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# Civil Forfeiture Regimes in Canada and Internationally

## BUILDING A SAFE AND RESILIENT CANADA

Forfeiture is important for reducing the rewards of financially motivated crimes such as drug trafficking and sales, gambling and vice, and organized crime.

A common criticism of civil forfeiture is that it is really ‘criminal forfeiture dressed up in sheep’s clothing.’ This underlines the fact that civil forfeiture achieves the same objectives as criminal forfeiture but without the procedural safeguards and human rights protections that apply to criminal proceedings. Critics cite that the excessive use of civil, in lieu of criminal, forfeiture is due to the lower evidentiary standard of proof for civil forfeiture. Critics also oppose the practice in the UK, as well as in the US federal and state governments, of sharing civil forfeiture net proceeds among law enforcement agencies that have a role in the seizure of the property.

This paper describes the civil forfeiture regimes in Australia, Canada, the United Kingdom (UK), and the United States (US). They are all common law countries having well-established democracies and an effective and impartial law enforcement and judiciary. While the civil forfeiture regimes of Australia, Canada, the UK and the US vary in their application and detail, they all share the *in rem* feature at all stages of the process from implementation to enforcement. The most significant difference is that Canada’s constitutional division of powers does not permit the Canadian federal government to undertake civil forfeiture proceedings, which is not the case in Australia, the UK or the US.

Australia and five of its six states, as well as both territories, have established civil forfeiture regimes. There is no single Australian civil forfeiture model. To improve the effectiveness of the civil forfeiture regime, the Commonwealth and select sub-national governments (New South Wales, Northern Territory, and Western Australia) of Australia adopted legislation allowing for unexplained wealth orders (UWOs). The main features of the UWO provisions of the

Commonwealth *Proceeds of Crime Act of 2002* are the reversal of the burden of proof to the respondent to justify that the wealth was acquired by lawful means, and the lack of a requirement for the state to show a linkage between the offence and the property. The reverse onus provisions in forfeiture statutes have been challenged but upheld as being necessary in Australian courts.

Like Australia, the UK has a comprehensive confiscation and civil forfeiture regime established in its *Proceeds of Crime Act of 2002*. The *Act* created three mechanisms of civil recovery orders, forfeiture, and the taxation of unlawful earnings. Initially, the UK civil forfeiture regime provided fewer results than anticipated. In part, this was due to legal challenges that led to delays in civil recovery cases in the High Court. The UK High Court held that civil recovery was not a criminal, but a civil, proceeding intended to recover property obtained by unlawful conduct. In a change in tactics, the UK placed its emphasis on civil recovery orders and improved its effectiveness.

Unlike Australia and the UK, the US does not have a comprehensive forfeiture statute providing for all types of offences. There are three procedural options under US federal law administrative forfeiture, civil forfeiture and criminal forfeiture. Civil forfeiture is an *in rem* proceeding, where the property is the defendant in the case. An owner’s innocence is irrelevant since the property was involved in an unlawful activity to which forfeiture attaches. To improve effectiveness, the US Congress often allows administrative forfeiture in uncontested civil confiscation cases. Criminal forfeiture is an *in personam* proceeding, and seizure is only possible upon conviction of the property’s owner.

As seen in other jurisdictions, US case law has defined the parameters for civil forfeiture. The US Supreme Court held that “authorities may seize

movable property without prior notice or an opportunity for a hearing” (Doyle 2007, i). In certain cases, civil forfeiture may be considered punitive for the purposes of the Eighth Amendment’s excessive fines clause, and civil forfeitures do not implicate the Fifth Amendment’s double jeopardy clause unless they are so punitive as to preclude any chance of remedial action. US statutes also authorize intergovernmental transfers of sale proceeds to other US law enforcement agencies.

In Canada, pursuing criminal assets using civil proceedings favours the civil model of crime control in provincial jurisdictions in which there are eight provincial civil forfeiture models. The Canadian federal jurisdiction usually undertakes criminal forfeiture subject to the higher evidentiary standard of proof ‘beyond all reasonable doubt.’

Although there has been little by way of academic commentary on civil asset forfeiture in Canada (McKeachie and Simser 2009, 184-185), and limited published case law, a number of principles have emerged from case law echoing that seen in international jurisdictions. The courts have intervened in Canadian civil forfeiture case law to use their authority to refuse the order of forfeiture if it was not in the ‘interests of justice’ (Koren 2013, 4). The courts have also had to provide guidance to ensure that the *Charter of Rights and Freedoms*, as well as common law principles, are being followed.

The discussion paper has been prepared using the Campbell Systematic Review, which involves using explicit criterion to limit hidden biases and assumptions, thus enabling a replication of the research by others. This research included a systematic review of empirical and narrative studies of the types of asset forfeiture regimes, specifically civil forfeiture regimes. This approach permitted a current and comprehensive assessment of the present state of literature on the features of civil forfeiture regimes that could be considered in the Canadian experience.

Koren, Elaine (2013). *Civil Forfeiture Regimes in Canada and Internationally*. Ottawa, ON: Public Safety Canada.

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