other issues were addressed by the *Civil Asset Forfeiture Reform Act, 2000*. In the federal system alone, \$1.2 billion (USD) was recovered in 2006 and the estimate for 2007 is

\$1.6 billion. Only one-third of that money will be recovered through conviction-based forfeiture. The balance will be recovered through civil asset forfeiture cases.<sup>16</sup>

Civil forfeiture has spread across the common law world. Australian developments can be traced to their customs law, which in 1977 addressed drug money through an *in rem* forfeiture, as well as a working group of Attorneys General who in the mid-1980s were concerned with drug trafficking. A series of conviction-based laws were developed between 1985 and 1993. In 1990, New South Wales significantly reformed their law to add civil forfeiture.<sup>17</sup> A report of the Australian Law Reform Commission looked closely at the New South Wales law and subsequently the Commonwealth introduced comprehensive civil forfeiture legislation, with several states then either upgrading their own civil forfeiture legislation or introducing such legislation for the first time. New Zealand has for some time had legislation before their legislative assembly.<sup>18</sup>

The Republic of Ireland has become one of Europe's leading jurisdictions in this field. Their non-conviction based forfeiture scheme developed out of a tragic series of events. In 1995, campaigning reporter, Veronica Guerin, began to compile a story on a local crime figure, John Gilligan. She went to his house and interviewed him; he attacked her violently, punching her in the head and body, and threatened to kill her. A complaint was launched and an assault prosecution commenced. On June 26, 1996, a day after the prosecution had been adjourned, Guerin was shot dead in her car as she drove back to Dublin from County Kildare where she had contested a traffic ticket. There was a tremendous outpouring of grief and anger across Ireland. This was compounded by the fact that, weeks earlier, an IRA gang had shot dead a policeman, Jerry McCabe, and wounded his partner during a botched robbery. The government reacted quickly, using portions of a private member's bill lowering the standard of proof for forfeiture and addressing a longstanding tension between the police and customs by introducing the *Proceeds of Crime Act, 1996* and by creating a new agency, the Criminal Assets Bureau (CAB).<sup>19</sup> The work of CAB attracted the interest of officials in the United Kingdom.<sup>20</sup>

The U.K. Home Office developed a working group that produced some groundbreaking ideas by late 1998.<sup>21</sup> Ultimately, the Cabinet Office produced an influential report on the proceeds of crime in 2000.<sup>22</sup> The report, endorsed by Prime Minister Blair, stated that:

*...most crime is motivated by profit. Pursuing and recovering the proceeds of crime would send out a message that crime does not pay; prevent criminals from finding further criminality; remove negative role models in communities; and, decrease the risk of instability in financial markets.*

Following consultation,<sup>23</sup> legislation was introduced that became the *Proceeds of Crime Act, 2002*. That legislation has been influential in a number of jurisdictions, including Jamaica.

Meanwhile, the American approach was influential in a number of countries. South Africa, for example, drew many concepts from American law. Statutory concepts, like the “innocent owner defence,” were brought into the *Prevention of Organized Crime Act, 1998*. The courts continue to apply American jurisprudence as they interpret the statute.<sup>24</sup> South Africa is, in turn, likely to influence other countries. The American influence was also imported into the non-conviction based forfeiture legislation in the Philippines, although Canada had some influence in the finishing details.<sup>25</sup>

In Canada, we had the benefit of the experience in the U.S., although as noted above, American law developed over time through an array of statutory provisions.<sup>26</sup> We had the opportunity to address matters comprehensively. We also had the benefit of the Australian, Irish and South African experiences, all of which influenced portions of Ontario’s statute. We also had a sense of the burgeoning developments in the U.K. As Ontario’s statute developed, important jurisprudence supporting civil forfeiture, including cases in Ireland, came in a series of court decisions. Foremost among those decisions was *Gilligan v. Criminal Assets Bureau*,<sup>27</sup> in Europe, non-conviction based forfeiture had been considered under an ECHR challenge, *M. v. Italy*.<sup>28</sup> The Australian case of *DPP v. Toro-Martinez*<sup>29</sup> considered the constitutionality of the federal *Proceeds of Crime Act, 1987*. Other Canadian jurisdictions have, to some degree, been influenced by the Ontario experience.

Civil forfeiture can address a variety of problems, including corruption, which is particularly challenging for developing countries that can ill-afford to have their treasuries looted. Vladimiro Montesinos, the former head of the Peruvian National Intelligence Service, fled Peru in September 2000. Within two weeks, Swiss prosecutors began freezing \$113.6 million (USD) in corruption related proceeds. The government of Nigeria has received back, through civil forfeiture, \$1 billion of the \$5 billion looted by late dictator Abacha, who took bribes and stole directly from the Central Bank. The Philippines have received an estimated \$2 billion of the \$5 billion (some estimates are \$10 billion) stolen by Ferdinand Marcos. Civil asset forfeiture can be an important tool to disgorge the proceeds of corruption wherever they are located.<sup>30</sup> Traditional criminal justice mechanisms, bringing a dictator to trial, convicting him and forfeiting his assets in a sentencing hearing, will often not be a viable method of proceeding.

Civil forfeiture is an important remedial tool which is a particularly precise device. An *in rem* proceeding requires the state to adduce evidence that shows the property's provenance lies in unlawful activity. Unlawful activity conducted for profit, whether that be drugs, weapons or people smuggling, still needs to be addressed by traditional criminal justice methods: arrest, prosecutions and incarceration. Civil forfeiture creates an option to ensure that wrongful proprietary gains do not remain in the hands of a wrongdoer. Civil forfeiture ensures that the capital needed for further unlawful activity is removed, preventing further harm to society. In the case of acquisitive unlawful activity, such as fraud or theft, civil forfeiture allows the state to stand in the shoes of a victim, to disgorge the illicit profits of a wrongdoer, and to see that money is returned to the victim. Finally, where organised crime insulates itself from culpability through the use of foot soldiers, civil forfeiture can still effectively get at the lifeblood of the organisation, its money.

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<sup>1</sup> Legal Director, Civil Remedies for Illicit Activities Office, Ministry of the Attorney General (MAG), Toronto, Ontario, Canada. The views expressed in this paper are those of the author alone, and do not represent the views of the Government of Ontario. I am grateful for the comments of colleagues and friends, including Stefan Cassella, James McKeachie, Elizabeth Cowie and an anonymous colleague from Europe; all errors are those of the author.

<sup>2</sup> *NDPP v. Mohamed* (2002), 4 SA 843 (CC) at 853. See also (2003), 4 SA 1 (CC).

<sup>3</sup> Kennedy, A., “Designing a Civil Forfeiture System: An Issues List for Policymakers and Legislators” (2006), 13:2 *Journal of Financial Crime* 132.

<sup>4</sup> (1984), 465 US 354; this case happens to canvass some interesting issues respecting collateral estoppel.

<sup>5</sup> Civil forfeiture is available only if there's money laundering under Antigua and Barbados's *Money Laundering (Prevention) Act, 1996* at s. 20. In the U.K., it's property obtained by or in return for unlawful conduct; see *Proceeds of Crime Act, 2002*, s. 242.

<sup>6</sup> Section 1 of the Irish *Proceeds of Crime Act, 1996* for example, or s. 1 of South Africa's *Prevention of Organized Crime Act, 1998*.

<sup>7</sup> See *Civil Remedies Act, 2001* at ss. 2, 4 and 17.

<sup>8</sup> *Ontario (Attorney General) v. Jinareem* [2005] O.J. No. 6008 (S.C.J.)

<sup>9</sup> *Op cit*, Note 7, section 7; on the conviction-based side in Canada, the *Criminal Code, 1985* refers to “offence-related property,” see s. 2.

<sup>10</sup> Mitchell, A.; Taylor, S.; Talbot, K., *Confiscation and the Proceeds of Crime* (London: Sweet and Maxwell, 1997), page 1.

<sup>11</sup> Holmes, O., *The Common Law* (Boston: Little, Brown, 1880), pages 24 – 25.

<sup>12</sup> “In 1902, for example, nearly 75 percent of total federal revenues – \$479 million out of a total of \$653 million was raised from taxes on liquor, customs and tobacco.” Forfeiture was used to ensure those income flows kept coming. *U.S. v. James Daniel Good Real Property* (1993), 510 US 43 at 60 per Kennedy, J.

<sup>13</sup> *The Palymra* (1827), 12 Wheat 1 (USSC).

<sup>14</sup> *JW Goldsmith, Jr. Grant Co. v. US* (1921), 254 US 505; *Van Oster v. Kansas* (1926), 272 US 465. See Chapter 2 – 3 of S. Cassella's book, at note 26 below.

<sup>15</sup> *US v. Bajakajian* (1998), 524 US 321 found that a forfeiture would be punitive and violate the 8<sup>th</sup> Amendment if it was grossly disproportional to the gravity of the offence it was designed to punish. Section 2(g) of the *Civil Asset Forfeiture Reform Act* codifies the procedure requiring a claimant to bear the burden of showing that forfeiture is grossly disproportional.

<sup>16</sup> Thirty-eight percent (38%) were uncontested civil cases and 29% were contested civil cases. These numbers only represent Department of Justice agency forfeitures; Treasury and Homeland Security forfeitures typically forfeit 50% of Department of Justice agency forfeitures. So, the numbers are considerably higher. Cassella, S., “The Case for Civil Forfeiture,” Cambridge: Cambridge International Symposium on Economic Crime, September 7, 2007.



<sup>17</sup> The Australian Law Reform Commission, “Confiscation That Counts: A Review of the *Proceeds of Crime Act, 1987*” (Canberra: ALRC Report No. 87, 1999).

<sup>18</sup> See Note 2.

<sup>19</sup> Williams, P., *The Untouchables* (Dublin: Merlin Publishing, 2006), pages 37 – 51. CAB was created by the *Criminal Assets Bureau Act, 1996*.

<sup>20</sup> See Bell, R.E., “Prosecuting the Money Launderers Who Act for Organized Crime” (1999), 2 *Journal of Money Laundering Control* 104, at 110.

<sup>21</sup> Home Office, “Working Group on Confiscation Third Report: Criminal Assets” (London: Organised and International Crime Directorate, Home Office, November 1998).

<sup>22</sup> Cabinet Office, “Recovering the Proceeds of Crime” (London: Performance and Innovation Unit Report, June 2000).

<sup>23</sup> See for example Home Office “Proceeds of Crime: Consultation on Draft Legislation” (London: Home Office, March 2001).

<sup>24</sup> See for example *Mohunram and Another v. National Director of Public Prosecutions* (26 March 2007), CCT 19/06 (S. Afr. Const. Ct.).

<sup>25</sup> See Simser, J., “The Significance of Money Laundering: the Example of the Philippines” (2006), 9 *Journal of Money Laundering Control* 293.

<sup>26</sup> Cassella, S., *Asset Forfeiture Law in the United States* (Huntington, N.Y.: JurisNet, 2007).

<sup>27</sup> [1998] IR 185.

<sup>28</sup> [April 15, 1991] ECHR Application No. 12386/86.

<sup>29</sup> (1993), 119 ALR 517 (NSW CA).

<sup>30</sup> See the U4 Anti-Corruption Resource page, an NGO under the auspices of Transparency International, “Recovery of Corruption-Related Assets” at [www.u4.no/helpdesk/helpdesk/queries/query4.cfm](http://www.u4.no/helpdesk/helpdesk/queries/query4.cfm). See also articles 31, 54 and 55 of the UN Convention Against Corruption. See also Maria Costa, A., “Striking Back at Kleptocrats” (International Herald Tribune, September 12, 2007). Civil recovery can be instituted at the behest of a state, see *AG of Zambia v. Meer Care and Desai and Ors*, [2007] EWHC 952 (Ch).