Chatterjee v. Ontario: Property, Crime and Civil Proceedings

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The idea of suing, in addition to prosecuting, people for their misdeeds is hardly novel. Wrongful actions can give rise to criminal and civil liability. Given that the balance of probabilities standard of proof governs civil actions, it can be appreciably easier to attach civil liability than to secure a criminal conviction. Many provinces have sought to incorporate the idea of civil liability, or the general concept of civil actions, into their efforts to confront criminal activity. They have enacted laws that enable property tainted by crime to be forfeit in civil proceedings. Justified as devices that service the aims of conventional civil actions – providing compensation for the victims of crime – as well as instruments that ensue that crime does not pay, the enactments invite constitutional inquiry as to whether they exceed provincial jurisdiction by encroaching upon federal legislative domain over the criminal law.

Chatterjee v. Ontario (Attorney General) is the first test of the concept of relying on civil legal proceedings to tackle crime, of using civil actions and their lighter standard of proof, to recover property linked to crime.1 Organized around Ontario’s Civil Remedies Act, the Supreme Court of Canada was asked whether actions to forfeit the proceeds of unlawful activity exceeded provincial constitutional competence by invading federal jurisdiction over the criminal law.2 To the relief of Ontario and other provinces, the Supreme Court upheld the constitutional validity of the reliance on forfeiture, on civil actions, to remove property derived from crime.

The Legislation

Ontario’s Civil Remedies Act arose as part of protracted latter-day efforts to tackle crime by attacking its financial underpinnings. In the late 1980s, awareness of the importance of the financial dimension of crime – that it fostered and facilitated crime – prompted policy-makers to embark on a legislative journey to construct legal regimes aimed at tainted, or criminal, resources. Initial manifestations of that journey assumed the form of the criminalization of money laundering and confiscation (or criminal forfeiture) laws. Later, the journey grew to include enhanced supervision of financial transactions in order to detect the presence of criminal resources.3 Most recently, the trajectory led to provincial laws that enabled the taking of criminal resources through civil legal proceedings.

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1 2009 S.C.C. 19 (hereafter Chatterjee).
2 S.O. 2001, C-28 (hereafter, CRA).
The Ontario law exemplifies this reliance on civil legal proceedings to target the financial element of crime. Many provinces have followed suit by enacting laws that, in one form or another, permit property linked to crime to be recovered by the state through civil actions.\(^4\) When initially enacted in 2001, the Ontario law was called “Remedies for Organized Crime and other Unlawful Activities Act”, a rather pronounced semantic reference to its focus on criminal activity. In 2007, this link softened, and the name changed to Civil Remedies Act.\(^5\) Nor does the law formally contemplate “criminal” property. Rather, it envisions the forfeiture of the proceeds of unlawful activity.

The Ontario law gives the Attorney General the power to bring an action to forfeit the proceeds of unlawful activity.\(^6\) “Proceeds of unlawful activity” means property acquired, directly or indirectly, in whole or in part, as a result of unlawful activity.\(^7\) “Unlawful activity” means an act or omission that:

“(a) is an offence under an Act of Canada, Ontario or another province or territory of Canada, or (b) is an offence under an Act of a jurisdiction outside Canada, if a similar act or omission would be an offence under an Act of Canada or Ontario if it were committed in Ontario, whether the act or omission occurred before or after this Part came into force.”\(^8\)

Although the Act creates a number of civil powers, the only civil proceeding of interest in Chatterjee was the power to forfeit the proceeds of unlawful activity.\(^9\)

Expressly stated, the purpose of the Ontario law is to provide compensation for the victims of crime as well as to prevent people who acquired property through unlawful activity from retaining ownership therein.\(^10\) Chief pertinent ingredients of the forfeiture law include protections for innocent property owners who acquire the proceeds of unlawful activity yet are unaware of its unlawful character; the direction that any proceeds that are forfeit be distributed to the victims of crime; and the statutory direction that the civil standard of proof governs forfeiture proceedings.\(^11\) Equally, although the Ontario law draws on the idea of civil liability, the subject of the action is the property, not property owners. Forfeiture does not formally recognize any civil liability attaching to property owners for any engagement in unlawful activity. Rather, the regime implicitly draws on the ancient concept of in rem, as opposed to in personam, liability. Not particularly familiar to contemporary legal discourse, in rem refers to the liability of

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\(^6\) CRA, supra note 2, s. 3.
\(^7\) Ibid. s. 2.
\(^8\) Ibid. s. 2.
\(^9\) Ibid. ss. 7-11 (permit the forfeiture of the instruments of unlawful activity); ss. 11.1 – s. 11.4 (permits forfeiture in the context of unlawful activities related to road safety); ss.12 - 15 (civil orders respecting conspiracies that injure the public.).
\(^10\) Ibid. s. 1.
\(^11\) Ibid. s. 2 (defines legitimate owners) and s. 3(3).
the *res*, the thing. The action lies against property, not against property owners or any other persons allegedly involved in criminal activity.

With baited breath, the provinces awaited the outcome of *Chatterjee*. A vindication of the constitutional character of Ontario’s civil forfeiture regime would secure the provinces with a potentially powerful deterrence device, the capacity to sue and forfeit property tainted by crime.

*The Decision*

The facts in the Chatterjee case are straightforward. The appellant, Mr. Chatterjee, was stopped by the Ontario police for a routine traffic violation. Information revealed that Mr. Chatterjee was in breach of a recognizance order. He was arrested and his vehicle searched. The search revealed $29,020 in cash and various (possibly) drug-related paraphernalia that bore the scent of marijuana. The appellant was not charged with any offence related to the cash. Instead, the Attorney General brought an action under Ontario’s *Civil Remedies Act* to forfeit the cash found in the automobile. The appellant challenged the constitutionality of the Ontario law.

In the lower courts, the appellant contended the forfeiture law was *ultra vires* provincial jurisdiction and also infringed upon rights guaranteed by the Canadian Charter of Rights and Freedoms. By the time the appeal arrived at the Supreme Court of Canada, the appellant chose to focus on the division of powers dimension, and narrowed his appeal to the provisions that tied civil forfeitures to federal criminal offences. These aspects of the *Act*, the appellant contended, interfered with federal jurisdiction over criminal law, section 91(27), and were therefore of no force and effect. The Supreme Court upheld the constitutionality sections 1-6 and sections 16 and 17 of the *Civil Remedies Act*, the power to forfeit property unlawfully acquired.

A few terse initial lines of the judgement foreshadow the Court’s disposition towards the appeal and the premises that inform its constitutional analysis. The Court characterizes the appellant’s arguments as based on: “an exaggerated view of the immunity of federal jurisdiction in relation to matters that may, in another aspect, be the subject of provincial legislation”. And in reference to recent jurisprudence, “a court should favour, where possible, the ordinary operation of statutes enacted by both levels of government”. These premises, the cautioning against an inflated view of federal jurisdiction over criminal law at the expense of otherwise valid provincial enactments coupled with the disposition, where possible, to uphold enactments, establish the framework which guides the Court’s analysis of whether provincial civil forfeitures are unconstitutional because they enter into federal criminal law terrain.

The Court begins with the conventional examination of the pith and substance of the Ontario forfeiture law. Looking chiefly to the law’s stated purpose – providing

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13 *Supra* note 1 at para. 2.
compensation to the victims of crime, redistributing tainted property and deterring crime through the removal of criminal property - and its effects – that it principally takes the profit out of, and deters, crime by targeting property– the Court finds that the pith and substance of the law is the regulation of property so to compensate victims and to deter criminal activity. This places the law firmly within provincial competence of property and civil rights, section 92 (13). Assigning the law to this constitutional category, however, does not preclude interference with federal jurisdiction over criminal law. The remainder of the Court’s investigation concerns the dual aspects of the initiative, the property-based deterrence aspects and the criminal aspects, and asks whether compelling reasons exist to deny the ordinary operation of a law enacted by the province.

Compelling reasons, according to the Court, might exist when a provincial enactment, though designed to regulate property and to deter crime, amounts to a criminal law initiative by effectively doing “violence” to the division of powers. The Court points to provincial laws that deter crime by targeting property – the closure, for example, of establishments of disrepute - whose constitutional authority was upheld. It is only when the dominant purpose is to criminalize conduct or to punish that a law might be characterized as unduly entering into federal domain. The Ontario regime does not criminalize conduct. Rather, it relies upon existing criminal offences created through valid exercises of federal criminal law power. There is no general prohibition on a province’s power to enact civil consequences to criminal acts. With the civil forfeiture device, the province is concerned with the affects of crime and the costs to society and the costs to provincial coffers of mitigating the effects of crime. Equally, in a forfeiture action, no one is charged with any criminal offence nor, indeed, are proceedings under the provincial regime brought against individual defendants: the subject of the action is property.

Nor, the Court continues, is the provincial enactment displaced or otherwise rendered invalid because it overlaps or interferes with existing criminal law forfeiture powers contained in the criminal code or with the sentencing process. A successful criminal prosecution usually precedes criminal code forfeitures and the province regime does not require that any predicate conviction trigger forfeiture. In fact, provincial forfeiture may ensue without anyone, the appellant or anyone else, having ever been convicted of any offence in relation to the property liable to forfeiture. Accordingly, it is not necessarily an element of a criminal sentence, a punitive measure, for someone to be deprived of unlawfully acquired property. Moreover, should elements of actions brought under provincial forfeiture powers interfere with federal criminal forfeiture, the presiding court has the statutory power to determine that the proceedings constitutes an abuse of process. In cases where actual conflicts occur, the doctrine of federal paramountcy might equally prevail.

15 Ibid. paras. 16 – 23.
16 Ibid. para. 30.
17 Ibid. paras. 25 – 28.
18 Ibid. para. 29.
19 Ibid. para. 40.
20 Ibid. para. 48.
21 Ibid. paras. 49 – 52.
In conclusion, and framed by its initial premises, the Court holds that the legislation constitutes a valid exercise of provincial authority and does not interfere or sufficiently conflict with federal criminal law to warrant a finding that Ontario’s power to forfeit property unlawfully acquired is ultra vires.

Analysis
From a policy and a legal perspective, there is very little principled reason to quibble over the Supreme Court’s ultimate conclusion. The civil forfeiture actions created under provincial law hardly invoke matters over which reasonable individuals might have equally persuasive yet staunchly opposed views. After all, what policy considerations auger in favour of recognizing any entitlement to unlawfully acquired proceeds? With respect to the legal analysis, the decision does not deal with a troublesome aspect of the Ontario law, the forfeiture of the instruments of crime and an account need be noted of the Court’s curious endorsement of in rem proceedings. It would, however, be rather myopic, in light of the Court’s reference to potential conflicts with federal enactments, not to note the pronounced overlap of Chatterjee with a second 2009 Supreme Court of Canada decision that investigates forfeiture in a somewhat different context.

Policy rationales underlie all legal enterprise. Through civil forfeiture laws, the province seeks to ensure that crime does not pay and to ensure compensation for the victims of crime. In the usual course, private civil actions secure that policy: the victims of crime bring civil proceedings against their transgressors and receive compensation for their injury or for the loss they have suffered. Crime often yields financial rewards, sometimes the paltry sums involved in a simple burglary, sometimes the copious quantities gained from insider trading. Drug crimes, the precise allegations that inform the Chatterjee ruling, produce extraordinary financial rewards yet rarely are there clear victims, individuals who might bring a civil action against the drug dealer and through that action, claim compensation – money – from the offender. To make the province the repository of the civil action, to give the province the power to take benefits gained from criminal offences and to distribute these to the victims of crime, resonates loudly with conventional understandings of civil justice. In this, the constitutional inquiry pursued in Chatterjee rings very hollow: there are compelling policy reasons for allowing either the province or the federal government to use forfeiture to recover the proceeds of unlawful activity.

Against the backdrop of compelling policy rationales, the Supreme Court’s legal analysis neatly moves towards the conclusion that the device is within provincial competence. There are a litany of examples of the interplay of provincial deterrence instruments – attacks on the property-based component of crime – and the criminal law. The Court is a bit troubled by the Johnson decision, a case in which the same court held that the forfeiture of slot machine under provincial law violated the constitutional division of powers because it conflicted with provisions of the criminal code regulating the gaming industry.22 Johnson, however, according to the Court, relied chiefly on the idea that federal law already occupied the field of gaming and concludes that it is now clear that

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“touching on a matter” – does not oust provincial jurisdiction to touch on the same matters if the provincial law is in relation to valid provincial objects.\(^\text{23}\)

The legal significance, however, that the Court attributes to the concept of \textit{in rem} character of forfeiture actions is, quite simply, misconceived. In demonstrating that forfeitures do not expose individuals to criminal liability, the Court refers to the \textit{in rem} character of forfeiture action, that the target of the action is property, not people. Quite simply, the framing of an action \textit{in rem} ignores the veritable affects of forfeiture. Property, or proceeds of crime, cannot be held liable. Property does not care into whose hands it falls: property owners do. A forfeiture action effectively imposes a species of liability on property owners – it is owners, or anyone who claims entitlement to property – that endures its lost in a forfeiture action, owners who suffer or pay for the crime. In this, \textit{in rem} would be better characterized as imposing a form of limited liability onto property owners. Their liability for any unlawful act is limited to the property liable to forfeiture.

Framed as a constitutional inquiry only into the power to forfeit the proceeds of unlawful activity, the Court does not deal with a more troublesome element of the Ontario law, the forfeiture of the instruments of crime. The Ontario law gives the Attorney General the power to forfeit the instruments of unlawful activity, a phrase defined as “property that is likely to be used to engage in unlawful activity that, in turn, would be likely to or is intended to result in the acquisition of other property or in serious bodily harm to any person, and includes any property that is realized from the sale or other disposition of such property”.\(^\text{24}\)

Proof that property was used to engage in unlawful activity constitutes proof that the property falls within this definition.\(^\text{25}\) The problem with the forfeiture of the instruments of unlawful activity is its decidedly blunt character. The forfeiture, for example, of an expensive yacht upon which offences occurred as an “instrument of unlawful activity” may be dramatically disproportionate to the underlying offence. To a degree, the forfeiture of the proceeds of unlawful activity tailors this “remedy” to the offence – the forfeiture loosely reflects benefits gleaned from crime. When the effects of the forfeiture are grossly disproportionate to the underlying unlawful acts, the forfeiture resonates with the qualities of a criminal sentence, a punishment imposed for crime. Forfeiting the instruments of crime, in this context, shares more in common with criminal sentences and criminal punishment that the concept of an appropriate civil remedy. In the constitutional analysis, this casts the device into the federal criminal law camp and equally invites serious questions about respect for compliance with \textit{Charter} rights.\(^\text{26}\)

\[^{23}\text{Supra note 2 para. 35.}\]
\[^{24}\text{Supra note 1 at s. 7 (1).}\]
\[^{25}\text{Ibid. at s. 7 (2).}\]
Finally, account must be taken of a Supreme Court of Canada decision delivered a month later, *R. v. Craig*. Craig dealt with an action to forfeit offence-related property under the *Controlled Drugs and Substances Act* (CDA). The appellant was convicted of drug offences under the CDA for activities related to her home. She was sentenced for offences and the Attorney General also sought the forfeiture of her residence under provisions of the CDA that permit the forfeiture of offence-related property. Offence-related property is defined to include any property related to, or used in any manner, in connection with a designated substance offence. In this case, the offences related to her residence. The regime provides that if the court is satisfied, on a balance of probabilities, that property is offence-related property, it may order its forfeiture. Additional CDA provisions provide that if the forfeiture of real property would be disproportionate to the nature and gravity of the offence, the circumstances surrounding the offence and the criminal record, the court may decide not to order forfeiture.

The chief issue Craig raises is the relationship between the forfeiture and “sentencing consequences”. The principle question is whether the proportionality of forfeiture should be considered within the context of the global punishment – including the sentence imposed – or whether forfeiture required an independent, separate inquiry as to whether it was disproportionate merely, or exclusively, according to the precise considerations outlined in the CDA. The Court determines that forfeiture involves a separate, independent inquiry of whether it is disproportionate, an inquiry that does not take into account the sentence imposed. Although the Court recognizes the tensions between a holistic approach, one that assesses forfeiture in light of the totality of sentencing consequences, and an independent inquiry, they express clear problems with the inequities that result from a totality approach. A totality approach would permit persons with property to reduce their sentences through the forfeiture of property. Individuals with property “might be able to avoid jail or receive reduced custodial terms, while those without property would not.” Accordingly, the Court opts for the separate inquiry approach and assesses the disproportionateness of the forfeiture of real property in light of the specific statutory criteria contained in the Act.

*Craig*, of course, can be readily distinguished from *Chatterjee* – the forfeiture was triggered by a criminal code conviction and concerned a specific forfeiture regime contained in the CDA. However, the congruence is palatable because both conclude that forfeitures are not generally considered punitive measures, are not part of a criminal sentence. *Craig* stands as an example of the potential overlap between provincial and federal forfeiture powers. Had the appellant in Craig not be convicted of criminal offences, and had cash been discovered in her residence, that cash would be liable to forfeiture under Ontario’s civil forfeiture law.

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29  Ibid. at para. 34.
30  *Supra* note 2 at para. 93 - 94. A minority of the Court characterizes these particular forfeitures, the forfeiture of real property, as punitive measures. The punitive designation obtains because the forfeiture contemplates the taking of property lawfully, not unlawfully, acquired. Flowing from the conviction, it constitutes a penal consequence that must be taken into account in discerning the appropriateness of the entire sentence (including forfeiture) imposed on the appellant: *ibid* at paras. 93 – 107.