Civil Asset Forfeiture in Canada

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> [Civil forfeiture's] …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. [2]

This paper has been written as a background document for the Commission of Inquiry into Money Laundering in British Columbia, more commonly known as the Cullen Commission. The vexing challenge posed by the legerdemain of money laundering requires a variety of policy responses, one of which is civil forfeiture. This paper draws liberally from my book, Civil Asset Forfeiture in Canada[3] with a view of providing a survey of the nine civil forfeiture statutes currently in place across Canada. Part One of the paper sets out the background to civil forfeiture in Canada; Part Two describes British Columbia's civil forfeiture statute the *Civil Forfeiture Act* (CFA); Part Three considers the eight other jurisdictions in Canada; Part Four offers conclusions. Overall, this paper will compare and contrast, at a high level, the primary differences between the CFA and other Canadian jurisdictions.

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. The concept of forfeiture evolved from Saxon and Scandinavian legal thought, followed 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

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[1] This paper has been prepared in advance of remarks before the Cullen Commission in December 2020. The views expressed in this paper are personally those of the author and do not represent the views of his employer, the Ministry of the Attorney General. This paper and the author's work with the Cullen Commission has been written on personal time. The author is grateful for the sharp editorial assistance of Colleen Carson, LL.B. and Rachael Simser, M.A.

[2] *Chatterjee v. Ontario (Attorney General),* 2009 SCC 19, [2009] 1 S.C.R. 624 para 4

[3] Civil Forfeiture in Canada (Canada Law Book, 2011, loose-leaf); many of the book's footnotes have been intentionally omitted from this paper; in the interests of brevity, jurisprudence is largely not discussed in this paper.

pass title to his heirs. Lords with treason on their minds attempted to circumvent the rules, no doubt on advice from the family lawyer, 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 (for example, the heirs of the treasonous lord). Over time, a distinct but related forfeiture concept developed: *in rem* proceedings.

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". [4]

1.1 What is Civil Asset Forfeiture?

Civil asset forfeiture, sometimes referred to as non-conviction based (or NCB) forfeiture, is a remedial statutory device designed to recover the proceeds of unlawful activity, as well as property used to facilitate unlawful activity. The Supreme Court of Canada described Ontario's statute (the *Civil Remedies Act, 2001* or CRA) as follows:

> The CRA was enacted to deter crime and to compensate its victims. The former purpose is broad enough that both the federal government (in relation to criminal law) and the provincial governments (in relation to property and civil rights) can validly pursue it. The latter purpose falls squarely within provincial competence. Crime imposes substantial costs on provincial treasuries. Those costs impact many provincial interests, including health, policing resources, community stability and family welfare. It would be out of step with modern realities to conclude that a province must shoulder the costs to the community of criminal behaviour but cannot use deterrence to suppress it. [5]

[4] Holmes, O The Common Law (Boston: Little, Brown, 1880) at pp. 24-25

[5] *Chatterjee v. Ontario (Attorney General)*, 2009 SCC 19, [2009] 1 S.C.R. 624 at para 3

Generally, the state (in Canada, province) brings a proceeding against property (*in rem*) rather than against individuals. This distinguishes the process from the criminal law, which "couples a prohibition with a penalty" and criminal procedure, wherein a specific criminal allegation is made against an individual.

The modality in civil forfeiture depends on the type of property involved. Proceeds of unlawful activity are items of property that have, as their provenance, crime: illicit drugs are exchanged for money; the money is a proceed. In proceedings, the court is invited to inquire into the origin of the property. Does title lie in unlawful activity? If the state proves this to the satisfaction of the court, then the court is empowered to extinguish the title interest of the person from whom the money was seized.

If the law does not like a void, property law despises it. A potential void in title can be addressed in one of two ways: if there is a legitimate owner (the victim of a theft, for example), the money can be returned to her; absent such a claim, forfeiture allows the court to ensure there is no void by a transfer of title to the province. Often times a proceeding will involve complex property, with some of the property forfeited and some returned to victims. Instruments are pieces of property that make the labour of unlawful activity possible. Here the court is asked to inquire into the property's usage. Each province differs slightly in their approach to instruments. In Ontario, for most instruments cases, the proceeding is premised on the notion that, if the property is not taken away, it will be used again. In other words, the province is suppressing the conditions that lead to crime. In the case of proceeds, this happens when the incentive is removed; in the case of instruments, this happens when the property that facilitates the crime is removed through forfeiture.

1.2 Policy Rationale

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. As the Supreme Court stated, one of the

"practical (and intended) effects" of civil forfeiture is "to take the profit out of crime".[6]

A second practical and intended effect, noted by the Supreme Court is to "deter . . . present and would-be perpetrators".[7] If there is no money to be made or if the money that you make is likely to be lost through forfeiture, then the province has suppressed 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 organized crime to book, in view of the fact that they invariably ensure that they are far removed from the overt criminal activity involved.[8] An effective organized crime operation exposes the eminently replaceable foot soldiers and hides the operating mind of the enterprise. Civil forfeiture addresses this problem by bringing the gains of an unlawful enterprise to justice.

1.3 Terminology

There are a number of legal and linguistic terms applied to civil forfeiture depending on the jurisdiction being studied. This paper refers to civil forfeiture, which in other places can be civil asset forfeiture, non-conviction based forfeiture (NCB), 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*,[9] for example). By way of contrast, criminal asset forfeiture is *in personam*, against the person; following conviction, forfeiture is part of the sentencing process.

The detailed language varies from province to province. All provinces allow the courts to freeze property on an interlocutory basis. In Ontario, this is informally called a "preservation order"; in Alberta, the interim order is informally called a restraint; and in B.C., the order is formally called an

[6] Ibid, para 23

[7] Ibid

[8] *National Director of Public Prosecutions v. Mohamed N0* [2003] ZACC 4 (CC)

[9] 465 US 354 (1984). See s. 15.6(1) of Ontario's *Civil Remedies Act* that stipulates proceedings are *in rem*.

interim preservation order or IPO. Saskatchewan refers to an interlocutory order as an interim order or IO. The concept behind the order, be it an IO or IPO, is remarkably consistent: illicit property must be frozen quickly or it will not be available for litigation.

1.4 Two Interlinked Civil Forfeiture Techniques

Canada now has two civil asset forfeiture techniques, a court-based system and administrative forfeiture. The systems link: if administrative forfeiture is challenged, then the courts adjudicate the dispute. Court-based forfeiture is a system in place in all Canadian civil forfeiture jurisdictions: the government sues property in *in rem* proceedings as an instrument or a proceed of unlawful activity with a view to a court granting forfeiture as the remedy. This process is subject to judicial oversight. Administrative forfeiture allows the provincial authority to send documentation to any prospective property owner notifying them of the potential forfeiture of their property based on a proceeds or instruments claim. If the property owner does not challenge the claim, the property is forfeited to the province. If the property owner wishes to challenge forfeiture then they can engage a two-step process by:

- Sending an affidavit for review by the forfeiture authority in the province outlining the property owner's basis for the legitimate provenance of the property. The authority can choose to return the property, or,

- Where the explanation of the provenance of the property is rejected by the authority, then resort is to the civil courts and the case follows the same steps as court based forfeiture.

Canadian administrative forfeiture learned heavily from the United States' use of the technique. Customs jurisprudence also supported the legal architecture: *Martineau v. Canada (Minister of National Revenue-M.N.R.)*.[10]

1.5 Conviction-Based Forfeiture

Conviction-based forfeiture is an important element of our criminal justice system and is generally part of the sentencing process. Civil forfeiture laws,

[10] *Martineau v. M.N.R.,* [2004] 3 S.C.R. 737, 2004 SCC 81

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. Instead, it responds to the policy challenge of ensuring disgorgement of wrongful proprietary gains.[11]

1.6 The Common Law World

Civil forfeiture has spread across the common law world. In the United States, a form of civil asset forfeiture was passed into law by the first U.S. Congress in 1789. Until the 16th 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.[12] 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 owner (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 US$10,228 in 1827, was forfeited.[13]

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. In 1970, the U.S. Congress focused on organized crime with the passage of the well-known *Racketeer Influenced Corrupt Organization Act* (3.4 below discusses a Canadian remnant of RICO); a lesser-known statute was passed at the same time, being 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 the Eighth Amendment protection which constitutionally prohibits excessive fines. In 2000, this and a number of other issues were addressed by the *Civil Asset Forfeiture Reform Act, 2000*. In the U.S. federal system alone, between $1

[11] Simser, J; Valiquette, G; Mauti, F *Topic 14 Criminal Asset Forfeiture in Canada (2020)* published in William H. Byrnes & Robert J. Munro, Money Laundering, Asset Forfeiture and Recovery and Compliance—A Global Guide (Matthew Bender)

[12] *US v. James Daniel Good Real Property*, 510 US 43 (1993)

[13] The Palymra, 25 US 1 (1827)

and $2 billion annually have been recovered over the past few years.[14] Civil forfeiture has and continues to be the focus of vigorous debate in the United States. [15]

South Africa's forfeiture laws drew many concepts from American law. Statutory concepts, like the "innocent owner defence", are found in the *Prevention of Organized Crime Act, 1998*. The courts continue to apply American jurisprudence as they interpret the statute. 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.

Australian civil forfeiture can be traced to their customs law, which in 1977 addressed drug money through an *in rem* forfeiture. A working group of Attorneys General in the mid-1980s, concerned with drug trafficking, looked to forfeiture and confiscation as a policy solution. 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. A report of the Australian Law Reform Commission looked closely at the New South Wales law and subsequently the Commonwealth of Australia 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, the other antipodean country, also has legislation.

The Republic of Ireland has become one of Europe's leading jurisdictions in this field. Their non-conviction based forfeiture regime developed out of a tragic series of events. In 1995, a 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

[14] See for example, the US Dept. of Justice Asset Forfeiture Program 2019 Performance Budget: https://www.justice.gov/jmd/page/file/1034336/download

[15] Cassella, S *The Case for Civil Forfeiture* (2008), 11 J Money Laundering Control 8; Smith, D; Cassella, S *The Role of Civil Forfeiture* (2016), 100:4 Judicature 68

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 long-standing 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). The work of CAB attracted the interest of officials in the United Kingdom (U.K.).

The U.K. Home Office developed a working group that produced some ground-breaking ideas by late 1998. Ultimately, the Cabinet Office produced an influential report on the proceeds of crime in 2000. The report, endorsed by then British Prime Minister, Tony 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, legislation was introduced that became the *Proceeds of Crime Act, 2002*. That legislation has since evolved into a unique series of provisions that includes value-based confiscation.

1.7 Canadians Adopt the Best of All Worlds

In Canada, we had the benefit of the experience in the U.S., although as noted above, American law developed over time through a disparate array of statutory provisions. 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 them was *Gilligan v. Criminal Assets Bureau*[16] (which relates to the Veronica Guerin story). In Europe, non-conviction based forfeiture had been considered under a European Court of Human Rights challenge, *M. v. Italy*.[17] The Supreme Court of the United Kingdom has affirmed the civil nature of non-conviction based asset recovery.[18] The

[16] 1998 3 IR 185

[17] Unreported April 15, 1991, ECHR Appl No. 12386/86

[18] See for example Gale v. SOCA [2011] UKSC 49

Australian case of *DPP v. Toro-Martinez*[19] considered the constitutionality of the federal *Proceeds of Crime Act 1987*.

Ontario was the first province to enact a civil forfeiture law and the author of this paper has both been involved in the development of the law in Ontario, as well as laws in other provinces and other jurisdictions over the past twenty years. The next section of the paper reviews the primary features of British Columbia's CFA and then the key differences with statutes in Alberta, Saskatchewan, Manitoba, Ontario, Quebec, New Brunswick, Nova Scotia and Nunavut.

2.0 British Columbia's Civil Forfeiture Act (CFA)

The Civil Forfeiture Act or CFA came into force on April 16, 2006. The CFA has been amended several times and is supported by a Civil Forfeiture Regulation. The CFA is divided into eight parts. Part 1 sets out definitions and stipulates that the Act applies retrospectively. Part 2 sets out the process for forfeiture orders. Part 3 deals with interim preservation orders, as well as protection orders that a court can issue in a pending forfeiture proceeding. In 2011, amendments to the CFA created a new Part 3.1 that deals with administrative forfeiture. Part 4 deals with forfeiture proceedings, statutory presumptions and the standard of proof. Part 5 contains administrative provisions for the statutorily created director, as well as for the registration of orders issued under Parts 2 and 3. Part 6 establishes a process for the distribution of money following a final order of forfeiture. Finally, Part 7 contains general provisions including a regulation-making power.

2.1 Overview — How the CFA Works

The CFA creates and empowers an actor, the "director", to play a number of key functions under the statute. The director, for example, can collect information from any source and use that information in a proceeding. Generally the bulk of information comes from law enforcement, particularly the Royal Canadian Mounted Police who are responsible for policing significant parts of the province. Other police services, like the Vancouver Police Department, and some public bodies also provide information to the director. The director reviews information and decides one of three things:

[19] (1993), 119 ALR 517 (NSWCA)

1. If the case is weak or underdeveloped, the director may not pursue it all;

2. If the conditions of the CFA can be met, the director may seek to forfeit the property administratively; or

3. The director may initiate a judicial forfeiture proceeding.

When considering a potential case, the director will first want to consider the nature of the property. Proceeds are, generally, property that is acquired directly or indirectly through unlawful activity. Unlawful activity includes acts or omissions that are offences under provincial or federal law. If the unlawful activity occurred in another jurisdiction and the property is in B.C., that property can still be forfeitable so long as the offshore unlawful activity would be unlawful activity had it been committed in British Columbia. An instrument is property that has or is likely to be used to engage in unlawful activity, which may result in the acquisition of other property or cause serious bodily harm.

Typically an administrative forfeiture proceeding will begin with the director giving notice to people with a potential interest in the property. The most likely use for this process will be cash seizures. If no one contests, then following the notice period the property is forfeited. A person wishing to dispute the forfeiture can force the matter to a judicial hearing.

Typically a judicial civil forfeiture proceeding begins with the director seeking an IPO or interim preservation order from the court. This IPO literally preserves the property for litigation. Civil forfeiture proceedings, unlike garden-variety litigation, involve proceeds and instruments of unlawful activity. The IPO itself will often be designed to prevent dissipation of the property (freezing bank accounts, clouding title, or physically seizing items), as well as to prevent the property from being used to commit unlawful activity. In most instances, the IPOs will be sought on an *ex parte* or without notice basis. The court's authority to grant an IPO comes from the CFA and is entirely statutory. In 2019, the CFA was amended to allow the director to seek a preliminary order to preserve (POP): this is an order where the formal forfeiture application has not yet been created or filed; the amendments address exigent circumstances where property will dissipate if not preserved quickly.

The IPO places the property under the control of the courts. The level of that control will vary from case to case. In a typical real property case, for example a residential house, the court will allow the party to continue to occupy the premise provided that their interest is not alienated or disposed of. In other instances, the director may seek exclusive possession of the property (an outlaw motorcycle gang club house or a car belonging to a recidivist drunk driver). An IPO or POP will be granted if a court is satisfied that there is a serious question to be tried: is part or all of the property a proceed or instrument? Even if so satisfied, the court can refuse to make an order where to do so would clearly not be in the interests of justice.

In 2019, the CFA was amended to allow a court to order the production of documents, information or records that the director might reasonably need to fulfill their statutory duties. The director can issue a notice to produce information to a financial institution. Information gateways are critical to the proper functioning of a civil forfeiture law.

If the property is secured by an IPO or a POP, notice of the order is provided to parties with a known interest in the property. At that phase of the proceeding, the party can seek to review, alter or challenge the preservation order. If the litigation proceeds, parties will exchange documents, there will be motions, filing of transcripts and cross-examinations of witnesses. The litigation then moves toward the penultimate forfeiture hearing. In that hearing, the court is asked to determine, on a balance of probabilities, whether the property is a proceed or an instrument. The director bears the onus of establishing this proposition. The owner or a claimant to the property can choose not to defend; if they do so, there is a risk that any interest they have in the property will be extinguished by forfeiture.

Parties claiming an interest in property subject to a civil forfeiture proceeding can assert one of three types of claims:

- They can dispute the province's assertion that the property is a proceed or instrument. If the province fails to establish this assertion, the civil forfeiture case fails;

- They can demonstrate that, even if the property is a proceed or instrument, the court ought to protect their specific interest in the property; or,

• They can assert that forfeiture ought not to issue as to do so would clearly not be in the interests of justice. Alternatively, a respondent can argue doctrines like abuse of process or posit that there is a constitutional problem which trumps forfeiture.

Typically, the director will oppose any effort to conflate or collapse these claims.

CFA cases use the balance of probabilities as a general standard of proof. The CFA includes a number of presumptions that a court can apply including:

- Proof that someone participated in unlawful activity that resulted in the receipt of financial benefit combined with proof that that person subsequently acquired property is proof, in the absence of evidence to the contrary, that the subsequently acquired property is a proceed.
- Convictions (and findings of not criminally responsible on account of a mental disorder) are presumptively proof of unlawful activity. The lack of charges or a conviction is not a bar to a civil forfeiture proceeding.
- Cash or negotiable instruments worth more than $10,000 that are found near drugs or are not bundled in a manner consistent with standard banking practices are presumptively proceeds.
- A criminal court finding on a criminal organization offence is presumptive proof that person is a member of a criminal organization.
- The presumption of advancement for spouses, children and the like does not apply in civil forfeiture cases.[20]
- Drugs or weapons found in vehicles make the vehicles presumptively an instrument.
- Failing to stop or fleeing from police makes the vehicle presumptively an instrument.

Where there is no forfeiture, the court can restore the ownership interests that were present prior to the proceeding. Alternatively, the court can order property or a property interest transferred to a legitimate owner. If there is

[20] Where property transfers gratuitously to a spouse or child, absent evidence to the contrary, the transfer is presumed to be a gift. "The presumption of resulting trust is the general rule for gratuitous transfers and the onus is placed on the transferee to demonstrate that a gift was intended. However, depending on the nature of the relationship between the transferor and transferee, the presumption of advancement may apply and it will fall on the party challenging the transfer to rebut the presumption of a gift." *Pecore v. Pecore*, 2007 SCC 17

forfeiture, the government takes title. Generally property is liquidated to cash. That cash is then deposited in a segregated account and made available to victims, for cost recovery and for grants. As CFA proceedings are civil, costs follow the event. The prevailing party can seek costs.

2.2 Administrative Forfeiture

As noted above, in 2011, British Columbia adopted an idea that has previously been used in the customs context: administrative forfeiture. Under the CFA, the B.C. Director must satisfy a four-part test for administrative forfeiture:

1. Is the whole or part of the property an instrument or proceed?
2. Is there reason to believe that the property is of a value equal to or less than $75,000?
3. Is the property in British Columbia and in possession of a public body? A public body will most typically be a police service. Note that real estate is excluded from the administrative forfeiture process.
4. Are there any protected interest holders in relation to the property? Typically that would be a property owner with a registered interest who did not directly or indirectly engage in unlawful activity.

There is a 10 year limitation period and administrative forfeiture cannot be used where a judicial forfeiture process has been undertaken. If someone wants to contest the Director's administrative forfeiture, they have to comply with notice provisions. Once properly lodged, the Director can react to a claim in one of two ways: they can concede the interest and allow the property to be returned to the claimant or the Director can launch a judicial forfeiture proceeding before the courts.

3.0 Other provinces

There are eight other jurisdictions with a civil forfeiture law in Canada. The sections of this paper that follow focus broadly on some, but not all, of the key differences between those jurisdictions and the CFA.

3.1 Alberta and the *Victims Restitution and Compensation Payment Act, 2001* ("VRCPA")

Alberta's law evolved from 2001 to present, moving from a prosecutor's tool into a civil forfeiture law consistent with other provinces. Originally, the

statute was largely designed to assist prosecutors on restitution orders. For example, in a *Criminal Code* prosecution involving fraud, the prosecutor can seek a restitution order against the defendant with a view to making the victims whole. While there are provisions within the *Criminal Code* to assist prosecutors, they are not regarded by practitioners as effective vehicles to chase down assets and properly compensate victims. The structure and some of the operational provisions of that original design remain and the VRCPA has a look and feel that is markedly different from other Canadian civil forfeiture laws.

The 2001 version of the statute was not proclaimed until 2004 and was not much used until significant amendments were made in 2008. Those amendments brought a civil forfeiture regime into place. The VRCPA is formally divided into five parts, with each part containing divisions. The first part governs proceeds (the VRCPA refers to “Property Acquired By Illegal Means”) "proceeds", and includes provisions for the restraint and disposal of such property. The second part, Part 1.1 introduced with the 2008 amendments, deals with “instruments”. The third part addresses restitution assistance, and the fourth governs payments of compensation when victims are not specified. In 2013, the parts were renumbered and an administrative forfeiture procedure process was added to the statute. Bill 38, introduced into the Alberta Legislature, proposes to make a number of changes including changing the name of the statute to the Civil Forfeiture Act.[21]

3.1.1 Features of the VRCPA

The VRCPA has some unique provisions that differ from the CFA, including:

- There are linguistic differences. The VRCPA uses the term “restraint” order instead of the Interim Preservation Order/ Preliminary Order to Preserve (IPO/POP) references in the CFA. While there are differences in detail, particularly procedural differences, the VRCPA forfeiture process is not significantly different from the CFA process.
- A police officer has the power under the VRCPA to seize something for 10 days, following which a civil forfeiture proceeding can be brought.[22] This approach, while unusual, is not without precedent:

[21] At the time of writing, Bill 38 had received second reading and was sent to the Committee of the Whole.
[22] VRCPA s. 6(3)(a)

under British law, a police officer can bring a cash seizure case before Magistrate's Court.[23] In Ireland, a police led agency brings civil asset forfeiture proceedings.[24]

- In 2010 and then in 2013, there were a number of legislative amendments, the most significant of which added administrative forfeiture (which is similar to the CFA process). An initial order by the Minister will, according to the statute, give police or other public bodies the authority to continue holding seized property; even if an order under s. 490 of the *Criminal Code* is "running out" seized property can be retained. There are fairly stringent time limitation periods during which a notice of dispute must be lodged.
- The Minister, or the designate of the Minister, plays the role of the CFA's director.
- In CFA proceedings, costs follow the event (as they do in garden variety civil litigation cases). Under the VRCPA, costs can only be awarded against the Minister in limited circumstances, namely where restrained property has been returned at an interim stage (as opposed to the end of the final forfeiture hearing).
- The older provisions of the VRCPA deal, in essence, with restitution and victims in the context of a criminal prosecution. In some cases, for example a fraud case, when the Crown convicts an offender, a restitution order can be sought. The idea is to make the victims whole through the prosecution process. In fact, the *Criminal Code* process has a number of gaps that the VRCPA purports to fill. Part 2 of the VRCPA is entitled Restitution Assistance. The Minister can seek essentially two types of orders under Part 2: the Minister can ask for a restitution assistance order and a restitution payment order. An assistance order can freeze property pending a hearing; the order can also compel the offender to disclose their asset holdings. A payment order can be used to set aside property transfers (for example between an offender and his or her spouse), as well as directing that property of the offender be made available for victim compensation. Failure by the offender to comply can lead to fines and/or jail time. Part 3 operates in a very similar fashion but allows the Minister to seek compensation where victims were not identified

[23] *Proceeds of Crime Act 2002*, (2002 c. 29) e.g. s. 289(6) and s. 298(1)
[24] *Proceeds of Crime Act, 1996* (No. 30/96)

in a restitution order or where the criminal court did not issue a restitution order.

3.2 Saskatchewan: The *Seizure of Criminal Property Act* ("SCPA")

In 2005, Manitoba passed civil forfeiture legislation and Saskatchewan quickly followed with a similar statute. That legislative model did not work. The responsibility for bringing a proceeding was largely delegated to police services; police appeared to have largely ignored the legislation. In the normal course of a criminal proceeding, police conduct investigations, lay charges where appropriate, and hand the matter over to the Attorney General who brings a prosecution. In 2009, the law in Saskatchewan was changed. *The Seizure of Criminal Property Act*, *2009* ("SCPA") drew lessons from other provinces as well as from another Saskatchewan law known as SCAN or *The Safer Communities and Neighbourhoods Act, 2004*. The SCPA is formally divided into seven parts. As with the CFA, the SCPA creates and empowers a "director", to play a number of key functions under the statute.

As with the CFA, a civil forfeiture proceeding either begins as an administrative forfeiture or with the director seeking an interim order from the court. Under the SCPA, the interim order can serve two purposes: one, as with other provinces, the interim order literally preserves the property for litigation; unlike the CFA, an interim order in Saskatchewan can include a court order that would empower the director to investigate and inventory property. The director can be authorized to enter and search premises. The director can stop and search a vehicle. The director can be authorized to seize and remove anything that may be evidence of property that is a proceed or instrument. In most instances, the interim orders will be sought on an *ex parte* or without notice basis; in virtually all instances involving a search, one would expect orders to be sought on an *ex parte* basis. The court's authority to grant an interim order comes from the SCPA and is entirely statutory. The civil forfeiture process under the SCPA maps in a similar fashion to the CFA.

3.3. Manitoba: The Criminal Property Forfeiture Act (CPFA)

As with Saskatchewan, Manitoba first passed civil asset forfeiture legislation in 2004 but the law was not widely used until amendments in in 2008. Functionally, the Criminal Property Forfeiture Act or CPFA is similar

to the CFA. The CPFA uses a director model (the director is not compellable as a witness). An asset manager is also provided for in the CPFA; that person is responsible for possessing and managing property subject to an interim or final order. The director must produce an annual report for the Attorney General and Minister of Justice.[25]

In 2016, the Legal Research Institute of Manitoba conducted a study of 100 civil forfeiture cases in Manitoba.[26] The researchers wanted to compare the evocative and sensational media reports on civil forfeiture against the empirical evidence from the courthouse. Amongst the findings of the study:

- In 2014, Manitoba civil forfeitures realized roughly $3 million;

- Of the 100 cases examined between 2009 and 2014, a majority of the cases (87) involved drugs. The report does note that a civil forfeiture case does not require the court to make a finding related to specific unlawful activity. None of the drug cases related to personal consumption and many were, not surprisingly, co-mingled with other offences;

- Property liable to seizure included all classes of property and 40% of cases involved real property (half involved cash seizures);

- The study noted that the province was successful, in whole or in part, in nearly all of the cases examined; and,

- The study concluded that, while "evocative media accounts make great stories" empirical research places those stories in context.

3.4 Ontario the *Civil Remedies Act* (CRA)

Ontario's *Civil Remedies Act, 2001* or the "CRA" is Canada's first civil asset forfeiture law. The CRA is similar to the CFA in many respects. Recent amendments, not all of which are in force at the time of writing, will add an administrative forfeiture process. Some of the differences or interesting features of the CRA include:

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[25] The report is rolled up into a larger report from the Minister. See for example https://www.gov.mb.ca/justice/publications/annualreports/pubs/annualreport1819.pdf

[26] Gallant, M *An Empirical Glimpse of Civil Forfeiture Actions* 2014 38-1 Manitoba Law Journal 219, 2014 CanLIIDocs 269

- There is a limited ability for a respondent to access property secured by a preservation order for the purposes of legal expenses.
- The preservation order process (like the IPO) allows the court to grant an exclusive possession order to the Director of Asset Management — Civil (the "Director"). The CRA gives the Attorney General authority to bring proceedings and the Director fulfills various roles around property and information management under the statute. In cases where the property's value is diminishing because it is perishable (*e.g.* a shipment of fruit) or the cost to maintain the property exceeds its value (*e.g.* a $500 car being kept in a $200 per month lot), it makes no sense to keep the property. The CRA permits the court to sell the property and deposit the proceeds of the sale into court, minus costs of sale. The CRA also grants the Director the power, in some circumstances, to sell the property.
- Preservation orders are granted on a different standard than the CFA: the court can issue an order where there are reasonable grounds to believe that the property is a proceed or instrument (as opposed to the CFA's serious question to be tried standard[27]).
- The CRA has specific provisions designed to address recidivist impaired driving (which the statute refers to as vehicular unlawful activity). Broadly speaking, vehicles implicated in two or more impaired driving suspensions can be forfeited by the courts.
- There is a separate right of action that the Attorney General can bring against conspiracies that cause harm to the public. This is a residual aspect of the interest that policy makers had in RICO, the *Racketeer Influenced Corrupt Organization* statute passed by Congress in 1970. The Attorney General can seek orders that will reduce or prevent the risk of harm to the public as well as seek the disgorgement of profits.
- Appeals of final determinations go to the Ontario Court of Appeal where the value of the property is above $50,000. Where the value of the property is below $50,000 and it is a final determination or an interlocutory order, the appeal goes to Divisional Court.
- There have been a number of recent amendments to the CRA including:
    - the introduction of administrative forfeiture;

[27] CFA s. 8(5): Unless it is clearly not in the interests of justice, the court must make an interim preservation order applied for under this section if the court is satisfied that one or both of the following constitute a serious question to be tried: (a) whether the whole or the portion of the interest in property that is the basis of the application under subsection (1) is proceeds of unlawful activity; (b) whether the property that is the basis of the application under subsection (2) is an instrument of unlawful activity.

- a provision for judicially authorized disclosure orders; a court can order the disclosure of third party information if it is considered reasonably required by the Attorney General for the exercise of their powers or duties under the CRA;
- allowing estates to claim as victims;
- allowing settlements to include payments in lieu of forfeiture;
- allowing public bodies, like law enforcement, to hold property that may be the subject of a civil forfeiture proceeding for up to 75 days; and,
- requiring the Attorney General to issue an annual report.

At the time of writing, administrative forfeiture and the annual report requirement are not yet proclaimed into force.

3.5 Québec's Act respecting the forfeiture, administration and appropriation of proceeds and instruments of unlawful activity (the "QFA")

Québec's 2006 civil forfeiture legislation is called *An Act respecting the forfeiture, administration and appropriation of proceeds and instruments of unlawful activity*. For simplicity, that long name has been arbitrarily truncated to the Québec Forfeiture Act ("QFA"). As with the CFA, proceeds and instruments, property derived from or used in unlawful activities, may be forfeited in a civil court. Québec's law operates in a civil legal system that differs in many respects from common law systems like B.C.

Historically, Québec retained the vestiges of France's laws in the early to mid-17th Century. The laws of property and obligations in particular are informed by Roman law and would be far more recognizable to a Continental lawyer in Paris than a jurist in Victoria. The civil forfeiture scheme, however, appears to have been largely derived from common law models; while very unique, the law appears to have been informed by other jurisdictions like British Columbia. The QFA threads common law concepts into a civil law system. The bill has two stated purposes: to introduce civil forfeiture to Québec and to manage all forfeited property (both conviction and non-conviction based).

The QFA is formally divided into five divisions with two schedules. Division 1 sets out the purposes of the QFA and defines its scope. Division 2 houses the primary civil forfeiture provisions. Division 3 sets out the necessary administrative provisions to support civil forfeiture and asset management. Division 4 addresses financial matters and the final division contains miscellaneous and transitional clauses.

While the Minister of Justice is responsible for the overall administration of the statute, the Attorney General brings QFA proceedings in court. The *Code of Civil Procedure* (the Code) applies to those proceedings. The QFA adopts the existing seizure before judgment process in civil law (a process roughly analogous to the common law *Mareva* injunction). Essentially the Attorney General can ask the courts to freeze property prior to forfeiture or prior to a QFA proceeding being commenced.

Under the QFA, the Code applies to proceedings: an application is filed and heard under the Code and the civil rules of evidence. A number of those rules differ in detail from CFA proceedings. For example, service is always a challenging issue in civil forfeiture proceedings. Under the *Code of Civil Procedure*, hearings should only be held where parties are duly summoned; to facilitate this, extensive and detailed rules govern service. The QFA in turn modifies the *Code of Civil Procedure* service rules.

The forfeiture application is served on the owner of the property, if known, and on any possessor or holder of the property at the time the application is filed or at the time the property was seized by a police force or another authority empowered to do so. The Attorney General can rely on a presumption: there is deemed to be service at the time property was seized by the police. The Attorney General is still required to provide notice to other persons whose rights in the property are likely to be affected by the proceeding. Presumptions in the QFA can be used to support a request to compel a defendant to provide documents during a preliminary examination. For example, a presumption arises when an owner's legitimate income does not align with their asset holdings.

As with the CFA, The Attorney General can collect information from any source and use that information in a proceeding. Generally the bulk of information comes from law enforcement, particularly the Sûreté du Québec, as well as municipal services like the Montreal Police Service and some public bodies, which also provide information to the Attorney

General. The Attorney General reviews information and decides whether or not to bring a proceeding. The courts in Quebec have described the operation of the QFA as a statutory scheme allowing for the civil forfeiture of property derived from unlawful activity or used in the commission of such activity. Subject to a good faith defence, the holders of such property shall not retain the benefit of their unlawful activity.

Typically, a civil forfeiture proceeding begins with the Attorney General seeking a seizure before judgment ("SBJ") order from the court. Similar to the CFA, this SBJ literally preserves the property for litigation. In order to obtain an SBJ, the Attorney General must adduce evidence in an affidavit form that:

- Affirms that property is a proceed or instrument;
- States that an application for forfeiture has or will be filed;
- Sets out the facts and sources of information; and
- Provides a factual basis for the court to conclude that, without the SBJ, the property would be destroyed, damaged or squandered.

The SBJ then places the property under the control of the courts. Then the forfeiture litigation process commences in a fashion similar to the ways things would unfold under the CFA.

3.6 New Brunswick's *Civil Forfeiture Act* ("CFA")

New Brunswick first introduced civil asset forfeiture legislation in February of 2010. The N.B. *Civil Forfeiture Act* is similar to the CFA, or at least an earlier iteration of same.

3.7 Nova Scotia's *Civil Forfeiture Act* (CFA)

Nova Scotia passed their civil asset forfeiture legislation, the *Civil Forfeiture Act* in 2007, but the province did not proclaim the law into force until April 29, 2011. The N.S. legislation is similar to the CFA (or at least an earlier iteration). A companion piece of legislation, the *Assets Management and Disposition Act, 2007* ("AMDA") was passed at the same time as the CFA. The AMDA creates a "manager" position; that manager is responsible for

many of the steps under the civil forfeiture process and has the power to sell and dispose of property subject to CFA proceedings.

3.8 Nunavut Unlawful Property Forfeiture Act (UPFA)

On March 14, 2017 the Commissioner of Nunavut gave assent to the *Unlawful Property Forfeiture Act, 2017* (the "UPFA", or "the Act"). The UPFA was developed following consultations across Nunavut on alcohol and the impact it was having on communities. The government heard, amongst many other concerns, that the alcohol regulatory structure was not always effective. Fines did not deter those "bootlegging" in communities with an alcohol ban, where a "60 ounce" bottle of vodka could sell for $500 or more. A report on the consultations recommended the adaptation of civil asset forfeiture measures.

This is not the first time asset forfeiture has been considered in the north. In 2010, the Yukon government had introduced a civil forfeiture bill, which was withdrawn a month later. Nunavut consulted carefully in many communities and took nine months in the legislature to consider the bill. Practices unique in the north, like the communal use of property and Inuit societal values, were carefully considered during the consultations.

The purposes section states that the UPFA is intended to "promote safe and healthy communities in accordance with Inuit societal values". In other words, the statute's design reflects, in no small measure, its origins and, in particular, the consultative efforts discussed in the previous section. Functionally, the UPFA is similar to the CFA.

4.0 Conclusions

The paper has attempted to provide a brief overview of the CFA and the ways in which it differs from other civil forfeiture laws in Canada. Civil asset forfeiture is an important tool. Civil forfeiture makes unlawful activity unprofitable, captures resources tainted by unlawful activity (and prevents their reinvestment) and provides a mechanism to compensate victims. Civil forfeiture is not a panacea. Civil forfeiture is an option in a continuum of justice system remedies. As noted in the introduction, the vexing challenges under consideration by the Commission require a variety of policy options, some preventative, some punitive and in the case of civil forfeiture, some remedial. A keen reader will discern that many levels of detail are either omitted or simplified in the interests of brevity. The largest

area that this paper has neglected is jurisprudence. Over the past twenty years, a significant body of trial and appellate case law has emerged. My book, Civil Asset Forfeiture in Canada, attempts to chronicle that case law. Dr. German's book, Proceeds of Crime and Money Laundering,[28] is also an excellent resource for those with an interest in the subject. For those interested in our American neighbours, I commend you to Stefan Cassella's book Asset Forfeiture Law in the United States which I understand is in the process of being updated.[29]

[28] Toronto: Carswells, 1998 (loose-leaf).

[29] New York, JurisNet, 2007