
The Effects of Forfeiture on Third Parties

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Canada's federal government has recently expanded the scope of its criminal forfeiture legislation to include property that represents proceeds of crime, property that represents instruments of crime, as well as property that is owned or controlled by a terrorist group. Meanwhile, provincial governments in Ontario and Alberta have enacted novel legislation providing for so-called civil forfeiture. These developments suggest that Canadian lawmakers have become increasingly interested in pursuing property, as opposed to people, associated with criminal activity.

This article is concerned with how forfeiture affects the interests of parties who are not suspected of being complicit in the criminal activity that has motivated the forfeiture ("third parties"). Third parties include original owners or transferees of property subject to forfeiture as well as holders of security interests therein. Both the federal and provincial regimes grant judges—and, in some cases, the executive—remarkable amounts of discretion over whether and how to protect the interests of third parties. This article argues that this discretion creates undesirable legal uncertainty. It goes on to suggest ways in which legislation can be reformed, and judicial discretion structured, to ensure that the burden of achieving the public goals that motivate forfeiture does not fall disproportionately upon third parties.

Le gouvernement fédéral du Canada a récemment étendu la portée de sa législation sur la confiscation de biens en matière criminelle pour y inclure notamment les biens issus du crime, les biens ayant servi comme instruments du crime, et les biens possédés ou contrôlés par un groupe terroriste. En parallèle, les gouvernements provinciaux de l'Ontario et de l'Alberta ont mis en vigueur de nouvelles lois permettant la soi-disant «confiscation de biens civils». Ces développements suggèrent que les législateurs canadiens deviennent de plus en plus intéressés à pourchasser les biens, plutôt que les personnes, associés à l'activité criminelle.

Cet article étudie comment la confiscation des biens peut affecter les intérêts de parties qui ne sont pas soupçonnées de complicité avec l'activité criminelle justifiant la confiscation («les tiers»), ce qui inclut les propriétaires, les titulaires, et les détenteurs d'intérêts sur les biens faisant l'objet d'une telle mesure. Les régimes provinciaux et fédéraux accordent tous deux aux juges — et dans certains cas, à l'exécutif — un large pouvoir discrétionnaire quant à la pertinence et la manière de protéger les intérêts des tiers. Cet article tend à démontrer que cette discrétion crée une incertitude juridique indésirable. L'auteur suggère des avenues par lesquelles la législation pourrait être réformée et la discrétion judiciaire structurée, afin d'éviter que l'atteinte des objectifs publics justifiant la confiscation de biens n'impose un fardeau disproportionné aux tiers.

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Introduction

In recent years, law enforcement agencies around the world have become increasingly interested in pursuing property, as opposed to people, associated with criminal activity.¹ Canadian law enforcement agencies are no exception to this trend, as evidenced most recently by the federal government's decision to expand the scope of its forfeiture legislation and the Ontario and Alberta governments' pathbreaking decisions to enact their own legislation providing for so-called civil forfeiture.

There has been considerable debate in Canada and elsewhere about the merits of forfeiture legislation.² Much of that debate focusses on the effect of forfeiture on people who have committed, or at least are suspected of committing, criminal activity. This article, however, is concerned with a different topic, namely, the potential impact of forfeiture legislation on parties not suspected of being complicit in (i.e., capable of being charged as parties to) the criminal activity that has motivated the forfeiture ("third parties").

Issues of this sort are bound to arise in connection with the application of forfeiture legislation. Suppose, for example, that an automobile is used to commit a crime. As we will see, both federal and provincial law, at least in Ontario, allow the government to apply to have the car forfeited as an instrument of crime. But what if the offender borrowed the automobile from someone else (with or without their consent)? Or what if he leased it? What if the car is subject to a security interest in favour of the bank? Or what if it is jointly owned by the offender and his spouse? Alternatively, imagine that the car was either bought or leased with the proceeds of a crime. Should the lessor's interest be affected by the forfeiture? What if the car is subsequently sold or given to a bank as collateral for a loan?

Any workable forfeiture regime must provide some mechanism for determining how forfeiture will affect the interests of the third parties involved in each of these cases, and no assessment of the merits of any given regime can be complete unless it takes that mechanism into account. Surprisingly, however, in Canada at least, there has been relatively little analysis of those effects in the secondary literature.³

¹ Guy Stessens, *Money Laundering: A New International Law Enforcement Model* (New York: Cambridge University Press, 2000) at 4-5; R.T. Naylor, "Washout: A Critique of Follow-the-Money Methods in Crime Control Policy" (1999) 32 *Crime, L. & Soc. Change* 1.

² See e.g. Naylor, *ibid.*; Michelle Gallant, "Money Laundering, Criminal Assets and the 1998 Proposed Reforms" (1999) 6 *Journal of Financial Crime* 323 at 327, 330; Karen Selick, "Ontario Wants to Put Grab on Property Rights" *The National Post* (7 December 2000) C19 [Selick, "Property Rights"]; Karen Selick, "Go Ahead, Make Our Day" *The Globe and Mail* (10 January 2001) A15 [Selick, "Go Ahead"].

³ For discussions focussing on other jurisdictions see Stessens, *supra* note 1 at 33-42, 76-79; Kelly Rees, "Confiscating the Proceeds of Crime: The Effect on Legitimate Creditors and Bona Fide Third

This article provides a review and critique of Canadian law concerning the effects of forfeiture on third parties. On the assumption that this area of the law will be relatively unfamiliar to most readers, Part I provides a fairly detailed discussion of the various circumstances in which a forfeiture order can be made under federal law and the provincial legislation recently enacted in Ontario and Alberta. Part II discusses the potential impact of forfeiture on third parties, taking into account the statutory provisions designed to protect third parties and the manner in which they have been interpreted by the courts. Part III focusses on the disadvantages associated with the most striking feature of the law in this area: the fact that current law gives judges and, in some cases, the executive, a great deal of discretion as to whether, or to what extent, to protect third parties, even innocent ones, from forfeiture. Part IV discusses how various policy considerations might inform the formulation of rules or guidelines designed to resolve the uncertainty that currently plagues this area of the law. In light of that discussion, Part V provides suggestions for reform of both Canada's forfeiture legislation and judicial practice.

I. The Circumstances in which a Forfeiture Order Can Be Made

Canadian law permits forfeiture orders to be made in respect of three broad classes of property: proceeds of crime, instruments of crime, and property owned or controlled by terrorist groups. The provisions that apply to each of these classes of property are discussed below.

A. Proceeds of Crime

- *Criminal Code*

At the federal level, the general provisions concerning forfeiture of proceeds of crime are contained in Part XII.2 of the *Criminal Code*.⁴ Section 462.37 of the *Criminal Code* now permits a court imposing sentence for just about any indictable offence created by federal legislation (a "designated offence") to order that property that constitutes proceeds of crime be forfeited.⁵ (Previously this power was only available in respect of a more limited set of offences.) Proceeds of crime are defined

Parties" (1996) 11 J.I.B.L. 351; Michael F. Zeldin & Roger G. Weiner, "Innocent Third Parties and Their Rights in Forfeiture Proceedings" (1991) 28 Am. Crim. L. Rev. 843; David R. Fine & Raymond P. Pepe, "*Bennis v. Michigan* and Innocent Owners In Civil Forfeiture: Balancing Legitimate Goals With Due Process And Reasonable Expectations" (1997) 5 Geo. Mason L. Rev. 595; Stefan D. Cassella, "The Uniform Innocent Owner Defense to Civil Asset Forfeiture: The Civil Asset Forfeiture Reform Act of 2000 Creates a Uniform Innocent Owner Defense to Most Civil Forfeiture Cases Filed by the Federal Government" (2000) 89 Ky. L.J. 653.

⁴ R.S.C. 1985, c. C-46, ss. 462.3-462.5.

⁵ *Ibid.*, s. 462.37.

as “any property, benefit or advantage” that is “obtained or derived directly or indirectly as a result of” the commission of the relevant offence.⁶ This definition is obviously intended to include not only the original property derived from the commission of an offence, but also property into which the original property can be traced.⁷

Part XII.2 of the *Criminal Code* provides for the forfeiture of proceeds of crime that both do and do not relate to the offence for which the offender is being sentenced.⁸ In the former case, the court is *required* to make a forfeiture order once it is satisfied on the balance of probabilities that the property constitutes proceeds of crime and relates to the offence in question.⁹ In making this determination, the court is permitted to infer that property was derived from the commission of an offence where the value of all of the offender’s property after the commission of an offence exceeds the value before the commission of the offence and where the offender’s income from sources other than designated offences cannot reasonably account for the difference.¹⁰ The code also *permits* a court to make a forfeiture order in respect of property that is not necessarily derived from the offence for which the offender is being sentenced. So long as the court is satisfied *beyond a reasonable doubt* that the property is the proceeds of crime, it may make a forfeiture order in respect of the property, even if the evidence is not sufficient to establish that the property relates to the offence for which the offender is being sentenced.¹¹

⁶ *Ibid.*, s. 462.3(1).

⁷ Some aspects of this definition are unclear. For example, it is unclear whether the definition of proceeds of crime includes the profit gained by a person convicted of an indictable offence from the creation of a work based on the offence. In 1997, the federal government introduced legislation that would have included these profits in the *Criminal Code* (Bill C-220, *An Act to amend the Criminal Code and the Copyright Act (profit from authorship respecting a crime)*, 1st Sess., 36th Parl., 1997). In 1998, however, the Senate recommended that the bill not proceed. For further discussion of the definitional issues that surround proceeds of crime, see David J. Fried, “Rationalizing Criminal Forfeiture” (1988) 79 J. Crim. L. & Criminology 328 at 375-80; Stessens, *supra* note 1 at 52-55.

⁸ *Criminal Code*, *supra* note 4, ss. 462.3-462.5. In cases where an accused has died or absconded, a forfeiture order may be made where proceedings in respect of an enterprise crime offence relating to the property have commenced and the court is satisfied beyond a reasonable doubt that the property is proceeds of crime (*ibid.*, s. 462.38(2)). It is unclear whether the court must be satisfied that the property relates to the offence charged on the balance of probabilities or beyond a reasonable doubt.

⁹ *Ibid.*, s. 462.37(1).

¹⁰ *Ibid.*, s. 462.39.

¹¹ *Ibid.*, s. 462.37(2).

- *Remedies for Organized Crime and Other Unlawful Activities Act* (Ontario)

In December 2001, the Ontario legislature enacted the *Remedies for Organized Crime and Other Unlawful Activities Act, 2001*.¹² This pathbreaking piece of legislation permits Ontario's attorney general to initiate judicial proceedings to obtain orders forfeiting proceeds of "unlawful activity". The term "unlawful activity" is defined as an act or omission that constitutes an offence under either federal, provincial, or territorial legislation in Canada, or "is an offence under an Act or 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 ..."¹³

The Ontario forfeiture legislation differs from the federal proceeds of crime legislation in four main respects. First, because of the breadth of the definition of the term "unlawful activity", the Ontario legislation applies to proceeds of crime derived from a much larger set of predicate offences.

Second, the Ontario legislation and the federal *Criminal Code* provisions differ in respect of the applicable standard of proof. One way or another, the federal provisions require that the commission of the predicate offence be proven beyond a reasonable doubt.¹⁴ By contrast, in proceedings under the Ontario legislation, relevant facts need only be established on the balance of probabilities.¹⁵ It is also significant that although conviction is deemed proof that a person has committed an offence, for the purposes of the Ontario legislation an offence may be found to have been committed even if no person was ever charged with the offence or a person was charged and the charge was either withdrawn, stayed, or an acquittal was entered.¹⁶

A third difference between the federal and the Ontario legislation lies in the amount of discretion conferred upon the judge seized with the issue of whether to grant a forfeiture order. Whereas the federal legislation requires a forfeiture order to be made in respect of proceeds of crime derived from a designated offence for which an accused has been convicted, the Ontario legislation provides that even if all of the

¹² S.O. 2001, c. 28 [*Organized Crime Act*].

¹³ *Ibid.*, s. 2.

¹⁴ Recall that federal law permits forfeiture of proceeds of crimes whether or not the offender has been convicted of the predicate offence. In cases where the offender has been convicted of the predicate offence, the general principle that the existence of all essential elements of criminal offences must be proven beyond a reasonable doubt (*R. v. Whyte*, [1988] 2 S.C.R. 3 at 15-17, 29 B.C.L.R. (2d) 273) guarantees the result described in the text. In cases where the offender has not been convicted of the predicate offence the *Criminal Code* provides that the court must be satisfied beyond a reasonable doubt that the property is the proceeds of crime (*supra* note 4, s. 462.37(2)). This provision clearly implies that the court must be satisfied beyond a reasonable doubt that the predicate offence has been committed.

¹⁵ *Organized Crime Act*, *supra* note 12, s. 16.

¹⁶ *Ibid.*, s. 17(2).

statutory preconditions to making a forfeiture order have been satisfied, a forfeiture order need not be made “where it would clearly not be in the interests of justice.”¹⁷

A fourth difference is that while the Ontario legislation contains a fifteen-year limitation period (measured from the date at which the proceeds were generated),¹⁸ there is no limitation period applicable to forfeiture proceedings under the *Criminal Code*.

- *Prohibiting Profiting from Recounting Crimes Act* (Ontario)

In 1994, Ontario enacted legislation that permitted the government to confiscate money paid to a person accused or convicted of a crime in exchange for either providing information about a crime or the use of documents or things related to a crime.¹⁹ This type of legislation is sometimes referred to as “Son of Sam” legislation in reference to legislation first enacted by New York State in order to prevent David Berkowitz, a notorious serial killer known as “Son of Sam”, from profiting by selling the story of his crimes while the families of his victims went uncompensated.²⁰ Money obtained by the government pursuant to these statutes is typically held in trust for purposes that include compensating victims of crime.²¹

Ontario recently repealed its original “Son of Sam” statute and replaced it with the *Prohibiting Profiting Act*.²² The new statute contains two main operative provisions. First, it provides that a court may order that any money or other consideration that is to be paid to a person convicted or charged with designated offences, or their agent, pursuant to a contract for the use of recollections, documents, or other things that relate to the relevant offence (“contract for recounting crime”) must be paid instead to the Crown in right of Ontario.²³ Second, the statute provides that the court may make an order forfeiting any property that constitutes proceeds of a contract for recounting crime.²⁴

¹⁷ *Ibid.*, ss. 3, 8.

¹⁸ *Ibid.*, s. 3(5).

¹⁹ *Victims’ Right to Proceeds of Crime Act, 1994*, S.O. 1994, c. 39 [*Victims’ Right Act*], as rep. by *Prohibiting Profiting from Recounting Crimes Act*, S.O. 2002, c. 2 (not in operation), s. 17 [*Prohibiting Profiting Act*].

²⁰ Yitschak Keren-Paz, *A Notoriety-Based Justification for the “Son of Sam” Legislation* (LL.M. Thesis, University of Toronto, 1998) [unpublished] at 1.

²¹ See e.g. *Victims’ Right Act*, *supra* note 19, s. 3(1).

²² *Prohibiting Profiting Act*, *supra* note 19, repealing *Victims’ Right Act*, *supra* note 19.

²³ *Prohibiting Profiting Act*, *ibid.* s. 4(1)(a). The designated offences are, essentially, serious violent crimes, sexual assaults, and serious property offences (as defined by regulation) (*ibid.*, s. 2).

²⁴ *Ibid.*, s. 4(1)(b).

- *Victims Restitution and Compensation Payment Act (Alberta)*

In November 2001, the government of Alberta enacted its own civil forfeiture legislation, the *Victims Restitution and Compensation Payment Act*,²⁵ which contains three distinct parts.

In most key respects, Part 1 of the *Victims Restitution Act* resembles the portions of the Ontario *Organized Crime Act* concerned with proceeds of crime. First, the facts that must be established to support a “property disposal order” (the term used to denote a forfeiture order) need only be determined on the balance of probabilities.²⁶ Second, it is unnecessary to prove that any person has been convicted of an offence in order to establish that property has been “acquired by illegal means” (the main prerequisite to making a property disposal order).²⁷ Third, the court making a property disposal order has considerable discretion over whether to order forfeiture.²⁸ The most significant difference between Part 1 of the *Victims Restitution Act* and the comparable portions of the *Organized Crime Act* is that the Alberta legislation applies to property derived from a narrower set of predicate offences. Like both the federal and the Ontario legislation, the Alberta legislation applies to property acquired or derived, directly or indirectly, from contraventions of, or offences under, the *Criminal Code* and the *Controlled Drugs and Substances Act*.²⁹ Unlike the Ontario legislation, however, the Alberta legislation only applies to property derived from other violations of federal or provincial legislation that are specified by regulation.³⁰ Another interesting feature of the Alberta legislation is that it does not appear to contain a limitation period.

Parts 2 and 3 of the *Victims Restitution Act* contain novel provisions that are only triggered once an offender has been convicted of an offence under the *Criminal Code*.³¹ Part 2 allows an Alberta court to take various steps after making a “restitution order” in favour of a victim of crime pursuant to section 738 or 739 of the *Criminal Code*.³² Although this part of the *Victims Restitution Act* does not provide for forfeiture per se, it does permit the court to make orders—“restitution payment orders”—against property of the offender that may be functionally equivalent to certain types of forfeiture.³³ Specifically, the *Victims Restitution Act* permits the court to order either

²⁵ S.A. 2001, c. V-3.5 (not in operation) [*Victims Restitution Act*].

²⁶ *Ibid.*, s. 14.

²⁷ *Ibid.*, s. 13(4).

²⁸ *Ibid.*, s. 14(b) (providing that the court “may” grant a property disposal order).

²⁹ S.C. 1996, c. 19.

³⁰ *Victims Restitution Act*, *supra* note 25, s. 1(2).

³¹ *Ibid.*, ss. 20-30, 31-45.

³² *Ibid.*, s. 20(1)(f).

³³ *Ibid.*, s. 27.

that property of an offender be transferred directly to a victim or that the property be disposed of and the proceeds distributed to the victim.³⁴

Part 3 of the *Victims Restitution Act* is even more interesting in this respect. That part contains provisions permitting a sentencing court that has not made a restitution order pursuant to the *Criminal Code* but that has determined “the amount of gain made or the value of property acquired by the offender by virtue of carrying out the illegal act” to make a “compensation order” in favour of the Crown.³⁵ A compensation order requires the offender to pay an amount up to the previously determined value of the offender’s proceeds of crime to the Crown.³⁶ A compensation order may be enforced by a direction to dispose of the property of an offender and pay the proceeds to the Crown.³⁷

B. Instruments of Crime

- *Criminal Code*: General Provisions

The general provisions concerning forfeiture of offence-related property are contained in Part XV of the *Criminal Code*.³⁸ The term “offence-related property” is defined to include, essentially, any property in respect of which an indictable offence is committed, or which is used, or intended to be used, to commit an indictable offence under the *Criminal Code*.³⁹ As with the provisions governing forfeiture of proceeds of crime, the *Criminal Code* contemplates the forfeiture of offence-related property that both does and does not relate to the offence for which the offender is being sentenced.⁴⁰ In the former case, the court is required to make a forfeiture order once it is satisfied, on the balance of probabilities, that the property constitutes offence-related property and relates to the offence in question.⁴¹ In the latter case, the court is simply permitted to make a forfeiture order once it is satisfied, beyond a reasonable doubt, that the property constitutes offence-related property.⁴² One difference between proceedings concerning forfeiture of proceeds of crime and those

³⁴ *Ibid.*, ss. 27(b)-(d).

³⁵ *Ibid.*, s. 32.

³⁶ *Ibid.*

³⁷ *Ibid.*, s. 39(1).

³⁸ *Supra* note 4, ss. 483-492.2.

³⁹ *Ibid.*, s. 2.

⁴⁰ In cases where an accused has died or absconded, a forfeiture order may be made where proceedings in respect of a criminal organization offence relating to the property have commenced and the court is satisfied beyond a reasonable doubt that the property is offence-related property (*ibid.*, s. 490.2(2)). As in section 462.38, it is unclear whether the court must be satisfied that the property relates to the offence charged on the balance of probabilities or beyond a reasonable doubt.

⁴¹ *Ibid.*, s. 490.1(1).

⁴² *Ibid.*, s. 490.1(2).

concerning forfeiture of offence-related property is that the latter need not be part of the sentencing of an offender.⁴³

- *Criminal Code: Instruments of Terrorism*

As part of its package of anti-terrorist legislation, the federal government has added a provision to the *Criminal Code* that requires the Federal Court, upon the application of the attorney general, to order forfeiture of “property that has been or will be used, in whole or in part, to facilitate or carry out a terrorist activity.”⁴⁴ The principal difference between the general provisions dealing with forfeiture of offence-related property and the provision dealing with instruments of terrorism is that the latter requires a forfeiture order to be made once a judge is satisfied, on the balance of probabilities, that the relevant conditions have been fulfilled.⁴⁵ There is no requirement that anyone connected with the property be convicted of any offence. Consequently, whereas under the general provisions much of the factual underpinning for a forfeiture order typically must be established beyond a reasonable doubt, the provision focussed on instruments of terrorism permits all of the relevant facts to be proven on the balance of probabilities.

- *Organized Crime Act*

In addition to providing for forfeiture of proceeds of unlawful activity, the Ontario legislation also provides for forfeiture of “instrument[s] of unlawful activity”.⁴⁶ This term is defined to mean “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.”⁴⁷ By its terms, this definition is wholly prospective in orientation. In other words, it does not necessarily capture property that has previously been used to engage in the relevant types of unlawful activity. The *Organized Crime Act* goes on to provide, however, that property that has previously been used to engage in unlawful activity is considered, at least in the absence of evidence to the contrary, likely to be used that way in the future as well.⁴⁸

The conditions under which instruments of unlawful activity can be forfeited are virtually identical to the conditions under which proceeds of unlawful activity can be forfeited. This also means that the differences between federal and provincial law

⁴³ Subsection 462.37(1) of the *Criminal Code* (*ibid.*) specifies that a forfeiture order must be made by “the court imposing sentence on the offender”, whereas subsection 490.1(1) simply refers to “the court”.

⁴⁴ *Ibid.*, s. 83.14, as am. by S.C. 2001, c. 41, s. 4.

⁴⁵ *Ibid.*, s. 83.14(5).

⁴⁶ *Organized Crime Act*, *supra* note 12, s. 8(1)

⁴⁷ *Ibid.*, s. 7(1).

⁴⁸ *Ibid.*, s. 7(2).

concerning forfeiture of instruments of crime are similar to the differences that arise in connection with forfeiture of proceeds of crime. Specifically, because the term “unlawful activity” is broadly defined,⁴⁹ the provincial legislation covers a broader range of predicate offences than the federal provisions. In addition, the provincial legislation only requires findings on a balance of probabilities rather than beyond a reasonable doubt.⁵⁰ Finally, the provincial legislation is more flexible because it permits a judge to refrain from making a forfeiture order “where it would clearly not be in the interests of justice.”⁵¹ One curious difference between the Ontario provisions dealing with instruments as opposed to proceeds of unlawful activity is that there is no limitation period for proceedings in respect of instruments of unlawful activity.⁵²

C. Property Owned or Controlled by a Terrorist Group

The forfeiture power added to the *Criminal Code* by the federal government’s anti-terrorism package does not only apply to instruments of terrorist activity, it also applies to any “property owned or controlled by or on behalf of a terrorist group ...”⁵³ In many cases, it will be reasonable to presume that such property has been, or is intended to be, used to carry out criminal activity, and to that extent this provision covers property already subject to forfeiture under other legislative provisions as an instrument of crime. In principle, however, property owned or controlled by a terrorist group need not qualify as an instrument of crime nor, for that matter, as proceeds of crime. To the extent that it covers such property, this provision has to be distinguished from those concerning both instruments and proceeds of crime. This point aside, the circumstances in which property owned or controlled by a terrorist group can be forfeited are the same as those in which instruments of terrorist activity can be forfeited.

II. Potential Effects on Third Parties

The first section in this part analyzes whether forfeiture orders made pursuant to the provisions outlined above can affect the interests of third parties. The second section identifies the types of third parties that might be affected. The third and fourth sections discuss two mechanisms that a court might employ to avoid such effects, namely, providing relief from forfeiture and imposing some sort of personal obligation (e.g., a fine) in lieu of forfeiture.

⁴⁹ *Ibid.*, s. 7(1).

⁵⁰ *Ibid.*, s. 16.

⁵¹ *Ibid.*, s. 8(1).

⁵² *Ibid.*, s. 8(5).

⁵³ *Supra* note 4, s. 83.14(1)(a).

A. *Are the Interests of Third Parties Affected by Forfeiture?*

The *Criminal Code* does not contain any language to the effect that only the offender's interest in proceeds of crime or instruments of crime may be forfeited. In fact, the code's definitions of property subject to forfeiture make no reference whatsoever to the identity of the property's owner. Thus, a literal reading of the code suggests that so long as it satisfies the applicable conditions, property in which a third party holds an interest is subject to forfeiture. Moreover, the code contains explicit provisions permitting, but not requiring, the court to grant certain third parties relief from forfeiture.⁵⁴ These provisions, which are discussed in greater detail below, clearly contemplate a valid forfeiture order being made in respect of property in which third parties have an interest; otherwise, they would be superfluous. Thus at first glance, the statutory scheme appears to be sufficiently clear to override any presumption that these provisions ought to be construed so as to avoid permitting property to be taken away without compensation (assuming that this presumption applies in the context of forfeiture legislation).⁵⁵

There is, however, one potential source of ambiguity in the *Criminal Code*'s provisions concerning forfeitures of proceeds of crime. Subsection 462.37(3) permits a fine to be imposed in lieu of forfeiture where proceeds of crime that should be the subject of a forfeiture order "cannot be made subject to such an order ..."⁵⁶ The code goes on to state that this circumstance may arise when the property "has been transferred to a third party ..."⁵⁷ Based on this language, one might argue that proceeds of crime that have been transferred to a third party are not available for forfeiture unless the transfer is set aside.⁵⁸ This argument, however, was rejected by the British Columbia Court of Appeal in *R. v. Rosenblum*⁵⁹ where the court held that merely transferring property to a third party does not preclude the making of a forfeiture order. The court suggested that a transfer to a third party would only preclude the making of a forfeiture order in a limited set of cases, such as where property has been transferred to a third party who cannot be located and who cannot, therefore, be served with the notice that is a prerequisite to certain types of forfeiture orders.⁶⁰ The clear implication of the British Columbia court's decision is that a

⁵⁴ *Ibid.*, ss. 462.34(4), 462.41(3), 462.42, 490.4(3), 490.5.

⁵⁵ *Attorney-General v. De Keyser's Royal Hotel Ltd.*, [1920] A.C. 508 (H.L.), [1920] All E.R. 80; *Manitoba Fisheries Ltd. v. Canada* (1978), [1979] 1 S.C.R. 101, 88 D.L.R. (3d) 462.

⁵⁶ *Criminal Code*, *supra* note 4, s. 462.37(3).

⁵⁷ *Ibid.*

⁵⁸ The Ontario Court of Appeal obliquely referred to—but ultimately ignored—this argument in *Wilson v. R.* (1993), 15 O.R. (3d) 645, 25 C.R. (4th) 239 (C.A.) [*Wilson* cited to O.R.] ("[i]n that case the assigned funds would have been transferred to a third party and therefore not available for forfeiture" at 652).

⁵⁹ *R. v. Rosenblum* (1998), 167 D.L.R. (4th) 639, 130 C.C.C. (3d) 481 (B.C.C.A.).

⁶⁰ *Ibid.* at paras. 33-35. The notice requirements referred to can be found in the *Criminal Code*, *supra* note 4, ss. 462.41(1), 490.4(1).

forfeiture order under the *Criminal Code* affects a third party's interest in proceeds of crime in exactly the same way as such an order affects the interests of an offender.

The situation is similar under the Ontario *Organized Crime Act* and Part 1 of the Alberta *Victims Restitution Act*. There is nothing in either of these acts to suggest that their forfeiture provisions only apply to property owned by a person who has committed, or is likely to commit, an unlawful activity. Moreover, both pieces of legislation contain provisions designed to protect the interests of third parties who would otherwise be prejudiced by the making of a forfeiture order.⁶¹ Interestingly, however, the *Victims Restitution Act* only provides for the enforcement of restitution orders and compensation payment orders made under Parts 2 and 3 against "property of the offender" or "money of the offender", suggesting that the interests of third parties are not affected by these orders.⁶²

The *Prohibiting Profiting Act* is relatively clear in this respect as it expressly provides that the proceeds of a contract for recounting crime can be ordered to be paid to the Crown where money or other consideration is to be paid to an "agent" of the charged or convicted person.⁶³ The term "agent" is defined to include a person who has been assigned rights under a contract for recounting crime by the charged or convicted person.⁶⁴ It is important to note, however, that the term "assigned" is not defined in the statute and so it is unclear whether a person who merely obtains a security interest in rights under a contract for recounting crime will qualify as an agent, particularly if the security interest does not technically involve a transfer of title.⁶⁵ Again, these provisions seem sufficiently clear to rebut any presumption against interference with property rights.

B. What Types of Third Parties Might Be Affected?

A forfeiture order can affect third party interests acquired either before, after, or at the same time that the property becomes subject to forfeiture. Consider, for example, a situation in which an automobile owned by A is used by B as an instrument of crime and then is eventually transferred to C. In principle, the automobile can be declared

⁶¹ *Organized Crime Act*, *supra* note 12, ss. 3(3), 8(3); *Victims Restitution Act*, *supra* note 25, ss. 15, 18(1)(a), 27(2)(c), 39(2)(c).

⁶² *Victims Restitution Act*, *ibid.*, ss. 39(1)(a)-(c).

⁶³ *Prohibiting Profiting Act*, *supra* note 19, s. 7(1).

⁶⁴ The definition of an agent also includes a personal representative, a corporation with which the person has a substantial connection, and a spouse, former spouse, same-sex partner, former same-sex partner, or other relative of a charged or convicted person, but does not include agents of people who fall into any of these categories (*ibid.*, s. 2(b)).

⁶⁵ This issue does not appear to have been judicially considered. For a discussion of whether assignments by way of security are captured by the term "assignment" as it is used in federal intellectual property legislation, see Roderick J. Wood, "The Nature and Definition of Federal Security Interests" (2001) 34 Can. Bus. L. J. 65 at 101-106.

forfeit any time after B's intervention, to the prejudice of either A or C (or conceivably both). Similarly, imagine if an automobile owned by A is stolen by B—thereupon becoming proceeds of crime—and then transferred to C. In principle, the automobile can be forfeited to the Crown, although in practice, in these circumstances, a restitution order in favour of A is the more likely outcome.⁶⁶ Finally, consider a scenario in which A takes a security interest over B's present and after-acquired property, and then B acquires property (e.g., a cheque) that qualifies as proceeds of crime (simultaneously becoming subject to A's security interest) and subsequently transfers that property to C. Again, depending upon the exact timing, a forfeiture order could serve to negate the interests of either A or C.

There is a wide range of third parties that can be affected by a forfeiture order. The most obvious examples are third parties who hold some sort of legally cognizable interest in the property subject to forfeiture. Consider, for example, the case where a forfeiture order is made in respect of a matrimonial home that is jointly owned by an offender and his or her spouse. Alternatively, imagine the case of a forfeiture order made in respect of a car that has been leased or borrowed by an offender. Perhaps most realistically of all, consider the possibility that either the home or the car will be subject to some sort of security interest. A similar range of third parties may be affected by an order made under Ontario's "Son of Sam" legislation in respect of a right of payment.

Another important category of third parties comprises those with defective legal interests in property subject to forfeiture. These parties are most likely to appear in cases involving proceeds of crime where the victim of the crime can trump the third party's claim to the proceeds by virtue of either the common law rule of *nemo dat quod non habet* ("he who hath not cannot give") or some sort of equitable proprietary claim.⁶⁷ The *nemo dat* rule, however, is subject to important exceptions in favour of good faith purchasers for value without notice in cases involving currency; negotiable instruments; sales by sellers with voidable title; sales by sellers, buyers, or factors in possession; and situations in which the true owner is estopped from denying the authority of the intermediate transferor.⁶⁸ Moreover, equitable proprietary claims are

⁶⁶ See *Criminal Code*, *supra* note 4, s. 740 (in circumstances where both a restitution order and forfeiture order can be made, the restitution order is to be made first).

⁶⁷ The *nemo dat* rule is merely a priority rule and so will not be of assistance to a victim who does not hold a legally cognizable interest that can be followed or traced into the property in question. In some such situations, however, the victim may still be able to obtain a remedial constructive trust over the proceeds of the crime. See *Hong Kong (A.G.) v. Reid*, [1994] 1 A.C. 324, [1994] 1 All E.R. 1 (P.C.) (principal granted constructive trust over bribe paid to agent). Compare *Rosenfeldt v. Olson* (1986), 25 D.L.R. (4th) 472, [1986] 3 W.W.R. 403 (B.C.C.A.). See generally Lord Goff of Chieveley & Gareth Jones, *The Law of Restitution*, 5th ed. (London: Sweet & Maxwell, 1998) at 84-91, 811-13.

⁶⁸ For a brief discussion, see Marjorie Lynne Benson & Marie-Ann Bowden, *Understanding Property: A Guide to Canada's Property Law* (Scarborough: Carswell, 1997) at 50-53. For a detailed

generally ineffective against persons who can raise equitable defences such as good faith purchase for value without notice or change of position.⁶⁹ Consequently, the category of third parties with defective interests is likely to comprise parties who either do not qualify as good faith purchasers for value or have obtained proceeds of theft as opposed to proceeds of fraud. (Victims of theft can take advantage of the *nemo dat* rule but victims of fraud cannot because fraud typically renders a transaction voidable and thus triggers the exception for sales by sellers with voidable title.)⁷⁰

Finally, forfeiture also has the potential to affect the interests of third parties who have economic, but not legal, interests in property. The most important examples of third parties of this sort are unsecured creditors and their representatives (e.g., trustees in bankruptcy). Although unsecured creditors have no legal interests in the property of their debtor, they clearly have economic interests in the sense that they may suffer prejudice if their debtor's property is forfeited.⁷¹

Because of the range of different types of third parties who may be affected by an order of forfeiture, the term "third party", in the discussion that follows, will be defined broadly to include any third party with an economic interest in the property subject to forfeiture.

C. Relief from Forfeiture

Each of the statutory regimes discussed in Part II provides some sort of scheme under which a court may grant certain third parties what I will call "relief" from forfeiture. There are, however, subtle differences between each of these schemes concerning matters such as the notice that third parties are entitled to receive prior to the making of a forfeiture order, whether relief can be granted after a forfeiture order

discussion of English law on this topic, which is very similar to Canadian law, see Roy Goode, *Commercial Law*, 2nd ed. (London: Penguin Books, 1995) at 450-482, 495, 539-44.

⁶⁹ Goff & Jones, *supra* note 67 at 818-28, 843. For a recent discussion of the scope of certain types of equitable proprietary claims in the Canadian context, see *Citadel General Assurance v. Lloyds Bank Canada*, [1997] 3 S.C.R. 805, 152 D.L.R. (4th) 411.

⁷⁰ For cases supporting the proposition that fraud renders a transaction voidable, see *R. v. Canadian Imperial Bank of Commerce* (2000), 51 O.R. (3d) 257, 151 C.C.C. (3d) 439 (C.A.) [*CIBC* cited to O.R.]; *White v. Garden* (1851), 10 C.B. 919, 138 E.R. 364; *Babcock v. Lawson* (1879), 4 Q.B.D. 394, 41 Law Times Reports 252. On the other hand, there is authority for the proposition that if the effect of a fraud is to induce a "fundamental" mistake, the resulting contract will be void rather than voidable, meaning that the victim will retain title and be entitled to recover the property. See *Cundy v. Lindsay* (1878), 3 A.C. 459 (H.L.), [1974-80] All E.R. Rep. 1149. For a case applying the *nemo dat* rule in favour of a victim of theft, see *Cuff-Waldron Manufacturing Co. v. Heald*, [1930] 3 D.L.R. 901, 24 Sask. L.R. 441 (C.A.).

⁷¹ Compare *R. v. Zlatich*, [1993] 2 S.C.R. 29, 100 D.L.R. (4th) 642, McLachlin J. (suggesting that unsecured creditors hold a "pecuniary interest" in the property of their debtor).

has been made, which third parties are eligible for relief, and the amount of discretion possessed by the trial judge in determining whether to provide relief.

- *Criminal Code: General Provisions*

At a purely procedural level, one of the most noteworthy features of the *Criminal Code*'s general provisions concerning forfeiture of proceeds and instruments of crime is that before a forfeiture order can be made, notice must be provided to "any person who, in the opinion of the court, appears to have a valid interest in the property."⁷² This important procedural right safeguards third parties' substantive rights to relief from forfeiture.

As far as those substantive rights are concerned, we can begin with the *Criminal Code* provisions that allow a court to make an order requiring that property of an offender that would otherwise be forfeited, or in the case of proceeds of crime, property that has been seized or detained pending forfeiture, be restored to an innocent third party.⁷³ Specifically, this sort of restoration order may be made where the third party (1) is not charged with, and has not been convicted of, a designated offence; (2) is not a person who "acquired title to or a right of possession of [the] property ... under circumstances that give rise to a reasonable inference that the title or right was transferred for the purpose of avoiding the forfeiture of the property"; (3) is innocent of complicity in or collusion in relation to a predicate offence that was committed in relation to the property forfeited; and (4) is the lawful owner or is lawfully entitled to possession of the property.⁷⁴ Similar provisions also permit the court to grant an innocent third party relief from an order of forfeiture that has already been made, provided they apply for such relief within thirty days of the forfeiture order.⁷⁵

⁷² *Criminal Code*, *supra* note 4, ss. 462.41(1), 490.4(1).

⁷³ *Ibid.*, ss. 462.41(3), 490.4(3). Third parties can also obtain relief by demonstrating that property that has been seized or detained pending forfeiture is no longer required for the purposes of forfeiture, for the purpose of any investigation, or as evidence in any proceeding. In this case the court is required to return the property to "the lawful owner or the person who is lawfully entitled to its possession ..." if that person is known (*ibid.*, s. 462.43(1)(c)(ii)). The court has no discretion in this respect and need not be satisfied that the lawful owner is innocent in any way.

⁷⁴ *Ibid.*, ss. 462.34(4)(b), 462.34(6)(a)(ii), 462.41(3), 490.4(3).

⁷⁵ *Ibid.*, ss. 462.42, 490.5. These provisions define the class of protected third party individuals in a slightly different way from the provisions that govern restoration of property to third parties prior to forfeiture. First, in the case of parties seeking relief from forfeiture of both proceeds of crime and offence-related property, the third party need not establish that she or he has never been charged with or convicted of a predicate offence. Instead, she or he need only demonstrate that she or he has never been charged with or convicted of a predicate offence in relation to the property that has been forfeited (*ibid.*, ss. 462.42(1), 490.5(1)). Second, in the case of parties seeking relief from forfeiture of offence-related property, the third party must, in addition to the other conditions referred to above,

It is worth noting that these provisions obviously do not protect all “third parties” as that term is being used in this article. The mere fact that a person has not been convicted of an offence will not necessarily permit them to claim innocence for the purposes of these provisions. Moreover, the references to a “lawful owner”⁷⁶ and to a person who is “lawfully entitled to possession of the property”⁷⁷ seem to exclude third parties who do not hold legally cognizable interests in the property subject to forfeiture.⁷⁸

Another interesting feature of these provisions is the fact that they are permissive rather than mandatory. In other words, the court has broad discretion over whether to return property to a third party, even if the third party demonstrates that they are innocent and are the lawful owners of the property. The only general constraint that the appellate courts have imposed on the exercise of this discretion is that it must be done in “a judicial manner which respects the intent of the legislation governing criminal proceeds: preventing a delinquent from enjoying the fruits of his crimes.”⁷⁹

The breadth of the court’s discretion in respect of forfeiture of property in which third parties have an interest is illustrated by the Ontario Court of Appeal’s decision in *R. v. Canadian Imperial Bank of Commerce*.⁸⁰ That case arose in connection with the sentencing of one Mr. Obront, who was charged and convicted of fraud in relation to a gemstone telemarketing scheme. The trial judge made a forfeiture order in respect of various assets, including funds in the account of a company named Royal International Collectibles (“RIC”). The funds were ostensibly subject to a security interest held by the bank at which the account was located, the Canadian Imperial Bank of Commerce (“CIBC”).

Prior to the making of the forfeiture order, CIBC argued that the funds should be returned to it, apparently relying upon subsection 462.41(3) of the *Criminal Code*. The trial judge rejected CIBC’s claim, however, on the basis that RIC could not have transferred an interest in the funds in the account to CIBC because those funds were proceeds of crime.⁸¹ On appeal, the Crown noted that according to the *Personal Property Security Act*⁸² a debtor must have rights in property before a security interest

establish that she or he “exercised all reasonable care to be satisfied that the property was not likely to have been used in connection with the commission of an unlawful act” by the person to whom the applicant gave possession or from whom she or he obtained possession or a security interest (*ibid.*, s. 490.5(4)(b)).

⁷⁶ *Ibid.*, ss. 462.34(4)(c), 462.41(3), 490.4(3).

⁷⁷ *Ibid.*

⁷⁸ *Lumen Inc. v. Canada (A.G.)* (1997), 151 D.L.R. (4th) 661, 119 C.C.C. (3d) 91 (Qc. C.A.) (ordinary creditors do not have an enforceable interest in the proceeds of crime subject to forfeiture).

⁷⁹ *Villeneuve v. Canada (A.G.)* (1999), 140 C.C.C. (3d) 564 at 575 (Qc. C.A.). See also *Wilson*, *supra* note 58 at 655-56.

⁸⁰ *CIBC*, *supra* note 70.

⁸¹ *Ibid.* at 258.

⁸² R.S.O. 1990, c. P-10.

can attach to that property and a security interest must attach to property before it can be effective as against third parties. The thrust of the Crown's argument was that because RIC obtained the funds in the account through fraud, it never had an interest in those funds and so CIBC could not have obtained a valid security interest in the property. Of course, without a valid interest in the property, CIBC was not entitled to relief from forfeiture.⁸³

The Ontario Court of Appeal rejected the Crown's argument and held that the trial judge erred in concluding that RIC never had an interest in the funds. According to the appellate court, RIC's title was voidable rather than void *ab initio*. As a result, the bank's security interest attached to the funds in the account. Nevertheless, the members of the Court of Appeal unanimously dismissed the appeal on the grounds that they were entitled to exercise the discretion that the trial judge was authorized to exercise under section 462.41 of the *Criminal Code*. The court declined to exercise that discretion in favour of the bank, stating:

Although we are satisfied that the bank has a security interest in all the moneys in the account pursuant to its security agreement, we would not exercise the court's discretion in favour of the bank in these circumstances in respect of any of the [proceeds of crime]. Those moneys are identifiable proceeds of crime which should be returned to the victims.⁸⁴

No further explanation was provided. As a result, this case illustrates both the breadth of the discretion enjoyed by courts in deciding whether to grant third parties relief from forfeiture and the reluctance of appellate courts to provide guidance on how that discretion ought to be exercised.

- ***Criminal Code*: Provisions Concerning Instruments of Terrorism and Property Owned or Controlled by a Terrorist Group**

The provisions of the *Criminal Code* concerned specifically with forfeiture of property connected to terrorist activity and terrorist groups contain their own scheme for protecting third parties—one that is considerably less complicated than the one connected to the other forfeiture provisions of the *Criminal Code*. The scheme has two components. First, it provides that a judge shall order that a third party's interest in property is not affected by a forfeiture order if the third party can establish that he or she "has exercised reasonable care to ensure that the property would not be used to facilitate or carry out terrorist activity, and is not a member of a terrorist group ..."⁸⁵ It is important to note that this language is mandatory rather than permissive. It is also worth noting that while this provision refers to third parties with "an interest in property [subject to

⁸³ *CIBC*, *supra* note 70 at 259.

⁸⁴ *Ibid.* at 261.

⁸⁵ *Criminal Code*, *supra* note 4, s. 83.14(8).

forfeiture],”⁸⁶ it is unclear whether this language embraces interests that are purely economic rather than legal.

The second component of the protective scheme attached to the terrorism-specific forfeiture provisions is much more open-ended and permissive. Subsection 83.14(9) of the *Criminal Code* requires a judge charged with deciding whether to make a forfeiture order in respect of a “dwelling-house” to “consider”:

- (a) the impact of an order of forfeiture on any member of the immediate family of the person who owns or controls the dwelling-house, if the dwelling-house was the member’s principal residence at the time the dwelling-house was ordered restrained or at the time the forfeiture application was made and continues to be the member’s principal residence; and
- (b) whether the member appears innocent of any complicity or collusion in the terrorist activity.⁸⁷

Since it is far from clear what it means to “consider” these factors, this provision gives judges significant discretion over whether to make an order of forfeiture in respect of a “dwelling-house” in which a third party has an interest.

Like the *Criminal Code*’s general forfeiture provisions, the terrorism-specific provisions permit third parties to claim protection from the effects of a forfeiture order either before or after such an order has been made. The ability to move to set aside a forfeiture order that has already been made, however, can only be exercised by a third party who did not receive notice of the application for a forfeiture order, and then only within sixty days of the making of the order.⁸⁸ Oddly, the court appears to have discretion over whether to provide third parties who do not own or control the property in issue with notice that an application for forfeiture has been made under this provision.⁸⁹

- *Organized Crime Act*

Ontario’s *Organized Crime Act* contains separate provisions designed to provide protection from forfeiture for third parties with interests in each of proceeds and instruments of unlawful activity. Unlike the federal legislation, however, the Ontario statute only provides for relief for third parties who are parties to the proceedings in which a forfeiture order is being sought. There is no provision for reversal of the effects of a forfeiture order that has already been made and it is unclear what sort of notice affected third parties are entitled to receive in respect of proceedings under the act.

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*, s. 83.14(9).

⁸⁸ *Ibid.*, s. 83.14(10).

⁸⁹ See *ibid.*, s. 83.14(7) (using the word “may” rather than “shall”).

Leaving aside these procedural matters, the provision designed to confer protection against forfeiture of proceeds of unlawful activity covers “legitimate owners.”⁹⁰ A “legitimate owner” is defined as someone who did not acquire the property as a result of his or her own unlawful activity and is, essentially, either a victim of the unlawful activity or a purchaser for (fair) value without notice, or a transferee from such a victim or purchaser.⁹¹ Meanwhile, the provisions that limit the scope for forfeiture of instruments of unlawful activity apply to “responsible owners.”⁹² A “responsible owner” is defined as

a person with an interest in the property who has done all that can reasonably be done to prevent the property from being used to engage in unlawful activity, including,

- (a) promptly notifying appropriate law enforcement agencies whenever the person knows or ought to know that the property has been or is likely to be used to engage in unlawful activity, and
- (b) refusing or withdrawing any permission that the person has authority to give and that the person knows or ought to know has facilitated or is likely to facilitate the property being used to engage in unlawful activity ...⁹³

Like the third party protection scheme associated with the general forfeiture provisions of the *Criminal Code*, the Ontario legislation gives the court discretion over whether to provide relief from forfeiture. Where a court finds that a person is either a legitimate owner or a responsible owner, “except where it would clearly not be in the interests of justice,” the court is required to make “such order as it considers necessary to protect ... [that person’s] interest in the property.”⁹⁴

⁹⁰ *Organized Crime Act*, *supra* note 12, s. 3(3).

⁹¹ Section 2 of the *Organized Crime Act* (*ibid.*, s. 2), provides:

“legitimate owner” means, with respect to property that is proceeds of unlawful activity, a person who did not, directly or indirectly, acquire the property as a result of unlawful activity committed by the person, and who,

- (a) was the rightful owner of the property before the unlawful activity occurred and was deprived of possession or control of the property by means of the unlawful activity,
- (b) acquired the property for fair value after the unlawful activity occurred and did not know and could not reasonably have known at the time of the acquisition that the property was proceeds of unlawful activity, or
- (c) acquired the property from a person mentioned in clause (a) or (b) ...

⁹² *Ibid.*, s. 8(3).

⁹³ *Ibid.*, s. 7(1).

⁹⁴ *Ibid.*, ss. 3(3), 8(3).

- *Recounting Crimes Act*

As previously mentioned, the *Recounting Crimes Act* effectively provides for two forms of forfeiture: (1) an order requiring money payable under a contract to be paid to the Crown, and (2) an order forfeiting proceeds of a contract for recounting crime.⁹⁵ Strangely, the statute only contains a scheme for protecting third parties from the effects of the second type of order. The court's authority to order forfeiture is limited by a provision that requires the court to make "such order as it considers necessary" to protect the proprietary interests of a party to the proceeding who proves that "he, she, or it is a legitimate owner of the property."⁹⁶ A "legitimate owner of the property" is defined, essentially, as a purchaser for fair value without notice or a transferee of such a person.⁹⁷ There is no comparable provision, however, that would protect an assignee of a right to payment under a contract for recounting crime from being prejudiced by an order requiring that the payment be made to the Crown. As with the *Organized Crime Act*, this statute only provides for relief for third parties who are parties to the original proceedings, and it is unclear what sort of notice affected third parties are entitled to receive in respect of those proceedings.

- Other Ontario Legislation

As noted above, neither the *Organized Crime Act* nor the *Prohibiting Profiting Act* makes any explicit provision for relief from forfeiture after a forfeiture order has been made. Third parties who find themselves in such a situation may, however, be able to obtain relief under one of at least two other pieces of legislation: the *Fines and Forfeitures Act*⁹⁸ or the *Escheats Act*.⁹⁹

The *Fines and Forfeitures Act* provides for relief in terms that are similar to the other federal and provincial legislation canvassed above. Section 6 of the act provides that in cases involving forfeiture of personal property, a third party can "apply for an order declaring the person's interest in the property immediately before forfeiture"¹⁰⁰ within sixty days of the date of forfeiture. The court is required to grant the order once it is satisfied that the third party not only had an interest in the property but also "exercised reasonable care with respect to the person given possession of the property so as to be satisfied that the person was not likely to use the property contrary to any

⁹⁵ *Prohibiting Profiting Act*, *supra* note 19, ss. 4(1)(a)-(b).

⁹⁶ *Ibid.*, s. 4(3).

⁹⁷ To be more precise, the legislation refers to a person who "acquired the property for fair value and did not know and could not reasonably have known at the time of the acquisition that the property was proceeds of a contract for recounting crime" (*ibid.*, s. 2).

⁹⁸ R.S.O. 1990, c. F-13, s. 6.

⁹⁹ R.S.O. 1990, c. E-20.

¹⁰⁰ *Fines and Forfeitures Act*, *supra* note 98, s. 6(1).

Act of the Legislature ...¹⁰¹ Once the order has been granted, the lieutenant governor in council is authorized to provide whatever relief he or she sees fit.¹⁰²

By contrast, the *Escheats Act* is more broadly worded. Section 3 of the act permits the lieutenant governor in council to transfer forfeited property "to any person for the purpose of transferring or restoring it to a person having a legal or moral claim upon the person to whom it had belonged ..."¹⁰³ Section 5 of the act permits the government to waive its right to forfeited property and release the property to the person who would have been entitled to it but for the forfeiture upon whatever terms the government deems proper.¹⁰⁴ The *Escheats Act* differs from the *Fines and Forfeitures Act* in that the former does not contain any limitation period for seeking relief from forfeiture, is not limited to forfeitures of personal property, and does not specify that the claimant must have taken reasonable care. A common feature of both statutes, however, is that they confer apparently unfettered discretion upon the lieutenant governor in council to determine whether, and to what extent, relief from forfeiture ought to be granted.

- *Victims Restitution and Compensation Payment Act (Alberta)*

The provisions of Alberta's *Victims Restitution Act* designed to protect third parties from forfeiture are distinguished by their extreme flexibility. The relevant provisions are spread across a number of sections of the act, but the two key provisions apply to property disposal orders made under Part 1 of the *Victims Restitution Act*. One of those provisions, section 15, gives the court broad discretion to return property acquired by illegal means, or its proceeds, to third parties. In order to qualify for protection under this provision, the parties must establish that they were not complicit in the illegal activity and, if their interest was acquired after the property was acquired by illegal means, that they "did not know and would not reasonably be expected to know"¹⁰⁵ that it had been so acquired.¹⁰⁶ The second key provision is paragraph 18(1)(a), which contains more general language. That provision permits the court to protect third parties with "bona fide intervening or other legal or equitable interests" in property in any manner it sees fit.¹⁰⁷ The general language of paragraph 18(1)(a) is mirrored in paragraphs 27(2)(c) and 39(2)(c), which are concerned with restitution payment orders and compensation orders, respectively. As previously mentioned, however, those orders should arguably have no impact on third parties

¹⁰¹ *Ibid.*, s. 6(3)(b).

¹⁰² *Ibid.*, s. 7(3).

¹⁰³ *Escheats Act*, *supra* note 99, s. 3.

¹⁰⁴ *Ibid.*, s. 5.

¹⁰⁵ *Victims Restitution Act*, *supra* note 25, s. 13(1)(b)(iii).

¹⁰⁶ *Ibid.*, s. 15.

¹⁰⁷ *Ibid.*, s. 18(1)(a).

who hold legally cognizable interests since they are limited in scope to the “property of the offender”.

D. Imposing a Personal Obligation in Lieu of Forfeiture

- *Criminal Code*

In cases involving proceeds of crime, but not instruments of crime, the *Criminal Code* provides for the imposition of a fine in lieu of a forfeiture order. This provision forms an important alternative to the forfeiture provisions discussed above because fines have a much less significant impact upon third parties. In fact, they are only likely to affect the interests of third parties who do not hold legally cognizable interests in any property of the offender, such as unsecured creditors.

The option of imposing a fine in lieu of a forfeiture order is available where the court is satisfied that a forfeiture order should be made in respect of property of an offender that cannot be made the subject of such an order. The code suggests that this will be the case where the property

- (a) cannot, on the exercise of due diligence, be located,
- (b) has been transferred to a third party,
- (c) is located outside Canada,
- (d) has been substantially diminished in value or rendered worthless, or
- (e) has been commingled with other property that cannot be divided without difficulty ...¹⁰⁸

In these cases, the court may order payment of a fine equal to the value of the property that cannot be made the subject of an order of forfeiture.¹⁰⁹ Where such a fine is imposed, the court must provide that in default of payment a sentence of imprisonment shall be imposed. The terms of such imprisonment are listed in the *Criminal Code* and vary according to the amount of the fine.¹¹⁰

There is relatively little caselaw discussing the manner in which courts should exercise their discretion to order payment of a fine in lieu of forfeiture. In fact, in certain respects the cases on point are contradictory.¹¹¹ For instance, there is conflicting authority on the question of whether the accused’s ability to pay the fine is

¹⁰⁸ *Criminal Code*, *supra* note 4, s. 462.37(3).

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*, ss. 462.37(4)(a)-(e).

¹¹¹ For a discussion of several general principles, see *R. v. Gagnon* (1993), 139 A.R. 264, 80 C.C.C. (3d) 508 (Q.B.).

a relevant consideration.¹¹² In addition, as noted above, it is unclear whether the mere fact that property has been transferred to a third party means that a forfeiture order “cannot be made”, thereby requiring the court to consider imposing a fine in lieu of forfeiture.

- *Victims Restitution and Compensation Payment Act (Alberta)*

Part 3 of the *Victims Restitution Act* permits the court, upon the application of the minister, to make a compensation order in favour of the Crown, provided that the offender’s trial involved a judicial determination of the value of the related proceeds of crime.¹¹³ It is unclear, however, whether a compensation order can be ordered in addition to or only in lieu of a fine or forfeiture ordered under the *Criminal Code* or Part 1 of the *Victims Restitution Act*.

III. The Problems with Unfettered Discretion

It should be clear from the above that both federal and provincial laws provide judges and, in some cases, the executive, with considerable flexibility in determining whether or not to protect third parties’ interests in proceeds of crime from forfeiture. There are certainly some advantages to having a regime that provides this kind of flexibility. As in other contexts, building flexibility into the law of forfeiture allows judges and other officials to make rulings that respond appropriately to factors that would not have been taken into account by a strict rule drafted in advance. Flexibility is desirable in situations in which it is difficult for lawmakers to identify all potentially relevant factors in advance, and so there is a significant risk that an inflexible rule will lead to undesirable outcomes.¹¹⁴

There are, however, several disadvantages associated with laws that provide this kind of flexibility, particularly in relation to property rights. First, to the extent that flexibility increases the number of factors that might be taken into account by a decision maker in any given case, it tends to increase the cost of proceedings. This is because parties will have an incentive to adduce evidence and make arguments concerning every potentially relevant factor.¹¹⁵

Providing decision makers with flexibility is also undesirable if, as in the present context, it is unclear how that flexibility will be used, thus giving rise to uncertainty. Legal uncertainty of this kind is problematic because parties will inevitably err when

¹¹² Compare *R. v. Garoufalis* (1998), 131 Man. R. (2d) 231, 131 C.C.C. (3d) 242 (C.A.) (ability to pay is irrelevant at paras. 19-20); *R. v. Savard* (1998), 126 C.C.C. (3d) 562 (Qc. C.A.) (ability to pay must be taken into account).

¹¹³ *Victims Restitution Act*, *supra* note 25, s. 32.

¹¹⁴ Louis Kaplow, “Rules Versus Standards: An Economic Analysis” (1992) 42 Duke L.J. 557.

¹¹⁵ *Ibid.* at 588-95 (discussing the effects of complexity on litigation costs).

guessing at the risk of forfeiture associated with their property. This means that some property owners will overestimate the risk of forfeiture associated with certain pieces of property and consequently refrain from making efficient investments in purchasing the property or enhancing their enjoyment thereof (e.g., by improving the property). Correlatively, some property owners will underestimate the risk of forfeiture associated with their property and make excessive investments in purchasing or attempting to enhance their enjoyment of the property. It is worth noting that according to this logic, uncertainty is more problematic for third parties who are purchasers for value than for those who are donees. Similarly, certainty is particularly important where the third party has the ability and incentive to invest in improving the property and less important in other cases, such as where the third party merely has a security interest in the property or where the property is of a kind that does not permit improvement by investment.

Arguably, legal uncertainty is also problematic to the extent that it increases the volume of litigation. The received wisdom among law and economics scholars is that the likelihood of parties settling their disputes out of court decreases to the extent that litigants are likely to disagree about the probable outcome of litigation; legal uncertainty tends to increase the likelihood of such disagreement.¹¹⁶ In the present context, this implies that uncertainty about whether the court will permit forfeiture in respect of property owned by third parties reduces the likelihood of property owners and the Crown settling their disputes without going to trial.¹¹⁷ Many would view this as an undesirable outcome.¹¹⁸

IV. Structuring Discretion: Why Should the Property of Innocent Third Parties Ever be Subject to Forfeiture?

According to the analysis set out in the previous section, the primary justification for giving judges or other officials flexibility in deciding whether to forfeit property owned by third parties only applies to the extent that it is difficult to identify in advance what factors should play a role in deciding those cases. Where, however, it is possible to identify the relevant factors, lawmakers should do so at the earliest possible

¹¹⁶ Richard A. Posner, "An Economic Approach to Legal Procedure and Judicial Administration" (1973) 2 *J. Legal Stud.* 399 at 423-26; George L. Priest & Benjamin Klein, "The Selection of Disputes for Litigation" (1984) 13 *J. Legal Stud.* 1 at 9-17.

¹¹⁷ It may not, however, be safe to presume that settlement is feasible in these contexts, even if the law is perfectly certain. In cases where the attorney general seeks forfeiture of an indivisible piece of property, the Crown may not have the authority to accept anything other than the property in question as consideration for relinquishing its right to seek a forfeiture order. On the other hand, in such cases it might still be possible for the owner to sell the property and then negotiate with the Crown over the division of the proceeds. If settlement is not feasible, the effects of legal uncertainty on the volume of litigation are ambiguous.

¹¹⁸ Compare Owen M. Fiss, "Against Settlement" (1984) 93 *Yale L.J.* 1073.

opportunity in order to mitigate the adverse effects associated with creating uncertainty about proprietary rights.

The balance of this article is designed to stimulate the process of clarifying the law in this area by outlining the public policies that might be furthered by allowing for forfeiture of property in which a third party has an interest. Before turning to a detailed analysis of whether, and in what circumstances, forfeiture of property owned by third parties might further public goals, however, it is important to question whether it is ever appropriate to sacrifice the property rights of an individual citizen to further public purposes.

It is frequently argued that as a matter of distributive justice, the burden of achieving public goals should be borne by society as a whole rather than a small subset of its members.¹¹⁹ If one accepts this as a blanket proposition, then it is easy to conclude that the law should never permit the property of innocent third parties to be forfeited. The proposition that it is unjust for innocent third parties ever to be exposed to the risk of forfeiture may not, however, be universally accepted. Some might argue, for example, that property owners assume the risk of forfeiture when they acquire their property.¹²⁰ Alternatively, it may be argued that it is fair for certain property owners to bear disproportionate burdens, at least in the short run, in order to promote an ethic of social responsibility.¹²¹ Finally, even if one accepts the proposition that innocent third parties should not bear a disproportionate portion of the burden of achieving public purposes, it is still necessary to define the term "innocent".

For any or all of these reasons, one might reasonably conclude that there are certain circumstances in which permitting the property of third parties to be forfeited can be justified. Therefore, the following sections will examine various policies—preventing unjust enrichment of offenders, deterring dealings with criminals, preventing property from being used to commit crime, compensating victims of crime, and financing law enforcement—that ought to be considered in determining whether to permit such forfeiture. The analysis is, however, premised upon the assumption that in the absence of any overriding policy considerations, the interest in distributive justice should prevail. This effectively means that there should be a presumption against permitting a forfeiture order to impair the interests of third parties—a view that, not coincidentally, is broadly consistent with the common

¹¹⁹ For an example of a judicial statement to this effect, see *Armstrong v. United States*, 364 U.S. 40 at 49, 80 S. Ct. 1563 (1960), Black J.

¹²⁰ For similar arguments presented in the course of analyzing the compatibility of "regulatory" takings with the U.S. Constitution, see Frank Michelman, "The Common Law Baseline and Restitution for the Lost Commons: A Reply to Professor Epstein" (1997) 64 U. Chicago L. Rev. 57.

¹²¹ A similar argument is made by Hanoch Dagan in an attempt to justify certain types of uncompensated takings. See Hanoch Dagan, "Takings and Distributive Justice" (1999) 85 Va. L. Rev. 741.

law's traditional hostility toward allowing state interference with the property rights of its citizenry.

A. Preventing Unjust Enrichment

The most frequently mentioned rationale for seeking forfeiture of proceeds of crime—but not instruments of crime—is to deprive offenders of the benefits of their crime. For the sake of convenience, I will refer to this rationale as the “preventing unjust enrichment” rationale, recognizing that this use of the term “unjust enrichment” may or may not be consistent with its usage in other contexts.¹²²

At first glance, it may be difficult to see how depriving third parties of their interests in property can prevent the unjust enrichment of an offender. In fact, however, there are two ways in which such a forfeiture might help to achieve this objective. The first was noted by Locke J. in the Supreme Court of Canada's decision in *Industrial Acceptance Corp. Ltd. v. Canada*.¹²³ In that case, Locke J. seemed to argue that forfeiture of property owned by an innocent third party “is an added punishment to the offender” because it gives the third party a cause of action against the offender.¹²⁴ Thus, forfeiting the property of a third party might indirectly reduce the benefit that an offender receives from the proceeds of crime.

One weakness in this argument is that it must be qualified to reflect the fact that the state's interest in preventing offenders from profiting from their crimes is only served—at least directly—by forfeiting property of third parties in cases where the third party will have a viable cause of action against the offender. This condition, however, will not always be satisfied. For example, the offender may be judgement-proof, making it pointless for the third party to take any steps to sue the offender.

¹²² There is room for debate over whether an offender is unjustly enriched in the sense that this term is used in private law. There is also some room for debate over the appropriate measure of the enrichment and whether the current definition of proceeds of crime is appropriate or should be modified to allow for deduction of the offender's expenses. Neither of these points is relevant to the current discussion, which essentially presumes that an offender is, from a moral perspective, unjustly enriched to the extent that he or she obtains an interest in proceeds of crime (as currently defined) and which focusses on whether forfeiting the interest of a third party can serve to prevent such enrichment.

¹²³ [1953] 2 S.C.R. 273, [1953] 4 D.L.R. 369 [*Industrial Acceptance* cited to S.C.R.]. See also *Wilson*, *supra* note 58.

¹²⁴ *Industrial Acceptance*, *ibid.* at 281. Locke J. stated (*ibid.*):

While, in my opinion, it is really aside from the point, the provision for the forfeiture is an added punishment to the offender, whether the vehicle be owned by him or by some other person who, as in the present case, is entirely free of any complicity in the matter.

In the latter case, it can scarcely be suggested that it would be an answer to a demand by the owner upon the offender for the return of his motor car that it had been taken from his possession by the Crown and became forfeited under the provisions of s. 21.

Consider, for example, *Wilson v. R.*,¹²⁵ where the Ontario Court of Appeal had to determine whether to allow the lawyers who had acted for the offenders during their criminal prosecution to recover fees for their services from funds that had been assigned to them after being seized but before being determined to be proceeds of crime. The court denied relief from forfeiture in order to ensure that the offenders did not profit from their crimes by being allowed to satisfy their indebtedness to counsel from proceeds of crime. The court did not, however, consider whether the offenders were judgement-proof. If they had been judgment-proof, denying the lawyers relief from forfeiture would serve little purpose because although it would technically expose the offenders to liability to their former counsel, that liability would be rendered practically meaningless because it could never be realized.

There is, also a second, more fundamental weakness in the argument that the interests of third parties need to be extinguished in order to prevent unjust enrichment of an offender. If the state's objective is to expose an offender to civil liability based on the value of property owned by a third party, the state should simply impose a personal obligation by fining the offender an appropriate amount. This would obviously serve the purpose of precluding unjust enrichment at least as well as ordering forfeiture of the actual proceeds of crime. In fact, imposing a fine would do an even better job of preventing unjust enrichment, particularly in cases where the proceeds of crime have been disposed of in such a way that they cannot be traced to any of the offender's current property. The imposition of a fine would also help to avoid the costly exercise of tracing proceeds through various forms of property. Most importantly for present purposes, imposing a fine would avoid prejudicing third parties by exposing them to the risk that the value of their claim against the offender will be lower than the value of the property forfeited.¹²⁶ In fact, if claims arising from fines of this sort are subordinated to the claims of an offender's other creditors, then the goal of preventing an offender's unjust enrichment can be achieved without harming even the offender's unsecured creditors.

Finally, I suggested above that there are two ways in which ordering forfeiture against a third party might further the state's interest in preventing wrongdoers from being unjustly enriched. As discussed, the first method involves giving the third party a cause of action against the wrongdoer. The second method is relevant in situations where the wrongdoer derives a certain measure of satisfaction from the third party's possession of the property. The most obvious examples are cases in which the third party is a close relative of the wrongdoer. In these cases, forfeiting the third party's interest in the property may serve the goal of preventing unjust enrichment of the wrongdoer, whether or not the third party brings a cause of action against the wrongdoer. This argument is still only compelling, however, in cases where the wrongdoer is insolvent. In other cases, as argued above, the goal of preventing unjust

¹²⁵ *Wilson*, *supra* note 58.

¹²⁶ *Fried*, *supra* note 7 at 343; *Stessens*, *supra* note 1 at 37, 48-49.

enrichment can generally be achieved more directly by imposing a personal obligation upon the wrongdoer.

B. Deterring Dealings with Criminals

It is sometimes argued that exposing property owned by third parties to forfeiture is justifiable because it encourages those parties to take precautions against transacting with criminals.¹²⁷ The United States Supreme Court has repeatedly referred to this argument in upholding forfeitures of property owned by innocent third parties.¹²⁸ Some commentators have questioned the wisdom of this policy, however, on the grounds that cutting “known” criminals off from commercial and familial relationships can be viewed as a form of disproportionate punishment and an impediment to their rehabilitation.¹²⁹ Concern has also been raised about the fact that forfeiture provides a very blunt instrument for deterrence. This is particularly true of forfeiture of the instruments of crime, because the value of those instruments to their owner need not be related in any way to either the benefit that they derived from their dealings with criminals or the resulting harm to society. Finally, it is important to keep in mind the distinction between deterrence and fairness. The fact that a given forfeiture can be justified on deterrence grounds does not necessarily mean that it can be defended in terms of fairness, in the sense of being proportional to the wrongfulness of the property owner’s conduct.

Notwithstanding the above, in many respects deterrence provides a stronger justification for forfeiting a third party’s property than does the objective of preventing unjust enrichment. Unlike unjust enrichment, the deterrence rationale justifies using forfeiture to extinguish third parties’ interests in both proceeds of crime and instruments of crime, since both types of forfeiture will deter certain—though perhaps slightly different—types of dealings with criminals. The deterrence argument is also distinguishable from the unjust enrichment argument in that the former applies even where it is feasible to impose a personal obligation in lieu of forfeiture. Moreover, deterrence, as a justification for forfeiture, has particular force in cases where the third party will not have a viable cause of action against the offender; if

¹²⁷ See Fried, *ibid.* at 350-52 (discussing the U.S. *Comprehensive Forfeiture Act of 1984*, 18 U.S.C.S. § 1961 (2003) (Lexis)). This argument is also consistent, at least to the extent that it applies to third parties who knowingly deal with criminals, with the terms of the *Criminal Code*’s provisions concerning money laundering. Those provisions essentially make it an offence to deal knowingly with proceeds of crime. See *Criminal Code*, *supra* note 4, s. 462.31.

¹²⁸ See *e.g. Bennis v. Michigan*, 516 U.S. 442, 116 S. Ct. 994 (1996) (wife’s interest in car subject to forfeiture where husband unlawfully used car to engage in sexual activity with a prostitute); *Calero-Toledo v. Pearson Yacht Leasing*, 416 U.S. 663, 94 S. Ct. 2080 (1974) [*Calero-Toledo* cited to U.S.] (innocent owner’s interest in yacht subject to forfeiture where marijuana—possibly only one cigarette—was found on board while yacht was leased to others).

¹²⁹ Fried, *supra* note 7 at 387, 426-27.

property owners know that forfeiture will be ordered in such circumstances, they will have a particularly strong incentive to avoid dealing with criminals.

Although the deterrence argument applies in a broad range of circumstances, it does not apply with full force in cases where the third party has taken reasonable precautions to avoid dealing with proceeds of crime.¹³⁰ Thus, even if one accepts the notion that Canada's forfeiture provisions are designed to achieve this form of deterrence, it is still possible to argue that property owned by third parties should not be forfeited where the owner has taken reasonable precautions to avoid illicit dealings.

C. Preventing Property from Being Used to Commit Crime

Both federal and provincial legislation dealing with forfeiture of instruments of crime explicitly extend to property that is likely to be used in the future to engage in criminal activity.¹³¹ The obvious implication is that the purpose of these provisions is to prevent property from being used to commit crime.

Often there will be no need to interfere with the interest of a third party in order to prevent property from being used to commit crime. For example, if a potential instrument of crime is being leased to a prospective offender, then restoring the instrument to the lessor should be sufficient for preventive purposes. It is not difficult, however, to imagine situations in which a third party has a type of interest in an asset that does not allow it to prevent the asset from being used to commit crime. In fact, this is a distinct possibility whenever the third party holds any sort of inherently non-possessory interest in the property at issue—for example, the position of a lender with a security interest in a potential instrument of crime. It is also quite possible that, in some of these cases, temporary seizure of the property at issue will not be practicable and so forfeiture will be the only viable option. Even in these cases, however, it is difficult to see why compensation cannot be provided to a third party whose interests are affected by the forfeiture.

The only type of case in which compensating third parties seems inconsistent with the objective of preventing property from being used to commit crime is where *any* property held by the third party is likely to be used to commit crime. This problem might arise where the third party is extremely vulnerable to the influence of a

¹³⁰ See e.g. *Calero-Toledo*, *supra* note 128 at 689-90:

[I]t would be difficult to reject the constitutional claim of an owner ... who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property; for, in that circumstance, it would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive.

¹³¹ See *Criminal Code*, *supra* note 4, s. 2 (“‘offence-related property’ means any property ... (c) that is *intended for use* ...” [emphasis added]); *Organized Crime Act*, *supra* note 12, s. 7(1) (“‘instrument of unlawful activity’ means property that is *likely to be used* ...” [emphasis added]).

potential offender (e.g., a spouse). Otherwise, the state's legitimate interest in preventing property from being used to commit crime does not appear to support allowing forfeiture to affect the rights of third parties without compensation.

D. Compensating Victims of Crime

In some cases, property that is forfeited to the Crown under the *Criminal Code* provisions concerning proceeds of crime is earmarked for transfer to victims of the crime that gave rise to the proceeds.¹³² Similarly, the *Criminal Code* provision aimed at instruments of terrorism and property owned or controlled by a terrorist group specifically provides that forfeited property may be used “to compensate victims of terrorist activities and to fund anti-terrorist initiatives ...”¹³³ The situation is similar at the provincial level—funds obtained by the Crown in right of Ontario under the *Organized Crime Act* and the *Prohibiting Profiting Act* must be placed in a special purpose account that can be used (among other things) to fund payments to victims of crime.¹³⁴ Similarly, money paid to the Crown under Alberta's *Victims Restitution Act* is to be used “for the benefit of or in relation to a victims program that, in the opinion of the Minister, provides assistance to persons suffering loss arising out of illegal acts that are the same as or similar in nature to the illegal act in respect of which the payment was made to the Crown.”¹³⁵ The existence of these provisions suggests that, to some extent, forfeiture of property owned by third parties not only serves to further the various public purposes identified in the preceding sections but also serves the purpose of providing compensation to victims of crime.¹³⁶ This is desirable not only

¹³² The *Criminal Code* provides that forfeited proceeds of crime may be “disposed of as the Attorney General directs or otherwise dealt with in accordance with the law.” *Criminal Code*, *supra* note 4, ss. 462.37(1), 462.38(2). See e.g. *CIBC*, *supra* note 70 (where the proceeds in issue were funds fraudulently obtained from various private individuals and the court gave the impression that, if forfeited, the funds would be returned to the victims).

¹³³ *Criminal Code*, *ibid.*, s. 83.14(5.1).

¹³⁴ *Organized Crime Act*, *supra* note 12, s. 6(1); *Prohibiting Profiting Act*, *supra* note 19, s. 9.

¹³⁵ *Victims Restitution Act*, *supra* note 25, s. 44(1). The act goes on to state in section 45:

If, in respect of an illegal act, money is paid under this Act to the Crown for the purposes of being used under this Division but, in the opinion of the Minister,

- (a) it is not possible or reasonably practicable to make a grant in accordance with section 44, or
- (b) the money or the circumstances in respect of which the money was paid are not dealt with under an order made under section 44(2),

that money is to be paid by the Crown into the Victims of Crime Fund to be used under the Victims of Crime Act.

¹³⁶ This is listed as one of the express purposes of Ontario's *Organized Crime Act* (*supra* note 12, s. 1) and *Prohibiting Profiting Act* (*supra* note 19, s. 1).

because it may be fair to victims, but also because it gives victims an incentive to encourage authorities to pursue criminals.¹³⁷

Determining when the public interest in providing compensation to victims should trump the interests of third parties is a difficult question because in these settings at least four distinct factors come into play.¹³⁸ First is the notion that where the courts are forced to allocate a loss between parties, the loss should be allocated to the person who is at greater fault, where fault is defined as failing to take appropriate steps to prevent the conflict.¹³⁹ An intuitively appealing variation on this theme is the idea that losses should be allocated in proportion to fault.¹⁴⁰

A second factor is the public interest in encouraging potential victims of crime to take precautions against being victimized. In some contexts, victims are in a good position either to prevent a crime from being committed or to minimize the losses that result from the crime. Giving a third party's claim priority over that of the victim in these cases would encourage potential victims to take precautions; the greater the proportion of the loss that victims are required to bear, the stronger their incentive to take precautions.¹⁴¹

A third factor that courts might wish to consider when determining the effects of a forfeiture order on third parties is the appeal of minimizing the total loss that will be suffered by the parties to the dispute. In order to achieve this objective in disputes between victims and third parties, the courts should allocate the property in question to whichever party is likely to suffer greater harm if deprived of the property. In many cases, this analysis will lead to indeterminate results because there is no reason to presume that the parties attach different values to the property in question. In some cases, however, parties may have different valuations because, for example, one party has become emotionally attached to the property or, if we accept the idea that wealth typically has diminishing marginal utility, because the property represents a relatively significant proportion of one party's wealth.

¹³⁷ Omri Ben-Shahar, "Property Rights in Stolen Goods: An Economic Analysis" (University of Michigan Law School John M. Olin Center for Law and Economics Discussion Paper 1999-015) at 22, online: University of Michigan Law School <<http://141.211.44.51/centersandprograms/olin/papers.htm#1999>>; Omri Ben-Shahar & Alon Harel, "Compensation of Victims of Crime: An Economic Analysis" at 3, online: <http://www-personal.umich.edu/~omri/Victim_Compensation.PDF>.

¹³⁸ See generally Menachem Mautner, "The Eternal Triangles of the Law": Toward a Theory of Priorities in Conflicts Involving Remote Parties" (1991) 90 Mich. L. Rev. 95.

¹³⁹ *Ibid.* at 106.

¹⁴⁰ See *Ingram v. Little* (1960), [1961] 1 Q.B. 31 at 73-74, [1960] 3 All E.R. 332 (C.A.), Devlin L.J., dissenting. Waddams has proposed a further variation on this approach that would define losses narrowly to include out-of-pocket expenses but exclude lost expectations (and apparently, lost opportunities). See S.M. Waddams, *The Law of Contracts*, 4th ed. (Toronto: Canada Law Book, 1999) at para. 306.

¹⁴¹ Ben-Shahar, *supra* note 137 at 24-25; Ben-Shahar & Harel, *supra* note 137 at 10ff.

A fourth factor is that it might be desirable to achieve a form of corrective justice by reversing the impact of the wrongful act upon the pre-existing set of entitlements. This is easiest to achieve in cases where the third party has not made any investment (defined broadly to include virtually any change in a party's economic position) in reliance on their entitlement to the property in question. In that case, compensating victims with forfeited property gives both victims and third parties entitlements similar to those that they had prior to the wrongful act. This result is impossible to achieve, however, in cases where the third party has made an investment in the property subject to forfeiture. In that case, making a forfeiture order in order to compensate the victim may indeed return the victim to a position similar to the one they were in prior to the wrongful act, but will leave the third party worse off to the extent of their investment. Achieving this kind of corrective justice is also difficult in cases where the property has changed in value since the time of the wrongful act.

The first factor mentioned above weighs heavily in favour of giving third parties priority over victims in cases where the third parties have taken all reasonable precautions to avoid dealing in proceeds of crime and where the victims have not taken reasonable precautions against loss. The second factor weighs in favour of third parties in any cases in which the victims have not taken reasonable precautions. Both factors support protecting third parties who obtain their interests in forfeitable property in good faith. They also might support drawing a distinction between victims of fraud and victims of theft on the grounds that victims of fraud can often readily protect themselves from being defrauded by either independently verifying or refusing to rely upon potential misrepresentations.¹⁴² The third factor implies that forfeiture orders should not take priority over the claims of relatively poor individuals to relatively valuable pieces of property, or over the claims of individuals to property that may have significant sentimental value.¹⁴³ The fourth factor weighs against forfeiture in cases

¹⁴² See also Kevin Davis, "Licensing Lies: Merger Clauses, The Parol Evidence Rule and Pre-Contractual Misrepresentations" (1999) 33 Val. U.L. Rev. 485 (suggesting that recipients of representations made by agents of an organization are relatively well placed to protect themselves against fraud).

¹⁴³ Mautner claims that this factor also justifies protecting purchasers for value. He states that "the need criterion would mandate giving priority to that competing party likely to suffer the greater loss if the other party prevails" (Mautner, *supra* note 138 at 106). He then goes on to claim that in the case of a purchaser for value this criterion is satisfied because "[b]y parting with actual value, the second-in-time party would equalize the losses likely to be suffered by him if the first-in-time party prevails to the losses the first-in-time party will likely suffer if the second-in-time party prevails" (*ibid.* at 120). On its face this argument is puzzling because there seems to be little reason to presume that a purchaser for value values property more highly than a donee. In other words, the loss that a second-in-time party would suffer if the other party prevailed should not be calculated by reference to the amount that such a party paid for the property, but rather by reference to the amount that the second-in-time party could receive if it were to sell the property. Mautner's position can, however, be defended by reference to the fourth factor listed above, namely, the desirability of reversing the effects of the wrongful act.

where the third party is a purchaser for value—though value in this context need not mean adequate value—or, more generally, has changed their position in reliance on their entitlement to the property.¹⁴⁴

It should be recalled that, as a matter of civil law, a third party's interest in property is likely to be defective when he or she either holds an interest in proceeds of theft or, for some reason, does not qualify as a good faith purchaser for value. Therefore, the cumulative effect of the arguments set out above is that it will often be possible to justify using forfeiture as a means of providing compensation for victims when a third party's interest in the forfeitable property is already defective.

E. Financing Law Enforcement

A final policy consideration that appears to have motivated at least some governments to enact forfeiture legislation is the desire to obtain property that can be used to generate funds to support law enforcement activities. Although this objective receives far less emphasis than those of preventing unjust enrichment and compensating victims of crime, it is obviously one of the objectives that modern legislators have sought to achieve through forfeiture legislation. For instance, generally speaking, property forfeited under the *Criminal Code* is placed under the control of the relevant attorney general or solicitor general rather than simply being forfeited to the Crown.¹⁴⁵ In addition, the forfeiture provision introduced in the federal government's anti-terrorism legislation specifically provides that forfeited property may be used to fund anti-terrorist initiatives.¹⁴⁶ Similarly, Ontario's *Organized Crime Act* provides that in addition to being used to compensate victims of crime, or to compensate the Crown or a municipality for various expenses or losses incurred as a

¹⁴⁴ This definition of a purchaser for value is consistent with Anglo-Canadian common law. See *Lipkin Gorman v. Karpnale Ltd.*, [1991] 2 A.C. 548, [1992] 4 All E.R. 512 (H.L.), Goff L.J. (where the defence of bona fide purchase for value is raised, "no inquiry is made (in most cases) into the adequacy of the consideration" at 581). Interestingly, American law on this point appears to be different. See Mautner, *supra* note 139 (under the traditional [American] rules of equity a person must provide present and adequate value in order to qualify as a good faith purchaser for value at 110-11). For a discussion of the change in position defence as it relates to the Anglo-Canadian definition of a purchaser for value, see Jonathan Dawe, "The Change of Position Defence in Restitution" (1994) 52 U.T. Fac. L. Rev. 275.

¹⁴⁵ See *Criminal Code*, *supra* note 4, ss. 83.14(5), 462.37(1), 462.43, 490(9), 490.2(4), 491.1. Pursuant to section 734.4 of the *Criminal Code*, fines imposed in lieu of forfeiture are generally, like other fines, simply forfeited to the Crown in right of the province in which the fine was imposed. At least one province, British Columbia, has enacted legislation that requires such fines to be placed in an account controlled by the attorney general together with the proceeds of forfeited property. See *Special Accounts Appropriation and Control Act*, R.S.B.C. 1996, c. 436, s. 7.

¹⁴⁶ *Criminal Code*, *ibid.*, s. 83.14(5.1).

result of unlawful activity, funds paid to the Crown under the act may be used “to prevent unlawful activities that result in victimization.”¹⁴⁷

The legitimacy of using forfeiture to finance law enforcement has been hotly debated. Several commentators have argued that giving law enforcement officials a share of forfeited assets detracts from their incentive to act in the public interest.¹⁴⁸ The most frequently voiced concern is that police decisions on how to allocate resources may be skewed in favour of investigating lucrative crimes such as drug trafficking and money laundering as opposed to violent crimes.¹⁴⁹ Even if one believes, however, that it is appropriate to use forfeiture to finance law enforcement, it nonetheless seems difficult to justify imposing the burden of providing that financing disproportionately upon innocent parties who happen to have received proceeds or instruments of crime.

V. Legal Implications

As outlined in Parts I and II, both federal and, to a lesser extent, provincial legislation grant courts fairly broad discretion regarding the protection of third parties from forfeiture of property tainted by its association with criminal activity. Part III argued that the breadth of that discretion and the uncertainty surrounding the manner in which it will be exercised are problematic. Having identified in Part IV a number of policy considerations that ought to bear upon decisions about whether to forfeit property in which third parties have an interest, we can now turn to the question of how those policy considerations ought to inform legal doctrine.

A. *Protecting the Rights of Investors Who Have Taken Reasonable Precautions*

The case for clarifying the law in this area is strongest in relation to third parties whose decisions about whether to invest in acquiring or improving property are liable to be influenced by the contents of the applicable legal regime. These “investors” will include third parties who may either (1) acquire an interest in forfeitable property in exchange for valuable consideration (thus excluding donees and some creditors), or (2) devote resources to enhancing their enjoyment of forfeitable property (thus potentially including donees but excluding creditors and owners of property such as passive financial instruments). These requirements will typically exclude unsecured creditors because, unless they have extracted some sort of negative pledge from their debtor, it will be difficult for them to establish that they extended credit in reliance on

¹⁴⁷ *Organized Crime Act*, *supra* note 12, s. 6(3).

¹⁴⁸ Fried, *supra* note 7 at 365; Selick, “Property Rights”, *supra* note 2; Selick, “Go Ahead”, *supra* note 2; Stessens, *supra* note 1 at 58; Naylor, *supra* note 1 at 44-45.

¹⁴⁹ See Eric Blumenson & Eva Nilsen, “Policing for Profit: The Drug War’s Hidden Economic Agenda” (1998) 65 *U. Chicago L. Rev.* 35; Brent D. Mast, Bruce L. Benson & David W. Rasmussen, “Entrepreneurial Police and Drug Enforcement Policy” (2000) 104 *Public Choice* 285.

any sort of legal entitlement to any portion of their debtor's property. Similar arguments might be made about creditors who obtain security interests in a very broadly defined class of property (e.g., in "all of the debtor's present and after-acquired property"). In most cases, however, it will be fairly easy to determine whether any given third party qualifies as an investor.

Part IV set out a number of arguments against forfeiting the interests of investors who have taken reasonable steps to avoid dealing in illicit property. To recapitulate, forfeiting property owned by these types of third parties cannot be justified as a means of deterring them from dealing with criminals because, by definition, those parties have taken reasonable steps to avoid such dealings. It is also impossible to justify forfeiting the property of investors as a means of preventing wrongdoers from being unjustly enriched because imposing a fine or entering a judgment in lieu of forfeiture would serve the same purpose without prejudice to third parties. (I argue below that the legislature should be encouraged to amend forfeiture legislation to the extent that it does not currently permit such orders to be made.)

The situation is somewhat more complicated when forfeiture is motivated by the desire to compensate identifiable victims of crime. In these cases, providing relief from forfeiture is consistent with the idea that the law should create incentives for potential victims to avoid being victimized and attempt to reinstate the pattern of entitlements disrupted by the criminal action. On the other hand, depending on the circumstances, forfeiting property owned by investors may or may not be consistent with the objectives of allocating losses in accordance with relative fault or minimizing the loss caused by crime. So, for example, in a case like *CIBC*, one might argue that even if the bank took reasonable precautions to avoid dealing in illicit property, forfeiture of its collateral can be justified as a means of compensating the relatively poor victims and thereby minimizing the total losses suffered as a result of the offender's actions. On the other hand, if the victims have been at least marginally less careful than the bank, one might argue that the loss should not be allocated to the bank, either on the ground that loss allocation should be based on relative fault or with a view to creating incentives for other victims to take precautions.

The *Criminal Code* provisions concerning forfeiture of proceeds of crime and instruments of crime (i.e., "offence-related property")¹⁵⁰ as well as Alberta's *Victims Restitution Act* can easily be interpreted in a manner compatible with these prescriptions. Ideally, a leading appellate court would simply state that, other than in exceptional circumstances, a court should not make a forfeiture order (or property disposal order, as the case may be) that prejudices the interests of an investor who has taken reasonable precautions. In legal terms, this would largely be accomplished by stating that third parties should be given the benefit of the defences of good faith purchaser for value and change in position.

¹⁵⁰ *Criminal Code*, *supra* note 4, s. 2.

Ontario's legislation concerning forfeiture of proceeds of either unlawful activity or a contract for recounting crime is less compatible with these prescriptions. On the positive side, both the *Organized Crime Act* and the *Prohibiting Profiting Act* provide protection from forfeiture to third parties who acquire property for fair value without notice, "except where it would clearly not be in the interests of justice ..."¹⁵¹ While these provisions seem appropriate, it is unclear why they draw such a sharp distinction between purchasers who provide fair value and all other investors. Judges appear to have no discretion whatsoever to refrain from ordering forfeiture in respect of property owned by a person who has not provided fair value. This may permit injustice in cases where the third party has provided some value or has invested in improving the property, especially if the property has not been derived from an identifiable victim.

Each of the two Ontario statutes also contains unique deficiencies. The *Prohibiting Profiting Act* is problematic because it appears to provide no mechanism whatsoever for protecting an assignee of a contract for recounting crime from an order making the money or other consideration payable under the contract payable to the Crown. As a result, even an assignee who provides valuable consideration in return for an interest in a contract that, without their knowledge, qualifies as a contract for recounting crime, can see their interest extinguished by an order under the *Prohibiting Profiting Act*. As for the *Organized Crime Act*, the principal concern is that in order to qualify as a responsible owner, and thereby be protected from forfeiture of an instrument of unlawful activity, a person must have withdrawn permission "that the person knows or ought to know has facilitated or is likely to facilitate the property being used to engage in unlawful activity ..."¹⁵² This provision arguably goes beyond merely requiring that the third party take reasonable precautions, especially if the term "facilitate" is interpreted broadly.

B. Clarifying the Rights of Third Parties Who Have Not Invested in the Property

There is a less pressing need for legal certainty in cases where a third party has not invested in either acquiring or enhancing their enjoyment of the property subject to forfeiture. For all the reasons given in the preceding section, however, there is still little justification for ordering forfeiture in these cases if a third party has taken reasonable steps to avoid dealing in illicit property.

There are, however, two sets of cases in which the interests of a third party who has not made any investment in the forfeitable property will typically be less deserving of protection than those of other third parties. First, an important

¹⁵¹ *Organized Crime Act*, *supra* note 12, ss. 3(3), 8(3); *Prohibiting Profiting Act*, *supra* note 19, s. 4(3).

¹⁵² *Organized Crime Act*, *ibid.*, s. 7(1).

subcategory of parties who do not qualify as potential investors are beneficiaries of gratuitous transfers from offenders. These types of transfers are often made because the transferor derives some kind of satisfaction from the third party remaining in possession of the transferred property. Consequently, in these circumstances, forfeiting the third party's interest can be justified as a means of preventing unjust enrichment. Second, in cases involving proceeds of crime derived from identifiable victims, forfeiting property in which a third party has not made an investment is consistent with the notion of minimizing the effect of a wrongful act on the parties' pre-existing entitlements. This point may have little significance for the law of forfeiture, however, since in cases of this sort the *nemo dat* rule will often subordinate a third party's interest in the property to that of the victim.

C. Clarifying the Rights of Investors Who Have Not Taken Reasonable Precautions

People who invest in property in circumstances where they know or ought to know that it qualifies either as proceeds of crime or as an instrument of crime have a significantly weaker claim to protection from forfeiture than do other investors. Even investors with notice, however, can argue that it is inappropriate to punish them for the sake of deterrence, either on the grounds that deterring dealings with criminals is not a legitimate public purpose, or that forfeiture does not achieve an appropriate level of deterrence, or that, notwithstanding the deterrent effects of forfeiture, it is unfair. To the extent that the forfeited property is to be used to compensate victims of crime, purchasers might argue that forfeiture is inappropriate because the victim failed to take appropriate precautions or that the purchaser values the property more highly than the victim. Whether or not courts accept any of these arguments, it would be helpful for them to clarify the law on point. Moreover, whatever rules are established, they should take into account, in at least a rough way, factors such as what sort of precautions were taken by the parties (i.e., victims and third parties) and what value the parties place on the property at issue.

D. Facilitating the Imposition of Personal Obligations in Lieu of Forfeiture of Proceeds of Crime

One of the most important—though far from original—points made above is that forfeiting a third party's interest in property is not typically required to prevent offenders from profiting from crime because the same objective can be achieved by imposing a personal obligation in lieu of forfeiture. In many circumstances, ordering forfeiture of the proceeds of crime is the most convenient way of proceeding because it obviates the need to assign a value to the proceeds, a task that is fraught with difficulty since property values are often quite subjective and tend to vary over time. The thrust of the preceding analysis, however, is that in some cases forfeiture would cause unacceptable prejudice to the interests of third parties. In those cases, notwithstanding the administrative considerations that favour forfeiture, it seems preferable to substitute some form of personal obligation for a forfeiture order.

Both the *Criminal Code* and provincial civil forfeiture legislation require amendment in order to facilitate the imposition of personal obligations of this sort. The shortcomings of the *Criminal Code* provisions dealing with fines in lieu of forfeiture were pointed out by Doherty J.A. in *Wilson*. Doherty J.A. observed that under the current provisions of the *Criminal Code*, once an offender has been sentenced the court has no power to adjust the offender's fine to reflect property that has been restored to a third party. Thus, relieving a third party from forfeiture after the offender has been sentenced will tend to allow offenders to benefit from their crimes.¹⁵³ This point was significant in *Wilson* because, in that case, the application for relief from forfeiture was brought only after a forfeiture order had been made in respect of the funds. Doherty J.A. pointed out that granting the lawyers relief from forfeiture at that stage would benefit the offenders by allowing them to satisfy their debt to their lawyers out of proceeds of crime.¹⁵⁴

Justice Doherty's point is well taken. Under current law, granting a third party relief from forfeiture after the offender has been sentenced may bring the interests of the third party into conflict with the state's interest in preventing the offender from profiting from his or her crime. This suggests that it may be appropriate for Parliament to amend the *Criminal Code* to allow at least the fine part of an offender's sentence to be adjusted for some period of time after it is initially fixed to reflect benefits that the offender might receive when third parties are granted post-sentencing relief against forfeiture of proceeds of crime.

One objection to this proposal might be that it will tend to unduly delay completion of the process of punishing an offender. This concern seems misplaced in the present context, however, because the extent of the delay will be minimal. Indeed, the *Criminal Code* provides that third parties must apply for relief from forfeiture of proceeds of crime within thirty days of the forfeiture and that the date fixed for a hearing must be within thirty days of the application.¹⁵⁵ An additional point to keep in mind is that although there may be some drawbacks associated with delaying the process of settling an offender's fine, there are also certain advantages. As Stessens observes, while proceedings to fix an offender's term of imprisonment often need to be conducted expeditiously, particularly when the offender is in custody, it is not always possible to assess the value of proceeds of crime, or other potentially relevant factors such as the availability of assets, in a short period of time.¹⁵⁶ Thus, Canada's federal government might profit from following the example of European countries that permit proceedings to determine the civil consequences of a criminal conviction to be postponed until six months or even up to two years after the offender has been convicted.¹⁵⁷ Alternatively, the

¹⁵³ *Wilson*, *supra* note 58 at 655, 659-60.

¹⁵⁴ *Ibid.* at 657-58.

¹⁵⁵ *Criminal Code*, *supra* note 4, ss. 462.42(1)-(2), 490.5(1)-(2).

¹⁵⁶ Stessens, *supra* note 1 at 42-43.

¹⁵⁷ *Ibid.* (discussing English and Dutch law).

problem might be resolved through the enactment of provincial legislation similar to Part 3 of the *Victims Restitution Act* so long as the courts are given an extended period of time within which to make a "compensation order".¹⁵⁸

Moving to the provincial context, it is unfortunate that neither the *Organized Crime Act*, the *Prohibiting Profiting Act*, nor the *Victims Restitution Act* provides for the imposition of purely personal liability in lieu of civil forfeiture (Part 3 of the *Victims Restitution Act* only permits a compensation order to be made after an offender has been convicted). All three pieces of legislation could be improved significantly by adding provisions that allow courts to enter a civil judgement in an amount equivalent to the value of property that would ordinarily be subject to civil forfeiture.¹⁵⁹ As it stands, the legislation forces courts to choose between pursuing the public interest in depriving offenders of the benefits of crime and the interests of third parties.

Unfortunately, the existence of both federal and provincial legislation that separately provide for the creation of both personal and proprietary obligations in response to a particular transaction gives rise to the possibility of a form of civil double jeopardy. In other words, it is possible that a fine or a civil judgement awarded under one piece of legislation will be combined with, rather than be used to replace, a forfeiture order under another piece of legislation. For instance, it is not immediately obvious that imposing a fine in lieu of forfeiture under the *Criminal Code* precludes ordering forfeiture under either the Ontario or Alberta statutes considered above. Permitting the Ontario or the Alberta courts to grant the Crown an *in personam* claim in respect of proceeds of crime would only increase the range of potential problems by permitting forfeiture orders under federal legislation to be combined with civil judgements in respect of the same transaction issued under provincial law. It should not be difficult, however, to fashion either legislative or judicial solutions to this problem.¹⁶⁰

One final point is worth noting in relation to the imposition of personal obligations in lieu of forfeiture. It would be useful to amend both federal and provincial legislation to provide that *in personam* claims created in lieu of forfeiture rank behind all other claims in the distribution of the property of an offender amongst his, her, or its creditors. This will further reduce the adverse impact on third parties of pursuing the objective of preventing unjust enrichment.

¹⁵⁸ *Supra* note 25, ss. 31-45. The Alberta legislation does not clearly specify the time period within which a compensation order must be made.

¹⁵⁹ For an example of a civil forfeiture scheme that contains provisions of this sort, see *New York Civil Practice Law and Rules* (NY CPLR) (West Group 2001), s. 1311. It is difficult to see how the addition of such provisions would undermine the constitutionality of the legislation, although providing for imprisonment of people who default in payment of the fine might.

¹⁶⁰ See *e.g. Criminal Code*, *supra* note 4, s. 740 (which directs courts to respond in a way that is "appropriate in the circumstances" to potential conflicts between restitution orders and forfeiture orders made under the *Criminal Code*).

E. Ensuring that Third Parties Have Notice

For the reasons given above, I believe that many third parties ought to be given significant substantive rights to relief from forfeiture. Forfeiture orders under both the federal and provincial legislation, however, typically cannot be overturned more than thirty or sixty days after being made¹⁶¹ (subject, in the case of forfeitures ordered under Ontario law, to being reversed by the executive under the *Escheats Act*).¹⁶² This aspect of the respective regimes is probably a reasonable method of ensuring finality but serves to place a premium on third parties' ability to exercise their substantive rights either before or very shortly after the forfeiture order is made. In other words, in order for third parties to exercise their substantive rights effectively they must be given adequate notice of, and opportunity to participate in, forfeiture proceedings.¹⁶³ Yet neither the *Criminal Code*'s provisions concerning forfeiture of property owned or controlled by terrorist groups nor Ontario's *Organized Crime Act*, its *Prohibiting Profiting Act*, and Alberta's *Victims Restitution Act* guarantee that third parties will receive such notice. At a minimum, those pieces of legislation should be amended to provide that notice of forfeiture proceedings must be given to any person who appears to have a valid interest in the relevant property.

Conclusion

As the focus of penal law enforcement efforts expands to include property, it becomes increasingly important to understand as many aspects as possible of the relationship between penal law and property rights. To date, discussion of this issue has focussed on the impact of forfeiture legislation on the property rights of offenders and suspected offenders. It is now clear, however, that, at least under Canadian law, forfeiture can also interfere with the property rights of third parties. The purpose of this article has been to identify the circumstances in which this sort of interference might occur and to analyze if and when it should be tolerated.

To a certain extent, these issues can and should be resolved by adapting and extending familiar legal concepts—such as fair notice, the imposition of fines in lieu of forfeiture, and the defences of good faith purchaser for value and change in position—to fit the present context. Some situations will admittedly, however, involve conflicting policy considerations. While the analysis set out above does not provide

¹⁶¹ See *ibid.*, ss. 462.42(1), 490.5(1) (third parties must apply for relief from forfeiture within 30 days of the forfeiture); *ibid.*, s. 83.14(10) (third parties who did not receive notice of an order to forfeit an instrument of terrorism or property owned or controlled by a terrorist group can only apply for relief within 60 days); *Fines and Forfeitures Act*, *supra* note 98, s. 6(2) (application by claimant of an interest in forfeited property must be made within 60 days of the date of forfeiture).

¹⁶² *Escheats Act*, *supra* note 99.

¹⁶³ For an illustration of this point, see *Re Norris*, [2001] 1 W.L.R. 1388, [2001] 3 All E.R. 961, 2001 UKHL 34.

any definite answer to the question of how situations of conflicting policy ought to be resolved, it does emphasize the importance of providing legal clarity (whatever the substantive law may be) in order to avoid the overriding undesirable effects of legal uncertainty.
