

Criminal Wealth Law: From Maple Syrup to Hells Angels and Unexplained Wealth Orders

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I. INTRODUCTION

A significant dimension of modern crime management focuses on property, wealth, money, and financial activity. The organizing theme of late twentieth-century products such as anti-money laundering laws, criminal confiscation, criminal forfeiture, and civil forfeiture is detecting and capturing wealth associated with criminal activity. Such products, which have proliferated since the inception of modern management in the late 1980s, might be described as criminal wealth law.¹

An area of acute contemporary interest, a trilogy of recent developments, might be said to mark a certain sharpening of the edges of Canadian criminal wealth law. The first, a Supreme Court of Canada decision involving the theft of maple syrup, hones federal criminal forfeiture machinery, the principal anti-criminal wealth device. The second, a British Columbia Court of Appeal decision about clubhouses owned by the Hells Angels, sharpens a provincial criminal wealth device, civil forfeiture law. The third, arguably the most substantively significant of the trilogy, introduces a new tool to a province's wealth-focused toolkit, an unexplained wealth order regime. This essay examines this trilogy of contributions to criminal wealth law.

¹ The central origins of the focus on money lie in an international treaty designed to deal with drug proceeds and drug money laundering. A series of subsequent global instruments developed the strategy and continue to influence the direction of Canadian, and provincial, wealth-centered laws: see generally, *Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, 1988 (which introduced the criminalization of drug money laundering and the confiscation of the proceeds of drugs offences); *International Standards on Combating Money Laundering and the Financing of Terrorist and Proliferation*, the Financial Action Task Force Recommendations (which constitute the global money laundering and criminal finance standards).

II. THE SUPREME COURT CONTRIBUTION: MAPLE SYRUP AND THE PROCEEDS OF CRIME

Canada's primary criminal wealth, or anti-criminal wealth, mechanisms consist of federal criminal forfeiture law and federal anti-money laundering law. Federal anti-money laundering law is designed to enable the prevention and detection of money laundering and the collection of financial intelligence in relation to the financial aspects of crime.² Federal criminal forfeiture law attaches forfeiture – the divestiture of assets – to criminal convictions.

A 2022 Supreme Court of Canada case confirmed the sting of a piece of the federal forfeiture apparatus. In *R v Vallières*, the defendant was convicted of fraud, trafficking, and theft in connection with maple syrup.³ He was part of a well-planned enterprise that pilfered maple syrup from a warehouse, loaded it onto tractor-trailers, re-packaged, and sold the amber liquid. From this venture, the defendant admitted that the sale of the trafficked merchandise garnered slightly under \$10,000,000. Having had to pay various accomplices and absorb other costs, the defendant professed that his personal profit was just shy of \$1,000,000.

Upon his conviction, the Crown sought, among other consequences, a fine instead of forfeiture pursuant to section 462.37 (3) of the criminal code.⁴ The section is part of the package of proceeds of crime provisions introduced to spoil criminal prosperity.⁵ A part of this sequence - section 462.37 (1) - mandates that, upon conviction for a designated offence, if the court is satisfied, on a balance of probabilities, that any property is the proceeds of crime obtained through the designated offence, the court must order its forfeiture. The term, proceeds of crime, means "...any property, benefit or advantage...obtained or derived directly or indirectly as a result of... an offence."⁶ Property is defined as "...property originally in the possession or under the control of any person, and any property into or for which it has been converted or exchanged and anything acquired at any time by the conversion or exchange."⁷ Section 462.37 (3), the relevant section in *Vallières*, provides that where an order of forfeiture of the proceeds of crime cannot be made – where the property has been transferred, diminished in value, or is otherwise unavailable – a court can

² *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, SC 2000, c 17.

³ *R v Vallières*, 2022 SCC 10 [*Vallières*].

⁴ *Criminal Code*, RSC 1985, c C-46 [*Code*].

⁵ *Ibid*, being Part XII.2, Proceeds of Crime.

⁶ *Ibid*, s 462.3(1).

⁷ *Ibid*, s 2.

impose a fine in lieu of an amount equal to the value of the property that would otherwise have been liable to forfeiture. In this instance, the forfeitable property – the rewards of the trafficked maple syrup – was gone. That property not being amenable to forfeiture, the Crown sought a fine in lieu.

Applying section 462.37 (3), the trial court imposed a fine of just under \$10 million.⁸ The Quebec Court of Appeal overruled with respect to the amount of the fine, imposing a fine equivalent to the defendant’s profits of crime.⁹ The Supreme Court of Canada restored the lower court order.

The sting the Supreme Court delivered was the confirmation that Parliament had clearly and expressly defined the amount of the fine in lieu of forfeiture to the equivalent of the proceeds of crime, not the personal profits of crime.¹⁰ The fine replaces the actual forfeiture of the proceeds of crime where the forfeiture of that property has been rendered impossible. The proceeds generated from the sale of goods neared \$10 million, which, had it been available, would have been subject to forfeiture. The defendant’s personal profit was irrelevant. The Supreme Court held there was no discretion to limit a fine to the profits of crime.¹¹ An element of discretion lay in the decision to impose a fine, but once that decision was made, the amount was determined by reference to the statutory definition.¹² The defendant had acknowledged that the maple syrup sold for over \$10,000,000. That value was the correct value for the fine in lieu. While the court admitted the severity of the result, it held that that precisely was what Parliament intended in delivering a blow to “profit-driven” criminal activity.¹³

The Supreme Court also declined to exercise its discretion to apportion the amount of the fine amongst any co-accused or accomplices to avoid the risk of double recovery. While complicated by the fact that this issue was not raised at trial nor entertained by the Court of Appeal, the Supreme Court held that the defendant had not proven the risk of double recovery. Significantly, the Court held that the “possibility of double recovery was non-existent,” in part because the evidence disclosed that the defendant – a critical figure in the enterprise – had had “at least \$10,000,000” within his

⁸ *R v Vallières*, 2017 QCCS 1687.

⁹ *R v Vallières*, 2020 QCCA 372.

¹⁰ *Vallières*, *supra* note 3 at para 26.

¹¹ *Ibid* at para 35.

¹² *Ibid*.

¹³ *Ibid* at para 34.

possession or control.¹⁴ There could be no risk that any failure to apportion the fine would occasion a risk of double recovery.

The confirmation that the fine in lieu attaches to the proceeds of crime, not the profits, is an important one. In some discourses, these terms might be interchangeable. The word profit is common, typically connoting the simple mathematical calculation of revenues, sometimes called gross revenues, minus expenses, or the costs incurred to produce those revenues. The word “proceeds” tends to be more unique to criminal wealth law. For instance, it is rare to talk about the proceeds of a business endeavour but more common to speak of the profits. The term “proceeds” does not tend to have any similarly generic or common meaning. Attempts to shrink the scope of proceeds of crime to the profits – the net revenues – of crime have, in some settings, proven persuasive.¹⁵ However, as the Supreme Court notes in *Vallières*, to take into account merely of the profits of crime would tend to legitimize criminal activity.¹⁶ In this case, the decision confirms the sharpness of a tool used to tackle criminal wealth. The criminal entrepreneur, under federal proceeds of crime law, risks more than the mere forfeiture of the profits of crime. A harsh result for the defendant in *Vallières*, but nonetheless one dictated by Parliament.

III. THE BC COURT OF APPEAL CONTRIBUTION: HELLS ANGELS CLUBHOUSES AND CIVIL FORFEITURE

R v Vallières decision dealt with forfeiture under federal criminal law – forfeiture that attaches upon conviction for a criminal offence. A 2023 decision of the British Columbia Court of Appeal considered forfeiture under British Columbia’s provincial criminal wealth regime and affirmed the bite of provincial civil forfeiture law.

At issue in *British Columbia (Director of Civil Forfeiture) v Angel Acres Recreation and Festival Property Ltd* (hereinafter *Angel Acres*) was the constitutionality of a part of British Columbia’s civil forfeiture regime.¹⁷

¹⁴ *Ibid* at para 64.

¹⁵ In *US v Santos*, the US Supreme Court held that, in relation to a particular money laundering offence, the regime anticipated the profits of crime. This victory was short-lived. United States legislators immediately clarified that the regime contemplated the proceeds of crime, not the profits of crime: see, *United States v Santos*, 553 US 507 (2008); Public Law 111-21, 123 Stat 1618 (2009) (s 396) (111th Cong) (refining the definition of ‘proceeds’ as property obtained or retained as a consequence of a predicate offence, including gross receipts).

¹⁶ *Vallières*, *supra* note 3 at para 29.

¹⁷ *British Columbia (Director of Civil Forfeiture) v Angel Acres Recreation and Festival Property Ltd*, 2023 BCCA 70.

The BC *Civil Forfeiture Act* permits the forfeiture of the proceeds of unlawful activity and the instruments of unlawful activity.¹⁸ Unlike its federal cousin, in which access to forfeiture is triggered by a prior conviction, provincial forfeiture law is non-conviction based. Many provinces have enacted non-conviction-based forfeiture mechanisms.¹⁹ The province of BC sought the forfeiture of three clubhouses on the basis that these constituted the instruments of unlawful activity. Under the BC forfeiture regime, unlawful activity means an act or omission that is an offence under federal or provincial law.²⁰ An instrument of unlawful activity is defined as:

(a) property that has been used to engage in unlawful activity that, in turn, (i) resulted in or was likely to result in the acquisition of property or an interest in property or (ii) caused or was likely to cause serious bodily harm to a person; (b) property that is likely to be used to engage in unlawful activity that may (i) result in the acquisition of property or an interest in property, or (ii) cause serious bodily harm to a person.....²¹

Two distinct provisions of the BC *Civil Forfeiture Act* countenance the forfeiture of instruments used in unlawful activity and the forfeiture of instruments likely to be used in unlawful activity.

In *Angel Acres*, the province sought to forfeit three clubhouses on the basis that these constituted instruments likely to be used in unlawful activity. The case formed part of a decades-long battle that spawned multiple court decisions.²² Under the BC regime, as in its provincial counterparts, a forfeiture action is *in rem*, against the property, the instrument. Property owners are notified and named as parties to the action.²³ In resisting the forfeiture, the defendants, owners of the clubhouses, contended that both of the instrument provisions – the used in and the likely to be used – were exercises of criminal law and outside of provincial jurisdiction. The trial court characterized these as the present and future use provisions, holding that the first fell within provincial competence, but the second did not.²⁴ With respect to the future use - or

¹⁸ *Civil Forfeiture Act*, SBC 2005, c 29 [*Civil Forfeiture Act*].

¹⁹ See, for example, *Criminal Forfeiture of Property Act*, SM 2004, c 1 (Manitoba); *Civil Forfeiture Act*, SNB 2010, c C-4.5 (New Brunswick).

²⁰ *Civil Forfeiture Act*, *supra* note 18, s 1.

²¹ *Ibid.*

²² Since 2007, when the saga began, there were 18 decisions by the Supreme Court of British Columbia, 5 by the Court of the Appeal of British Columbia, and one – an application for leave to appeal – by the Supreme Court of Canada.

²³ *Civil Forfeiture Act*, *supra* note 18, ss 15.01 (2), 4.

²⁴ *British Columbia (Director of Civil Forfeiture) v Angel Acres Recreation and Festival Property Ltd*, 2020 BCSC 880.

likely to be used - prong, the trial court found that the provision was based on a propensity to commit a crime, in part because any forfeiture was necessarily based on the past use of property in connection with the crime.²⁵ That was the substantive equivalent of criminalizing a propensity to engage in crime, effectively creating a new criminal offence.²⁶ For the trial court, that put the provision within federal jurisdiction over criminal law.

On this point, the Court of Appeal disagreed. Both the lower court and the Court of Appeal drew heavily upon the Supreme Court of Canada's 2009 ruling of *Chatterjee*.²⁷ *Chatterjee* dealt with the constitutionality of Ontario's civil forfeiture regime in relation to the forfeiture of the proceeds of unlawful activity. It held that the forfeiture of the proceeds lay within provincial competence. The tension, in *Chatterjee* and the present case, was between federal jurisdiction over criminal law and provincial jurisdiction over property and civil rights. Following *Chatterjee*, the Court of Appeal noted that it was within provincial jurisdiction to attend to the consequences of criminal activity, to enact measures to deter crime, and that the regime operated in a civil context.²⁸ The pith and substance of the provincial law was to create "a civil scheme that will prevent and 'suppress' the use of property to acquire wealth or to cause bodily injury."²⁹ While there was undoubtedly a federal aspect - the link to crime - that was not fatal. The Court of Appeal found fault with the lower court's heavy reliance on the propensity analysis, an analysis that displaced the fundamental pith and substance investigation, a method used to discern the proper constitutional category of a particular measure.³⁰ The future prong - likely to be used in - like the past prong and the proceeds of crime provisions, lay within provincial jurisdiction over property and civil rights.

Of course, this piece of the criminal wealth story may be transient: an appeal to the Supreme Court of Canada has been filed.³¹ But given the Supreme Court decision in *Chatterjee*, is there much room to re-negotiate and re-interpret civil forfeiture law's constitutional character?

There is certainly some. *Chatterjee* dealt solely with the proceeds of unlawful activity provision of Ontario's civil forfeiture mechanism, not the instruments part. Long ago, the Supreme Court of Canada held that the

²⁵ *Ibid* at para 1468.

²⁶ *Ibid* at para 1471.

²⁷ *Chatterjee v Ontario (Attorney General)*, 2009 SCC 19.

²⁸ *Ibid* at paras 82-85.

²⁹ *Ibid* at para 86.

³⁰ *Ibid* at paras 90, 91.

³¹ Supreme Court of Canada, Docket 40688, *Angel Acres Recreation and Festival Property Ltd and all Others Interested in the Property, et al v Director of Civil Forfeiture, et al*, April 17, 2023.

imposition of penal consequences attracted rights applicable in criminal proceedings.³² There is little penal consequence in taking the proceeds of crime, the fruits of unlawful activity. There are strong penal leanings in the forfeiture of instruments. On its face, the BC civil regime would permit the forfeiture of any instrument of unlawful activity regardless of that instrument's substantive relationship to any underlying offence. Proportionality does not factor into any analysis of the civil forfeiture of the proceeds of unlawful activity because the forfeiture is inherently proportionate: the taking is the taking of the unlawful proceeds. A grossly disproportionate relationship between unlawful activity and the value of the property liable to forfeiture would tend towards the imposition of a penal consequence or might make the provision look more criminal than civil. A piece of the BC regime appears to mitigate against grossly disproportionate forfeitures: the court has the power, under civil forfeiture law, to refuse to make an order when it is not "in the interests of justice."³³ That may not be sufficient to displace any inherently potential punitive outcomes.

Second, there is considerable persuasive content in the idea that it is wrong to forfeit property on the basis that it is likely to be used in unlawful activity. It is presumptive and speculative. Even classically, civil proceedings tend to deal with what did happen rather than anticipate what might happen. To forfeit property because it had proven instrumental in facilitating unlawful activity differs starkly from forfeiting property because it is likely to be used in unlawful activity. The law does not ordinarily impose consequences today – even civil consequences – on the basis of a possible tomorrow.

IV. THE BC PROVINCIAL LEGISLATIVE CONTRIBUTION: UNEXPLAINED WEALTH ORDERS

The first two developments sharpen existent criminal wealth law. The third of the recent trilogy consists of a new tool known as an unexplained wealth regime or the use of unexplained wealth orders. Such a device arrived in British Columbia in April 2023 through a series of amendments to BC's *Civil Forfeiture Act*.³⁴ Rather than a stand-alone regime, unexplained

³² *R v Wigglesworth*, [1987] 2 SCR 541.

³³ *Civil Forfeiture Act*, *supra* note 18, s 8.

³⁴ Honourable Mike Farnworth, "Bill 21 Civil Forfeiture Amendment Act, 2023" (2023), online (pdf): *Legislative Assembly of British Columbia* <www.leg.bc.ca/content/data%20-%20ldp/Pages/42nd4th/1st_read/PDF/gov21-1.pdf> [perma.cc/J7L4-P3T3] [Bill 21].

wealth orders nestle within the provincial civil forfeiture apparatus, the apparatus upon which entitlement to the Hells Angels Clubhouses hinged.

Unlawful wealth regimes, or unexplained wealth orders, have assumed a certain prominence in several foreign jurisdictions.³⁵ To an extent, they have a tighter affiliation to the crime of corruption and the proceeds of corruption than to the wider annals of criminal wealth law.³⁶ A distillation of existing foreign models describes unexplained wealth law as regimes that commonly possess two features: they do not require that a state prove the commission of crime (through a criminal proceeding) or that a state first prove that certain proceeds, or certain instruments, are the proceeds, or the instruments of crime prior to forfeiture; and they shift the burden of proof onto property owners to prove a legitimate source of wealth in relation to property.³⁷

On Canadian terrain, references to unexplained wealth law entered the provincial lexicon through a 2018 report on money laundering in the British Columbia real estate sector that recommended, amongst other matters, the use of unexplained wealth orders to combat provincial money laundering.³⁸ Subsequently, the 2022 Cullen Commission Report, a compendious inquiry into all manner of money laundering in BC, similarly recommended that the province develop an unexplained wealth order regime.³⁹ From an exploration of foreign models, the Cullen Report set out certain broad architectural themes.⁴⁰ Modelled partly on that blueprint, in

³⁵ For examples, see Peter Sproat, “Unexplained Wealth Orders: An Explanation, Assessment and Set of Predictions” (2018) 82 J Crim L 232; Marcus Smith & Russell Smith, “Exploring the Procedural Barriers to Securing Unexplained Wealth Orders in Australia” (2016), online (pdf): *Criminology Research Grants* <www.aic.gov.au/sites/default/files/2020-05/unexplained-wealth.pdf>.

³⁶ See generally, Jean-Pierre Brun, et al, *Unexplained Wealth Orders: Towards a New Frontier in Asset Recovery*, Stolen Asset Recovery Initiative, World Bank, June 26, 2023.

³⁷ Boon, Allen and Hamilton, *Comparative Evaluation of Unexplained Wealth Orders*, Final Report, October 31, 2011, a Report Prepared for the US Department of Justice, National Institute of Justice at 2.

³⁸ Maureen Maloney, T Somerville & B Unger, “Combatting Money Laundering in BC Real Estate” (2018) at 81, online (pdf): *Expert Panel on Money Laundering in BC Real Estate* <www2.gov.bc.ca/assets/gov/housing-and-tenancy/real-estate-in-bc/combatting-money-laundering-report.pdf>.

³⁹ Commission of Inquiry into Money Laundering in British Columbia, Commissioner Austin Cullen (Cullen Commission) Part XII, Recommendation 101, at 1618.

⁴⁰ *Ibid* at 1615-1620. Broadly, the Commission recommended that an unexplained wealth regime, integrated into existing civil forfeiture law, would permit an order requiring that an individual identify the nature and extent of their ownership in provide and provide information on the source of resources used to acquire that property. If an individual failed to provide the information requested by the order, a rebuttable presumption would arise that the property was obtained by, or derived from,

April 2023, British Columbia unveiled an unexplained wealth order regime.

BC's unexplained wealth regime is vexingly elaborate. Much of its content prescribes relationships between property and those who own, control, or have an interest in it.⁴¹ This content echoes a persistent theme of criminal wealth law. Since assets derived from or connected to crime are often held or controlled through complex layers of legal ownership and control structures, anti-criminal wealth apparatuses regularly specifically attend to these complexities. The central core of the regime, however, is built on the common attributes noted above.

First, the mechanism provides that if there are reasonable grounds to suspect that a person engaged in unlawful activity owns property of a value in excess of \$75,000 and the owner's known sources of lawful income would be insufficient to enable the acquisition of that property, the province can apply to the court for an unexplained wealth order.⁴² If the court is satisfied that reasonable grounds exist, unless it is clearly not in the interests of justice, the court must make an explained wealth order.⁴³ The regime prescribes the contents of that order, central to which is the requirement that the owner discloses records and information in relation to that property.⁴⁴ Succinctly, an unexplained wealth order is an order to disclose information in relation to the acquisition of a particular property.

Second, the mechanism provides that if an owner does not provide the information required by the unexplained wealth order, or otherwise fails to comply, it is presumed that the property is the proceeds of unlawful activity.⁴⁵ Further, if an owner fails to comply with an order, and a statement made by a property owner is determined to be untrue or a record

unlawful activity. In speaking to the standard governing the issuance of such an order, the Commission generally recommended the reasonable suspicion standard although it suggested that the standard might differ dependent upon the nature of the alleged underlying unlawful activity. It suggested that the regime operate above a defined threshold amount, that the regime only apply to assets that exceed a value of \$75,000 or more.

⁴¹ *Bill 21, supra* note 34, s 10. The bulk of the regime consists of the addition of sections 11.05 -11.13 of the BC Civil Forfeiture Act. Sections 11.05 -11.08 define and capture the complex financial ownership and control world that can underpin entitlements to property such as beneficial owners, relatives and legal entities such as trusts and corporations.

⁴² *Ibid.*, ss 10,11.09-11.11. The term 'owner' is used here in the interests of simplicity. The regime speaks of respondents, and of responsible officers, the latter a reference to ownership in the context of a legal entity.

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*, s 19.07.

inauthentic, an adverse inference may be drawn against the owner.⁴⁶ In this, the mechanism works in conjunction with a civil forfeiture action: the presumption, and any adverse interference, apply to a related forfeiture action.

Newly minted, the unexplained wealth order regime has yet to be tested for compliance with the rule of law. Many point out that such a scheme invites profound questions of constitutional congruence.⁴⁷

Of the trilogy of developments, unexplained wealth orders stand as the most significant contribution to modern criminal wealth law. That significance derives from the relationship between unexplained wealth orders, presumptions and adverse inferences, and civil forfeiture. An explained wealth order is obtained on the basis of reasonable grounds. A failure to comply with an order creates a presumption that the acquisition of property derives from unlawful or unexplained sources of income. This combination means that a property owner bears the initial legal burden in a civil forfeiture action of proving lawful entitlement to the property. Through reliance on unexplained wealth orders obtained on the basis of reasonable grounds, at no point does the province bear the initial burden of proving, to the civil standard of a balance of probabilities, that some crime has occurred and that that crime has resulted in some acquisition of property. In building effective criminal wealth laws, or anti-criminal wealth regimes, the BC unexplained wealth regime would appear to mandate that property owners prove that their property entitlements are lawful, derive from lawful sources of income, or otherwise risk the forfeiture of property.

In species, the mechanics of unexplained wealth orders distort or invert a fundamental element of the law. In criminal and civil proceedings, ordinarily, he who asserts some allegation of wrongdoing bears the initial burden of proof. In criminal proceedings, the state alleges - bears the initial burden of proof - and must satisfy the criminal evidential standard of beyond reasonable doubt. In a civil action, to disrupt the status quo or to disturb the existing allocation of property entitlements, the plaintiff bears the initial burden of proof, and the applicable standard is the balance of probabilities standard. The mechanics of BC's unexplained wealth order regime alter this stance. Once an order is made according to the low evidential standard of reasonable grounds - a failure to comply with that

⁴⁶ *Ibid*, s 19.09.

⁴⁷ Cosmin Dzsurdza, 'Civil liberty groups blast proposed BC "unexplained wealth" seizure law,' (23 November 2022), online: *Truth North* <tnc.news/2022/11/23/civil-liberty-groups-bc/> [perma.cc/PFP7-J3NM].

order results in the shifting – in the context of a civil forfeiture action – of the initial burden of proof onto property owners.

This inversion, achieved through the interaction of unexplained wealth orders and the presumptions or adverse inferences that may be drawn in a related civil forfeiture action, certainly boosts the efficacy of criminal wealth law. Whether it will escape collisions with constitutional norms remains to be determined.

V. CONCLUSION

Of this trilogy of contributions to Canadian criminal wealth law, only the first stands as formally settled since it benefits from the authority of the Supreme Court of Canada. With respect to the second, a vindication of the BC civil forfeiture apparatus, the “future use prong,” there is some space within which a Supreme Court of Canada interpretation might disagree. The third, unexplained wealth orders, clearly sharpens criminal wealth law, yet its consonance with the rule of law remains to be assessed.