

## PART I: OVERVIEW AND STATEMENT OF FACTS

### Overview

1. The issue on this Appeal is whether the impugned provisions of the *Remedies for Organized Crime and Other Unlawful Activities, 2001*<sup>1</sup>, (“CRA”) are *intra vires* the Province of Ontario, pursuant to its jurisdiction over property and civil rights under s. 92(13) of the *Constitution Act, 1867*<sup>2</sup>, the administration of justice under s. 92(14), or matters of a merely local or private nature under s. 92(16). Ontario concedes that the CRA has federal criminal law aspects, but says that it is valid under the double aspect doctrine.<sup>3</sup> Canada agrees with Ontario, and says that the existence of two schemes for the forfeiture of the proceeds derived from the commission of federal offences is an example of “Cooperative Federalism in Process”.<sup>4</sup> The British Columbia Civil Liberties Association (“BCCLA”) disagrees, and says that the positions of the governments may be popular, but are not legally correct. The Constitution, not political expediency, must govern in an analysis of this kind. For the reasons set out below, the BCCLA says that the Ontario scheme is *ultra vires* because it is in pith and substance fundamentally an exercise of the federal criminal law power under s. 91(27).

2. A comment must be made about the special nature of the s. 91(27) power. Unlike environmental matters or health regulation, the criminal law power contains the most coercive statutory provisions in our law. The BCCLA says that the Court must be extremely cautious in endorsing alleged “double aspect” legislation that permits the provinces to exercise coercive state powers under the guise of cooperative federalism. The right of Canadians to live under one consistent criminal law regime is an inviolable right that cannot be weakened by the changing political positions of different levels of government. The BCCLA submits that this right is now threatened by provincial civil forfeiture regimes.

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1 *Remedies for Organized Crime and Other Unlawful Activities, 2001*, S.O. 2001, c. 28.

2 *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 33, reprinted in R.S.C. 1985, App. II, No. 5.

3 Factum of the Respondent, at paras. 76 – 80.

4 Factum of the Attorney General of Canada, at paras. 25 – 34.

3. The BCCLA says the following issues are irrelevant to the analysis because they do not determine the uniquely Canadian practice of federalism:

- (a) the right of the Provinces to enact forfeiture schemes under provincial legislation;<sup>5</sup>
- (b) the availability of civil remedies for private parties who are victims of crime; and
- (c) the existence of similar legislation in other western democracies<sup>6</sup>, and of treaty obligations of Canada.<sup>7</sup>

4. The first key question is whether *CRA* forfeiture of the proceeds of unlawful activity, when that activity is defined by reference to an offence under an act of Parliament, constitutes a colourable attempt by Ontario to enact criminal law. The BCCLA says that it is, because the overarching purpose of the *CRA* is to provide a public law response to the criminal activity of individuals. It achieves its purpose by identifying criminal conduct and then attaching the punishment of forfeiture to that conduct. In so doing, the statute operates as criminal law.

5. The other key question is whether the *CRA* is truly legislation with a double aspect. The BCCLA says that it is not. The legislation is not valid under s. 92(13), for the *in rem* nature of the forfeiture mechanism is merely incidental to the *CRA*'s dominant criminal nature. The legislation is too broadly cast to be valid under s. 92(16), and it is not within the confines of the s. 92(14) power. Accordingly, there is no concurrent legitimate provincial interest in the *CRA*.

### **Facts**

6. The BCCLA makes no comments on the facts of the seizure of items from Chatterjee, other than restating the conclusion that the money seized was found to be the proceeds of trafficking in or growing of marijuana.<sup>8</sup> Both are offences under the *Controlled Drugs and Substances Act*,<sup>9</sup> and are designated offences under Part XII.2 of the *Criminal Code*.<sup>10</sup> In

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5 Factum of the Respondent, at para. 66.

6 Factum of the Respondent, at paras. 71 - 72.

7 Factum of the Attorney General of Canada, at para. 27.

8 Reasons of the Court of Appeal, at para. 49.

9 *Controlled Drugs and Substances Act*, S.C. 1996, c.19.

particular, s. 462.37 of the *Criminal Code* would have provided for forfeiture of these monies had Chatterjee been charged and convicted.

## PART II: POSITION ON QUESTION IN ISSUE

7. The constitutional question in issue on this appeal is:

Are ss. 1 to 6 and ss. 16 to 17 of the *CRA ultra vires* the Province of Ontario on the ground that they relate to a subject matter which is within the exclusive jurisdiction of the Parliament of Canada under s. 91(27) of the *Constitution Act, 1867*?

8. The BCCLA says that the constitutional question should be answered “yes” to the extent that the provisions purport to legislate with respect to offences “under an Act of Canada”.

## PART III: ARGUMENT

### The Division of Powers Analysis - Overview

9. In a general sense, a division of powers analysis is of a concern to individuals. As indicated in *Reference re Secession of Quebec*, individuals have an interest in a consistent and principled application of federalism in accordance with the rule of law so there is “a stable, predictable and ordered society in which to conduct their affairs.”<sup>11</sup>

10. The Respondent and the Attorneys General urge the Court to consider the constitutional question in the context of a stated gap in the “war on crime”. The BCCLA says that it is equally important to examine the question through the lens of the civil liberty interests of Canadians. The exclusive federal jurisdiction over the criminal law is not only a constitutional assignment of legislative power but is also a right enjoyed by Canadians. That aspect of the division of powers was recognized by Sir John A. MacDonald, who said:

But under our constitution we shall have one body of criminal law, based on the criminal law of England, and operating equally throughout British America, so that a British American, belonging to what province he may, or going to any other

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<sup>10</sup> *Criminal Code*, R.S.C. 1985, c. C-46 as amended.

<sup>11</sup> *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at para. 70.

part of the Confederation, knows what his rights are in that respect, and what his punishment will be if an offender against the criminal laws of the land.<sup>12</sup>

That right means that Canadians have been, until now, subject to a single criminal law, with uniform substantive, procedural, evidentiary, and sentencing provisions in place nationwide.

11. A federal system which divides governmental power “operates to preclude an excessive concentration of power”, “raises impediments to legislative action” and therefore has “the indirect effect of safeguarding civil liberties”. Individual rights are particularly at issue when provincial legislation invades the exclusive criminal jurisdiction of the Parliament of Canada under s. 91(27) of the *Constitution Act, 1867*. If provincial legislation attempts to suppress the exercise of individual activities (such as “gambling or communism or prostitution”), the legislation may be classified as criminal and rendered invalid, resulting in individuals remaining at liberty to continue such activities. In that sense, the division of governmental powers, especially with regard to the criminal law power, is a right enjoyed by individuals.<sup>13</sup>

12. Canada’s federal system also means that in many instances individuals have the right not to be subject to the same coercive governmental power from two levels of government. In *Di Iorio v. Warden of the Montreal Jail*,<sup>14</sup> Laskin C.J., in dissent, commented that when governmental powers are exercised coercively against individuals, individuals have the protection provided by division of powers insofar as legislation “should be construed as far as possible to preclude both levels of governmental authority from being entitled to converge on an individual for the same purpose and possibly even at the same time”. Section 91(27) of the *Constitution Act, 1867* provides individuals with the right not to be subjected to criminal legislation from both the provinces and the Parliament of Canada.

13. The test for validity of legislation is a two-stage process. First, the court must identify the “dominant characteristic”, “matter”, or “pith and substance” of the legislation. Second, it must classify that essential character by reference to the heads of power in ss. 91 and 92 of the

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12 M. Friedland, *A Century of Criminal Justice: Perspectives on the Development of the Criminal Law* (Toronto: Carswell, 1986) at 48.

13 For this entire paragraph, see Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. supp. loose-leaf (Scarborough, Ont.: Thomson Carswell, 2007) at 5–15 and 34–9 to 34 – 10 [Hogg].

14 *Di Iorio v. Warden of the Montreal Jail*, [1978] 1 S.C.R. 152 at 181-182.

*Constitution Act, 1867*. In the first stage, the court may look at intrinsic and extrinsic evidence, and at the legal and practical effect of the legislation. The first stage analysis must be a clinical legal assessment, without reference to the popularity or support for the legislation, the desire to facilitate cooperative federalism, or the potential for a subject matter to have aspects falling under different heads of power.<sup>15</sup>

### **Stage One: The Pith and Substance of the CRA**

14. The BCCLA submits that the critical characteristics of the *CRA* are that it has a dominant criminal purpose and that it is punitive. The *in rem* form of *CRA* forfeiture is not a critical characteristic.

#### *The Dominant Criminal Purpose of the CRA*

15. The dominant purpose of legislation is a determinative factor in characterizing pith and substance. For the *CRA*, it is clear from the legislative debates that its objects, as stated by the Attorney General of Ontario, are to combat the mischief of crime, promote public safety in Ontario, and pursue wrongdoers.<sup>16</sup> The focus of the Factum of the Respondent indicates that the overarching concern of the *CRA* is to respond to criminal activity.<sup>17</sup>

16. The stated intention of the legislature has been borne out by the reported experience that 73% of all *CRA* cases are drug related.<sup>18</sup> Thus, in practice, the operation and administration of the *CRA* has proven that its essential character is the forfeiture of property obtained as a result of the commission of federal offences. Such evidence of the administration of a statute helps determine the statute's pith and substance.<sup>19</sup>

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15 *Reference Re Firearms Act (Canada)*, [2000] 1 S.C.R. 783, at paras. 15 to 18, and 25 [*Firearms Act Reference*]; *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3 at paras. 25 – 32 [*Canadian Western Bank*].

16 See Factum of the Respondent at paras. 40 and 41 which set out portions of Ontario, Legislative Assembly, Hansard Debates for May 1, 2001 and May 17, 2001.

17 Factum of the Respondent, at paras. 42 to 65.

18 *Civil Forfeiture in Ontario: An Update on the Civil Remedies Act, 2001*, Appellant's Record, Volume X, Tab 40, pp. 1731 – 1733.

19 *R. v. Morgentaler*, [1993] 3 S.C.R. 463 at 485 – 488; Hogg, *supra*, at 15-16 to 15 – 17.

17. Forfeiture has generally been treated as a criminal law, which supports the position that it has a criminal law purpose.<sup>20</sup> There are forfeiture provisions in Part XII.2 in the *Criminal Code* which provide for forfeiture of monies such as those seized from Chatterjee.<sup>21</sup> The procedures and burdens may be different under the *Criminal Code*, but the purpose and effect is identical: forfeiture of the proceeds of drug trafficking or some other act prohibited by a federal statute. These forfeiture provisions are post-conviction and form part of the sentencing proceedings.<sup>22</sup>

#### *The Punitive Nature of the CRA*

18. The *CRA* acts as a penal statute because it extinguishes a person's possessory right to property as a consequence of their criminal wrongdoing. Although there may at times be public policy concerns with enforcing title to the proceeds of crime,<sup>23</sup> it has long been held, in England at least, that the fact of possession gives the possessor a possessory title which is not prejudiced by the fact that the possession was obtained unlawfully. Lightman J., in *Costello v. Chief Constable of Derbyshire*, summarized the law as follows:

The fact of possession of a chattel of itself gives to the possessor a possessory title and the possessor is entitled to rely on such title without reference to the circumstances in which such possession was obtained: his entitlement to do so is not prejudiced by the fact that he obtained such possession unlawfully or under an illegal transaction. His claim can only be defeated by proof of a title superior to his possessory title.<sup>24</sup>

19. As acknowledged by the Attorney General for British Columbia, forfeiture is punishment in some circumstances.<sup>25</sup> When forfeiture is an administrative adjunct to a statute of general application, or it is in addition to a traditional punitive measure in criminal sentencing, it is not a punishment.<sup>26</sup> However, in other instances, when forfeiture forms part of the statutory consequence of unlawful conduct as imposed by a court, it is punishment.<sup>27</sup> Such is the case

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<sup>20</sup> *Firearms Act Reference*, *supra*, at para. 32;

<sup>21</sup> *Criminal Code*, s. 462.37.

<sup>22</sup> See *R. v. Craig*, 2007 BCCA 234 leave to appeal to S.C.C. granted [*Craig*].

<sup>23</sup> *Thomas v. Canada (Attorney General)*, 2006 ABQB 730 at paras. 44 – 48 and 57.

<sup>24</sup> *Costello v. Chief Constable of Derbyshire*, [2001] 3 All E.R. 150 (C.A.) at para. 14.

<sup>25</sup> Factum of the Attorney General for British Columbia, at para. 86.

<sup>26</sup> For example, see *Martineau v. M.N.R.*, [2004] 3 S.C.R. 737 and *R. v. Lavigne*, [2006] 1 S.C.R. 392 [*Lavigne*].

<sup>27</sup> *Craig*, *supra*.

with the *CRA*. It is a court ordered punishment because it extinguishes a person's property rights because of their criminally culpable behaviour.

20. Although the legislation purports to provide for an *in rem* remedy, there is a dominant concern with individual culpability. The legitimate owner defence, found in s. 3 of the *CRA*, is a significant indication that forfeiture is predicated upon the culpable conduct of property owners. If owners are not complicit, they are protected from forfeiture, with the necessary implication that owners who have their property forfeited are culpable. The U.S. Supreme Court, in *Austin v. United States*, recognized that innocent owner defences in civil forfeiture schemes made them "look more like punishment" and reflected a "congressional intent to punish only those involved in drug trafficking."<sup>28</sup>

21. The history of forfeiture in Canada also indicates that it is a punishment. As pointed out by the Attorney General for British Columbia's Factum, English common law provided for civil forfeiture of all personal property upon conviction of any felony, and forfeiture of real property by attainder, following conviction for capital offences. In Canada, forfeiture by attainder (along with deodands) was classified as a punishment when abolished under the *Criminal Code*.<sup>29</sup>

*The In Rem qualities of the CRA are Insignificant*

22. The Respondent and the government interveners rely considerably on the *in rem* nature of *CRA* forfeiture. The BCCLA says that such *in rem* aspects are not significant, and merely represent the form of the legislation. Form does not determine a statute's essential character.<sup>30</sup>

23. The legislation itself provides for a process where the court must find, on the basis of evidence presented, that there was conduct contrary to a federal statute and that property was acquired as a result of that unlawful conduct. The *CRA* speaks passively, camouflaging the fact that the forfeiture requires proof of the commission of a crime by a person, and proof of a

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<sup>28</sup> *Austin v. United States*, 509 U.S. 602, 125 L.Ed. 2d 488 at 504 (U.S. 1993).

<sup>29</sup> Factum of the Attorney General for British Columbia, at paras. 25 – 26 and 51 – 53, referring to *Criminal Code*, 1892, ss. 962 – 965 and the *Act respecting Procedure in Criminal Cases and other matters relating to Criminal Law*, S.C. 1868, c. 29, s. 54.

<sup>30</sup> Hogg, *supra*, at 15-20.

consequent acquisition of property by that, or another, person. Thus, although the legislation purports to provide for an *in rem* remedy, it is focused on the conduct of individuals.

24. There is no difference in outcome between the forfeiture scheme under the *Criminal Code* and that under the *CRA*. For the owners of property, there is no difference between *in rem* and *in personam* forfeitures: the owners lose their property, and they suffer the same stigma in their community of being criminally culpable. For the state, there is also no difference: the same property is forfeited.

### **Stage Two: A Criminal Law Power**

25. The second stage of the pith and substance analysis requires the identification of a head of power under which the statute falls. A criminal statute has three characteristics: a prohibited act or omission and a penalty or punishment that is enacted for a true criminal law purpose.<sup>31</sup>

26. The BCCLA says that the *CRA* is entirely criminal law in pith and substance. It has a true criminal law purpose of combating the mischief of criminal activity, promoting safety and pursuing wrongdoers.<sup>32</sup> It prohibits conduct that is defined as unlawful under federal statute. It punishes criminal activity because it extinguishes a person's property rights due to their criminally culpable behaviour. The BCCLA says that the *CRA*'s fundamental criminal nature is of such predominance that any of its other aspects are minor and incidental in comparison.<sup>33</sup>

27. The next question is whether the statute also has concurrent legitimate provincial objectives under ss. 92(13), 92(14), or 92(16) of the *Constitution Act, 1867*. The BCCLA says it does not. The BCCLA says that the fact that the *CRA* mechanism provides for an *in rem* remedy relating to property does not make it in pith and substance a property statute. Under *CRA* forfeiture, the *in rem* remedy with respect to property is purely incidental to the dominant nature of the *CRA*: the exercise of the criminal law power.

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31 *Firearms Act Reference, supra*, at para. 27.

32 *Firearms Act Reference, supra*, at para. 31.

33 *Canadian Western Bank, supra*, at paras. 28 – 31.

28. The *CRA* is a public response to criminal conduct, and is not akin to private restitution. Under the *CRA*, property is forfeited to the Crown, ostensibly on behalf of the public, and then administered by the state. In England there is no common law power for a public authority to bring an action on behalf of the public to seize the proceeds of crime. Stephenson L.J., in *Malone v. Commissioner of Police of the Metropolis*, summarized the law as follows:

The common law can develop in many ways, but I would accept it as clear law that, generally speaking, the right or power to deprive a defendant of his property even for a time, whether in criminal or in civil proceedings, for the purpose of punishing him by forfeiture or compensating the victim of his wrongdoing by any form of restitution, can only be conferred by express and unambiguous statutory provisions.<sup>34</sup>

29. Thus, the private law of restitution, which is not punitive, does not provide assistance in finding jurisdictional competence. The *CRA*, as a state remedy, cannot find its jurisdictional competence in the common law remedy of private restitution.

30. The s. 92(14) administration of justice power gives the provinces the power to administer the criminal law, not to enact it. It is inapplicable in this context.

31. The s. 92(16) local matters power does not apply here either, because it cannot be said that the *CRA* concerns matters of purely local interest. It applies to property obtained by criminal activity anywhere in the world. It is a statute designed to have a worldwide reach.

#### **PART IV: SUBMISSIONS REGARDING COSTS**

32. The BCCLA does not seek costs and asks that it not be subject to any costs order.

#### **PART V: DISPOSITION OF THE ISSUES**

33. The BCCLA requests that it be allowed to make oral argument at the hearing of the Appeal.

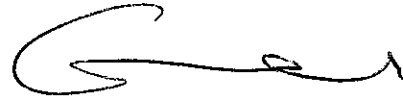
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<sup>34</sup> *Malone v. Commissioner of Police of the Metropolis*, [1979] 1 All E.R. 256 (C.A.) at 264. Also see *Attorney General v. Blake*, [2001] 1 A.C. 268 (H.L.) at 289 and 292 - 293; *R. v. Consolidated Fastfrate Transport Inc.*, [1995] O.J. No. 1855 (C.A.)(QL) at paras. 17 and 91 - 92.

34. The BCCLA submits that the constitutional question should be answered in the affirmative.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Vancouver, British Columbia this 17<sup>th</sup> day of October, 2008.



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DAVID G. BUTCHER  
Counsel for the B.C. Civil Liberties Association



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ANTHONY D. PRICE  
Counsel for the B.C. Civil Liberties Association