# British Columbia's Guardian Angels… Straight from Hell? BC's Civil Forfeiture Act Case

Recently, the Supreme Court of British Columbia ruled that certain provisions of BC's *Civil Forfeiture Act*,[1] which allows the BC government to seize property allegedly "tainted" by crime, were an unconstitutional overreach of the province's legislative authority.[2] The twist? The constitutional challenge was brought forth by the BC chapter of the Hells Angels. Hells Angels spokesperson Rick Ciarniello acknowledged the irony of the situation, noting that they were probably the wrong people to challenge the law, but they were the ones who had the resources and the wherewithal to do it.[3] Ciarniello also pointed out the importance of fighting this law, as it was not only the interests of the Hells Angels that were being affected, but those of all British Columbians.[4]

**BC's Civil Forfeiture Office was trying to seize three Hells Angels clubhouses**

In late 2007, British Columbia's Civil Forfeiture Office launched proceedings against the Hells Angels to seize their Nanaimo clubhouse. In 2012, they launched proceedings to seize their Vancouver and Kelowna clubhouses.[5] The *Civil Forfeiture Act* ("*CFA*" or "the Act") grants the director of the Civil Forfeiture Office the power to seize property that is an "instrument of unlawful activity," and to determine how it is to be redistributed.[6] The Act defines an instrument of unlawful activity as property that has been used in the past to engage in unlawful activity,[7] or property that is likely to be used in the future to engage in unlawful activity.[8] The clubhouses had been used in the past for three cocaine and methamphetamine deals.[9] The director of the Civil Forfeiture Office claimed that the clubhouses would be used for crime in the future because the Hells Angels had used them for crime in the past.[10] The director abandoned the "past use" claim in August of 2015, making the forfeiture case solely about the likelihood that the clubhouses would be used in the future for unlawful activity.[11] While the director was no longer using the past use claim in seeking to seize the property, the Hells Angels still challenged the "past use" provision's constitutionality.[12] Ultimately, the judge determined that the director was unable to prove the clubhouses or their contents were likely to be used in the future for unlawful activity.[13] Therefore, the clubhouses could not be seized and were to be returned to the Hells Angels.[14] However, that is not where this case ends. In addition to their challenge of the order to forfeit their clubhouses, the Hells Angels also challenged the constitutionality of the very Act that gave the director of the Civil Forfeiture Office the power to seize their clubhouses; the *CFA's* "past use" and "future use" provisions.

**The *Civil Forfeiture Act* has been criticized as being an overreach of power**

Concerns have been raised alleging that the *CFA* gives the Civil Forfeiture Office sweeping powers.[15] Initially, the Civil Forfeiture Office was established to fight organized crime, but

an investigation by *The Globe and Mail* determined that the Office was affecting more than just those involved in organized crime.[16] The Hells Angels claimed it was important for them to challenge the constitutionality of the *CFA* in the interest of other British Columbians who were being taken advantage of by allegedly unconstitutional legislation.[17]

British Columbia introduced a procedure called "administrative forfeiture" in 2011 which makes it easier for the government to seize property with a value under $75,000 if authorities believe it to be a product of unlawful activity.[18] Civil forfeiture cases do not require criminal charges or conviction.[19] It is the responsibility of the individual seeking to keep their property to challenge the forfeiture order and justify why they should keep their property. This is the reverse of a criminal proceeding where the government has the responsibility to prove why an individual should be convicted.[20] Jay Solomon, a Vancouver lawyer who has handled civil forfeiture cases, argued that the administrative forfeiture process should not exist, and that the seizure of allegedly "tainted" property should go through the courts automatically.[21] This is arguably supported by the moral thrust of the *Canadian Charter of Rights and Freedoms*, which grants individuals a right to be presumed innocent of a crime until proven guilty by the state.[22] In civil forfeiture proceedings, by contrast, it is the suspect who must prove why their property should not be seized. In this sense, they are essentially presumed "guilty" unless they prove otherwise (although the consequences of a failure to rebut this presumption differ from the full consequences of criminal conviction).

When commencing an administrative forfeiture case, the Civil Forfeiture Office must notify the owner of the property by mail, or by publication of a notice in the newspaper. If the property owner does not respond within approximately two months, the property is seized. If the owner contests the seizure within two months, the case will go to court.[23]

However, challenging a forfeiture case in court can be extremely expensive. Often, the value of the seized property will be less than the legal costs, leading many people to simply walk away.[24] Those with limited means who are unable to qualify for legal aid cannot afford to fight forfeiture.[25] Morgan Fane, another Vancouver lawyer who has worked on civil forfeiture cases, has stated that "(u)nless you're somebody who wants to fight this thing on principle, the economic answer is usually just, 'Forget it.' Regardless of any injustices involved, it's not worth your time."[26] As it turns out, for the Hells Angels, it ended up being well worth their time.

**The Court had to determine whether the provisions fit under provincial or federal legislative jurisdiction**

In the case of *BC v Angels Acres Recreations and Festival Property*, the Hells Angels challenged the constitutionality of the "instrument of unlawful activity" provisions of the *Civil Forfeiture Act*.[27] More specifically, they challenged the "past use" and "future use" provisions.[28] They claimed that those provisions were outside of the province of British Columbia's legislative jurisdiction.[29]

In Canadian constitutional law, "federalism" is the term used to describe the federal and provincial governments' division of powers. Both levels of government have areas of "legislative jurisdiction" within which they (for the most part)[30] have to operate. The matters about which the federal and provincial governments can legislate (or their "heads of power") are assigned by the *Constitution Act, 1867*.[31] For example, provinces have jurisdiction over the operation of hospitals within their territorial boundaries,[32] whereas the federal government has jurisdiction over the postal service.[33] That's why we have Alberta Health Services and the Canada Post!

If a government legislates outside its assigned jurisdiction, then the piece of legislation can be found to be "*ultra vires*" (Latin for "beyond the powers") and unconstitutional. If a government legislates within its legislative jurisdiction, then the legislation is found to be "*intra vires*" (Latin for "within the powers").

In order to determine if the past and future use provisions of the *Civil Forfeiture Act* were within or beyond the legislative jurisdiction of the government of British Columbia, the Supreme Court of BC had to engage in a federalism analysis. When undertaking such an analysis, a court first needs to establish what the law's true "character" is. This is done using a pith and substance approach.[34]

Writing for the BC Supreme Court, Justice Davies concluded that the purpose of the Act was to take profit out of unlawful activity, to prevent the usage of property to unlawfully obtain wealth or cause bodily harm, to compensate victims of crime, and to fund crime prevention programs.[35] He also concluded that the practical effects of the Act were to deter the commission of crime by taking the profit out of it.[36]

Once the true character of the Act is determined, the Court must then determine under which head of power it fits. The two heads of power relevant to the Hells Angels case are the provincial jurisdiction over "property and civil rights"[37] and the federal jurisdiction over "criminal law and procedure in criminal matters."[38] Whether the past and future use provisions are constitutional or not depends on which head of power applies. If the Court finds the provisions fit under the "property and civil rights" head of power, then the provisions would be within the province's jurisdiction. If the provisions fit under the "criminal law" head of power, then they would extend beyond the province's jurisdiction.

**The "past use" provision was found to be within the province's legislative jurisdiction**

Justice Davies determined the past use provision not to be "in essence" a criminal law; therefore, it fit within the province's legislative jurisdiction.[39] Essentially, provinces are allowed to create civil consequences for criminal actions as long as it is done within the proper jurisdiction and does not impede the *Criminal Code*'s functioning.[40] As noted above, the purpose of the provision is to take the profit out of crime, to compensate victims, and to prevent the use of property to unlawfully acquire wealth.[41] While there is a "punitive" aspect to the forfeiture of property, the Supreme Court of Canada previously noted that there will inevitably be overlap in measures used to prevent crime.[42] In the

*Chatterjee* case, the Supreme Court found that the Ontario *Civil Remedies Act* had been enacted "in relation to" property and civil rights, while only incidentally affecting criminal law and procedure without violating the division of powers.[43] The forfeiture of property tainted by a past unlawful act is sufficiently connected to the province's ability to legislate in relation to property.[44] Therefore, the past use provision was within British Columbia's legislative jurisdiction.

**The "future use" provision was found to be beyond the province's legislative jurisdiction**

In contrast, the Court found the future use provision to be unconstitutional as it intruded into the federal government's exclusive jurisdiction over criminal law.[45] The future use provision was found to be "in essence" a criminal law.[46] The dominant purpose of the future use provision is the creation of a new offence that punishes individuals based on their likelihood of committing a crime. The new offence accomplishes this by imposing the penalty of property forfeiture, either by itself or in addition to a criminal penalty already imposed on an offender.[47] Unlike the past use provision, the future use provision does not require a link between an already committed criminal act and the property in question, but is solely based on the apparent likelihood that an individual will commit a crime.[48] In this sense, the property taken would not truly be "tainted" by crime, but would rather be "tainted" by association on the basis of an individual's predicted criminality.[49]

The future use provision substantially intrudes into criminal law matters by *re-penalizing* criminal acts that have already been punished.[50] To illustrate this, Justice Davies uses the example of an individual previously convicted of dangerous driving, who then purchases a new vehicle; that vehicle could be seized due to the likelihood of the individual using the vehicle to commit a future unlawful act (in other words, future dangerous driving).[51] The provision allows for an individual who has already been punished under criminal law to be punished again even if they have not committed another crime.

**Conclusion**

The ultimate decision delivered by the Supreme Court of British Columbia did not comment on whether the *Civil Forfeiture Act* is a good law or not. Concerns with the Act, such as the cost of fighting forfeiture orders, and the onus of proof falling to individuals instead of the government, were not deciding factors here. Simply put, the province created a law that intruded into the federal government's jurisdiction, and that is the reason it is unconstitutional. Perhaps this decision will act as encouragement for other provinces to look at the constitutionality of their own civil forfeiture programs. Concerns have been raised about the civil forfeiture programs of other provinces,[52] so it may not be surprising to see an argument similar to the one advanced by the Hells Angels raised in those provinces. If the BC case is appealed, it will be interesting to see what the British Columbia Court of Appeal may say about the *Civil Forfeiture Act*. In the meantime, it appears that the Hells Angels struck a win for British Columbians against questionable civil forfeiture legislation.

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

[2] *British Columbia (Director of Civil Forfeiture) v Angels Acres Recreation and Festival Property Ltd*, 2020 BCSC 880 .

[3] Mike Hagar, "BC Supreme Court strikes down Civil Forfeiture Act provisions in Hells Angels case", (14 June, 2020), *The Globe and Mail* online: <https://www.theglobeandmail.com/canada/british-columbia/article-bc-supreme-court-strikes-down-civil-forfeiture-act-provision-in/> at paras 4-5 [Hagar].

[4] *Ibid*.

[5] *Ibid* at para 7.

[6] *Civil Forfeiture Act*, *supra* note 1 ss 3(2), 22(2), 22(3).

[7] *Ibid*, s 1(1)(a).

[8] *Ibid*, s 1(1)(b).

[9] Hagar, *supra* note 3 at para 6.

[10] *Angels Acres*, *supra* note 2 at para 57.

[11] *Ibid* at para 17.

[12] *Ibid*.

[13] *Ibid* at paras 1320-1321.

[14] *Ibid* at para 1323.

[15] Hagar, *supra* note 3 at para 1.

[16] Sunny Dhillon, "It's easy – perhaps too easy – for BC authorities to seize property worth less than $70,000", (30 January, 2014), *The Globe and Mail* online: < https://www.theglobeandmail.com/news/british-columbia/its-easy-perhaps-too-easy-for-bc-authorities-to-seize-property-worth-less-than-75000/article16601751/> at para 5 [Dhillon].

[17] Hagar, *supra* note 3 at paras 4-5.

[18] Dhillon, *supra* note 16 at para 6.

[19] *Ibid*.

[20] *Ibid* at para 20.

[21] *Ibid* at para 21.

[22] *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being schedule B to the *Canada Act 1982* (UK), c 11, s 11(d).

[23] Dhillon, *supra* note 16 at para 9; see also British Columbia, Civil Forfeiture Office, *Administrative Forfeiture*, (British Columbia: Civil Forfeiture Office) <https://www2.gov.bc.ca/gov/content/safety/crime-prevention/civil-forfeiture-office/administrative> accessed 29 July 2020.

[24] Dhillon, *supra* note 16 at para 10.

[25] Hagar, *supra* note 3 at para 8.

[26] Dhillon, *supra* note 16 at para 11.

[27] *Angels Acres*, *supra* note 2 at para 1324.

[28] *Ibid* at para 1327.

[29] *Ibid* at para 1324.

[30] For a more detailed discussion about the federal and provincial government being able to legislate outside of their legislative jurisdiction, see the Ley Terms on Co-operative Federalism and Watertight Compartments.

[31] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5, s 91, 92 .

[32] *Ibid*, s 92(7).

[33] *Ibid*, s 91(5).

[34] For a more detailed discussion about the pith and substance approach, see the Key Term on pith and substance.

[35] *British Columbia (Director of Civil Forfeiture) v Onn*, 2009 BCCA 402; cited in *Angels Acres*, *supra* note 2 at para 743; see also *R v Wolff*, 2012 BCCA 473 at paras 15-16.

[36] *Angels Acres*, *supra* note 2 at para 1398.

[37] *CA 1867*, *supra* note 31 s 92(13).

[38] *Angels Acres*, *supra* note 2 at para 1385; *CA 1867*, *supra* note 31 s 91(27).

[39] *Angels Acres*, *supra* note 2 at para 1413.

[40] *Chatterjee v Ontario (Attorney General)* , 2009 SCC 19 at para 40; cited in *Ibid* at para 1407.

[41] *Angels Acres*, *supra* note 2 at para 1415.

[42] *Chatterjee*, *supra* note 40 at para 24; cited in *Ibid* at para 1417.

[43] *Chatterjee*, *supra* note 40 at para 30; cited in *Ibid* at para 1417; see also Adam Badari,

"Chatterjee v. Ontario (Attorney General): Provincial Law on Proceeds of Crime (2009)", *Centre for Constitutional Studies* (12 May, 2009), online: <https://www.constitutionalstudies.ca/2009/05/chatterjee-v-ontario-attorney-general-provincial-law-on-proceeds-of-crime-2009/>.

[44] *Angels Acres*, *supra* note 2 at para 1419.

[45] *Ibid* at para 1499.

[46] *Ibid* at para 1466.

[47] *Ibid* at para 1471.

[48] *Ibid* at paras 1482-1485.

[49] *Ibid* at paras 1490-1492.

[50] *Ibid* at para 1497.

[51] *Ibid* at para 1494.

[52] See Sunny Dhillon, "BC, Ontario civil-forfeiture programs get failing grades, report says", (7 March, 2016), *The Globe and Mail* online: <https://www.theglobeandmail.com/news/british-columbia/bc-ontario-civil-forfeiture-programs-get-a-failing-grade-report-says/article29067454/>.