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#20 Retreating into Doubt: Tainted Finance, Civil Devices and the Rule of Law >>

M. M. Gallant

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RETREATING INTO DOUBT: TAINTED FINANCE, CIVIL DEVICES AND THE RULE OF LAW

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>> **RESUMO**

Ao confrontar a vertente financeira do crime, os Estados baseiam-se cada vez mais em processos legais de carácter civil, ao invés de penal. Muitas vezes apelidadas de abordagens de base de não-condenação, os dispositivos cíveis facilitam largamente a ofensiva financeira uma vez que operam de acordo com princípios legais convencionais civis, em vez de com normas do direito penal. Assim, visto que o ordenamento jurídico que rege os processos penais é mais exigente do que os processos, os direitos ou os entendimentos probatórios que se aplicam a questões civis, uma ferramenta civil capta mais facilmente as finanças adulteradas do que qualquer outro dispositivo criminal. Baseando-se principalmente na evolução de uma selecção de jurisdições de "common law" (direito comum), em particular o Canadá, este artigo apresenta uma avaliação crítica das ferramentas civis modernas dedicadas ao crime financeiro. A Parte 1 localiza a estratégia civil no contexto do projeto de internacional anti-crime financeiro. A Parte 2 apresenta os atributos centrais dos mecanismos civis. A Parte 3 estabelece os princípios teóricos essenciais da abordagem civil e a Parte 4 examina se os dispositivos civis estão em conformidade com o Estado de Direito. A Parte 5 examina a tributação como uma ferramenta civil.
Palavras-chave: penalização, tributação, evolução do crime, finanças criminosas

>> ABSTRACT

In confronting the financial aspect of crime, states place increasing reliance on civil, in contrast to criminal, legal processes. Sometimes called non-conviction based approaches, civil devices greatly facilitate the assault on finance since they operate in accordance with conventional civil legal principles rather than the norms of the criminal law. Accordingly since the legal ordering governing criminal manners is more exacting that the processes, rights or evidential understandings that apply to civil matters, a civil tool more ably captures tainted finance than any criminal device[*].

Drawing principally on developments in select common law jurisdictions, particularly Canada, this article offers a critical appraisal of modern civil tools aimed at criminal finance. Part 1 locates the civil strategy within the international anti-criminal finance project. Part 2 introduces the central attributes of the civil mechanisms. Part 3 lays out the essential theoretical tenets of the civil approach and Part 4 examines whether civil devices conform to the rule of law. Part 5 examines taxation as a discrete civil tool.
***Keywords**: forfeiture, taxation, proceeds of crime, criminal finance*

[*] This difference animates civil and common-law systems though this discussion draws principally on common-law jurisdictions.

>> 1. TACKLING CRIMINAL FINANCE

Reliance on civil legal processes to recover assets tainted by crime occurs as part of a global project to confront criminal activity, particularly lucrative crime, by attacking its financial underpinnings. The origins lie mainly in American struggles with illegal drugs of the 1970s when police-makers claimed that enormous revenues incapacitated control and sought to through laws aimed specifically at the financial aspects of the drugs trade.[1] This idea of targeting finance migrated into international law to beget a global strategy that while initially drug-centric, swiftly morphed into a generic strategy applicable to financial resources of any crime although illegal drugs, organized crime and, latterly, terrorism, remain of central concern.[2]

The core elements of this finance-centric strategy consist of the criminalization of money laundering, the enhanced regulation of financial activity (anti-money laundering laws) and modern conviction-based forfeiture, or conviction-based confiscation.[3] Anti-money laundering laws make association with the financial part of crime – the money, typically called the criminal proceeds – a criminal offence and permit the detection and interception of criminal wealth. Conviction-based forfeiture laws facilitate the garnishing of tainted wealth post-conviction, whether wealth accrued from drug trafficking, corruption or any serious, or profitable, crime.

The fashioning of civil devices, or civil legal approaches to criminal finance, largely began with the American re-animation of an ancient process known as civil forfeiture, sometimes confusingly identified merely as forfeiture.[4] Criminal forfeiture, or conviction-based forfeiture (sometimes called confiscation) connotes a taking of assets that flows from a criminal conviction. Civil forfeiture signifies a taking that can occur in the presence, or absence, of a criminal conviction.

Anti-money laundering regulation and conviction-based forfeiture form part of international law, part of the broader global project aimed at foreclosing upon criminal wealth. Civil forfeiture, or any other civil legal proceeding, does not. Many international treaties and related instruments speak directly

1 M Gallant, Money Laundering and Proceeds of Crime: Economic Crime and Civil Remedies, 2005, Edward Elgar 1-11;

2 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988; International Convention for the Suppression of the Financing of Terrorism, United Nations, 1999; United Nations Convention Against Transnational Organized Crime, 2000; United Nations Convention Against Corruption, 2003.

3 These developments are ably canvassed in N Ryder, Money Laundering – An Endless Cycle, 2012, Routledge, 8-39.

4 *Supra* note 2, 74-79.

to the criminalization of money laundering, to the monitoring of financial activity and to the post-conviction recovery of criminal finance but there is no specific global agreement that states implement civil devices.[5] However, at the national level, individual states have been quick to embrace the promise of civil tools. South Africa, Ireland and the United Kingdom were some of the first to incorporate civil instruments into modern anti-criminal finance strategies. Australia and Canada endorsed the approach in 2002 and 2001 respectively while other jurisdictions continue to move in this direction.[6] Some states have added taxation to their civil tools, contemplating the taxing of the business of crime.

[5] An influential international actor recently recommended the adoption of civil tools: Financial Action Task Force, International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation: The FATF Recommendations, February 2012, B 4.

[6] See generally, Simon Young, Civil Forfeiture of Criminal Property: Legal Measures for Targeting the Proceeds of Crime, 2009, Edward Elgar. Italy has long had "preventative" justice measures which harken of civil forfeiture; see *Raimondo v Italy* (1994) 18 EHRR 237; *M v Italy* (1991) 70 DR 59.

>> 2. STRUCTURAL ATTRIBUTES OF CIVIL DEVICES

Civil forfeiture legislation is the most common civil device used to catch criminal earnings. Some jurisdictions, notably the United Kingdom, rely on the process of civil recovery while the Canadian province of Alberta relies on restitution and compensation regimes.

The structural features of the civil devices differ, at times fairly significantly, though there are a number of commonalities. The civil mechanisms contemplate the taking of assets for a connection with criminal activity without any need for a prior, or contemporaneous, criminal conviction. No model of a civil approach conditions the taking of assets upon the prior establishment of criminal culpability through a classically criminal law process. Confiscation laws, a core element of global anti-criminal finance strategy, require a conviction for an offence. The fact that the civil devices do not underscores their precise relevance to the taking of tainted assets – the procedural and substantive rights, much more generous in the context of a criminal prosecutions, simply do not apply to civil legal process. As a rule, this makes it easier to secure a taking as assets through reliance on a civil tool than reliance on a criminal process.

Canadian civil models, which began to arrive in 2001, reflect other national civil legal regimes though they show some legislative excess. As a federal state, most civil approaches to criminal finance have been implemented under provincial, as opposed to federal, law.[7] A federal forfeiture model was also adopted largely as a consequence of September 11, 2001.[8] Canada has not, as yet, incorporated any reliance on taxation.

Provincial law, with the exception of Alberta, relies specifically on forfeiture. Alberta law contemplates the restraint of property that subsequently may be the subject of a property disposal order.[9] Other regimes afford the seizure, restraint and subsequent forfeiture, as opposed to disposal, to the state. There is no obviously significant way in which Alberta's disposal process differs from a forfeiture process. The same appears true of the Uni-

7 Civil Forfeiture Act [British Columbia], 2005; Victims Restitution and Compensation Payment Act [Alberta], 2001; Seizure of Criminal Property Act [Saskatchewan], 2005; Criminal Property Forfeiture Act [Manitoba], 2004; Civil Remedies Act [Ontario], 2001; Act Respecting the Forfeiture, Administration and Appropriation of Proceeds and Instruments of Unlawful Activity [Quebec], 2007; Civil Forfeiture Act [New Brunswick], 2010; Civil Forfeiture Act [Nova Scotia], 2007.

8 Proceeds of Crime (Money Laundering) and Terrorist Financing Act SC 2001.

9 Victims Restitution and Compensation Payment Act [Alberta], 2001 s 9 & 10.

ted Kingdom's reliance on civil recovery orders as opposed to forfeiture.[10] Rather, the remarkable quality of any civil legal regime is the unshackling of the taking of property tainted by association with the crime from any prosecutorial process.

The provincial models create two legal actions, one of which is common to most civil regimes, the other of which is not: an action to forfeit the proceeds of crime: an action to forfeit the instruments of crime.[11] "Proceeds of crime" has become a popular international mantra and is commonly defined as referring to any property derived directly or indirectly from a criminal offence.[12] Much of the initiative against criminal finance is often characterized as the pursuit of the proceeds of crime. Under the provincial models, the proceeds of crime liable to forfeiture include any property derived from any criminal offence acknowledged under Canadian federal or provincial law.[13] The former comprise classically criminal offences as defined by federal criminal law; the latter are usually described as regulatory, or quasi-criminal, offences, typically creatures of provincial law.

Most states embarking on this civil legal route enable the civil taking of the proceeds of crime although the scope may be framed slightly differently. The United Kingdom regime permits the civil recovery of property obtained through unlawful conduct;[14] Irish and South African law acknowledge the seizure of criminal proceeds.[15] Invariably, this action contemplates the removal of assets – whether real or personal property – derived from crime, representing the ability to seize and divest the revenues, the business profits, of illegal activity.

Provincial law permits a second civil taking of property tainted by crime, the forfeiture of the instruments of crime.[16] This type of action proves less common. Neither United Kingdom nor Irish legislation entertains this concept of a property taking whereas South African and American law does.[17]

Instruments provisions, also called instrumentalities provisions, permit the taking of assets that facilitate, or are otherwise linked to crime, short of the assets constituting the proceeds of crime. The province of Ontario's civil

10 Proceeds of Crime Act 2002 (UK) Part 5.
11 See Criminal Property Forfeiture Act [Manitoba] 2004 s 3.
12 International conventions establishing the global anti-criminal framework draw on this language: see, for example, United Nations Convention against Transnational Organized Crime, art 2 e.
13 Criminal Property Forfeiture Act [Manitoba] 2004 s 1.
14 Proceeds of Crime Act (UK) 2002 s 240 and 241.
15 Proceeds of Crime Act (Ireland) 1996 s 1, 2 & 4; Prevention of Organized Crime Act (South Africa) 1998 s 1 & chapter 6.
16 Civil Remedies Act [Ontario] 2001 s 7(1). The exception is antiquated notions of civil forfeiture that continue to be scattered throughout common-law jurisdictions.
17 Prevention of Organized Crime Act [SA] 1998 chapter 6 Part 2 & 3; 18 USC SS 981.

regime countenances the forfeiture of an instrument of unlawful activity, broadly defined as any property used to engage in illegal activity, or likely to be used to engage in illegal activity.[18] Unlike a civil process aimed at revenues, or proceeds of crime, the instrument provision can reach a car used in the transport of drugs or real property used in the cultivation of illegal drugs.[19] At times, these provisions have been defined to cover the forfeiture of property upon which sexual offences occur.[20] Unlike proceeds, instruments are not revenues, business profits or some other reflection of criminal prosperity. Their liability to be taken hinges on their role in facilitating crime.

Other salient shared attributes of civil regulatory mechanisms include the ability to seize and hold proceeds of crime or the instruments of crime pending commencement of a civil process.[21] These prevent any pre-trial dilution of assets, fettering the ability to remove property from a jurisdiction so to diminish the impact of any civil process.

Although the incorporation of civil strategies presumes, by its language, a civil orientation, many laws implementing this initiative speak directly to the standard of proof applicable in the forfeiture process.[22] These identify the civil standard of proof, typically expressed as a balance of probabilities, as the standard that governs the action. This is somewhat curious since the standard of proof, or any other trappings of a particular mode of trial, whether civil or criminal, usually remain unstated. A regime that directs civil entitlements or functions in a civil context would be governed by the norms applicable to any civil justice process.

Apart from the civil taking of the proceeds or the instruments of crime, a related dimension of non-conviction based regimes includes laws that permit the forfeiture of property for a failure to comply with declaratory export and import laws. Arising largely post-September 2001 and forming an integral part of anti-money laundering regulation, a failure to declare the import or export of certain monetary instruments entails the immediate forfeiture of that property.[23] Canadian federal law requires that the importation or expor-

18 Civil Remedies Act 2001 s 7(1).

19 British Columbia (Director of Civil Forfeiture) v Angel Acres Recreation and Festival Property Ltd (2007) BCJ No 2475; [2009] BCCA 124; [2010] BCCA 539; Sports Car Seizure a Deep Reversal of Important Rights, CTV News, 8 September 2011; available from: http://bc.ctvnews.ca/sports-car-seizures-a-deep-reversal-of-important-rights-1.694558

20 Lawsuit over Man. house spurs rights concern, 30 December 2010, CBC news; available from: http://www.cbc.ca/news/canada/manitoba/story/2010/12/30/mb-skavinsky-civil-claim-reaction.html.

21 All civil regimes contain some form of pre-trial seizure device: Proceeds of Crime Act (IR) 1996 s 2; Civil Forfeiture Act [NB] 2010 s 13.

22 Proceeds of Crime Act (UK) 2002 s 241; Victims Restitution and Compensation Payments Act [AL] 2001 s 51.

23 Proceeds of Crime (Money Laundering) and Terrorist Financing Act 2000 s 18.

tation of any currency or financial instruments exceeding a threshold amount be reported to Canadian customs official.[24] A failure to file the declaration results in immediate seizure of the instruments. The property may be returned upon payment of a penalty unless the customs officer has reasonable grounds to believe that the property constitutes the proceeds of crime or funds for use in terrorism in the property is immediately forfeit.[25] While not generally referred to as a civil forfeiture, this taking happens in the absence of any criminal conviction for any offence related to the property. In this respect, these provisions mimic civil forfeiture.

[24] Ibid. s 12. Current threshold is $10,000: Cross-border Currency and Monetary Instruments Reporting Regulations, SOR/2002-412 s 3.
[25] Ibid s 18(2).

>> 3. THEORETICAL UNDERPINNINGS

Use of civil devices is usually rationalized by the need for new tools to deal with the business of crime. Typically this rational aligns with the problem of organized crime and the related, and sometimes unrelated, concern with criminal profits, with the perils of tainted finance, with the corrosive influence of wealth, with acquisitive crime. Civil devices make sense since they facilitate the actual taking or forfeiture of property. They offer a degree of efficiency that criminal instruments – encumbered by the weighty exigencies of the prosecutorial process – do not.

Efficiency justifications are not particularly persuasive. A police state untrammeled by any rule of law may be equally efficient. The more compelling case for the civil devices are the underpinnings of civil justice, as opposed to criminal justice, systems. For the discrete tool of forfeiture, advocates equally appeal to history. These considerations inform the analysis of whether modern civil anti-criminal finance tools conform to the rule of law.

3.1 Of Civil Proceedings

The use of civil proceedings, broadly conceived and quite apart from any new tools, targets tainted finance. An aggrieved investor, deprived of financial interests through some species of fraud, can bring a civil action to recovery lost earnings. An action for fraud involving deceit in financial dealings resembles a modern forfeiture action, a civil proceeding brought to claim property wrongfully taken.[26] A victim of theft can bring a civil action to recover their property. In the hands of the thief, that property is tainted property. There is no legal impediment to the victims of drug use, or victims of drug violence, seeking to recover compensation from a drugs dealer. In the context of regulated, in contrast to prohibited, drugs, civil actions, particularly class actions remove the profits of drug sales from corporations whose actions are tainted by some regulatory failing. If the state, or a state entity, is the victim of crime, it can bring a civil action to recover its losses. Fraud on a public health care system creates civil liability to repayment.

Remedies and the provision of some form of compensation, form the bedrock of civil justice system. Allegations of criminal wrongdoing, in con-

[26] Civil forfeiture law supplements, or supplants, securities regulation: see Director of Civil Forfeiture v Doe [2010] BCSC 1784; 661946 BC Ltd (Wellspring Capital Group Ltd) 2009 BCSCCCOM 141.

trast to civil wrongs, can underpin a civil action. Modern civil tools aimed at tainted finance merely assist in the latent capacity of civil justice system to redress wrongdoing, to remedy an injustice, a wrongful, in this case unlawful, appropriate of wealth. Broadly conceived, enabling recovery of proceeds tainted by crime through civil legal mechanism accords with the traditional ends and functions of a civil justice apparatus.

3.2 Of Civil Forfeiture

As a popular vehicle through which to implement the civil strategy, civil forfeiture laws long pre-date modern anti-criminal finance initiatives. Most tie the earliest origins of forfeiture to the biblical phrase: "when an ox gore a man, the ox was forfeit…"[27] The consequences of the death, the goring, lay with the instrument of death, the ox, thus it was liable to forfeiture while no liability settled upon the ox's owner. Forfeiture, and a related doctrine known as deodands, refers loosely to this separation of liability, the fact that an object could be culpable and thereby liable to forfeiture for its wrongdoing.[28] Another version of forfeiture occurs in customs and admiralty law. Ships involved in wrongful actions on the high seas could be seized and liable to forfeiture when they arrived at a port. Goods wrongfully exported or imported have long been liable to forfeiture under customs law.[29]

In the biblical sense, and in admiralty and customs law, liability attached to the things themselves, to the property involved in the wrongful activity. Often called the "guilty property fiction," forfeiture classically affixes liability to objects, to property, without assigning any responsibility to a property owner.

Modern iterations of forfeiture share little in common with their historical forbears. Forfeiture continues, unlike other civil proceedings, to affix to things, to property, rather than individuals. Named defendants to modern forfeiture are usually the subject property, the bank accounts, the bundles of cash or the real estate seized as proceeds of crime. Yet these modern regimes are broad, reaching all manner of property including, under Canadian law, the instruments of crime. Arguably an appeal to history – the idea that states have long had acknowledged the practice of civil forfeiture – as the justification for a wide array of contemporary new tools is misconceived. Rule of law consi-

[27] Exodus 21:28.
[28] L Levy, A License to Steal: The Forfeiture of Property (University of North Carolina Press, 1996) at 7-20.
[29] Supra note 2 p 57-74.

derations governing the interpretation of an uncommon process, to a peculiar strand of ancient forfeiture law, retain little cogency when applied to newly forged instruments, to expansive civil tools designed to confront the contemporary problem of inordinate criminal wealth. American law proves beholden, to a pronounced degree, to historical constructions of civil forfeiture.[30]

[30] See lengthy and confusing attempts to mesh new forfeiture law with the old in *United States v James Daniel Good Property* [1993] 510 US 43.

>> 4 CIVIL APPROACHES AND THE RULE OF LAW

Adoption of the civil strategy represents perhaps one of the most profound legal developments of the past century in regards to crime control. Through the implementation of civil regimes, states acquire an unprecedented ability to sue and recover assets linked to crime. A blanket capacity to secure entitlement to assets that, on a balance of probabilities, are tainted by crime confers extraordinary power. It is true that some version of forfeiture has long formed part of common-law traditions. It is true that the victims of crime, and sometimes the state, can avail of a civil action to recover property linked to crime. Neither of these truisms captures the enormous potential of modern civil mechanisms. In the context of any type of crime having some property-based link, civil devices completely free the state from the constraints of the criminal process. Crime need no longer be proven, in any conventional criminal process, prior to securing public entitlement to any related property.

The pragmatic appeal of profound legislative developments must conform to the rule of law. The collapsing of the chase for criminal finance into a system of civil ordering proves resistant to certain challenges to its legitimacy while gently constrained by others.

4.1 Civil or Criminal Actions

The convergence of civil regulation and criminal finance prompts challenges to the proper character of civil models for the purpose of constitutional or rights-based norms. Regulation formally shaped as civil regulation may, on analysis, prove to be substantively criminal regulation and thereby, despite its formal character, attract any constitutional or rights-based constraints applicable in criminal matters. Amongst others, these would include the right to be presumed innocent and that any attribution of responsibility be suspended upon proven beyond a reasonable doubt or to some other enhanced standard of proof in contrast to standards that govern in civil matters.

In the main, the claim that civil forfeiture devices are criminal devices garbed in civil clothing has been rejected. The Canadian Supreme Court, in deciding whether, as a matter of constitutional authority, the provincial civil forfeiture regimes fell within federal jurisdiction over the criminal law,

determined that inquiry in the negative.[31] The civil tools were properly characterized as civil devices not incidents of the criminal law. Other jurisdictions have researched similar conclusions in the context of whether human rights applicable in criminal matters apply in the civil taking of tainted assets.[32] As instruments of civil justice, in contrast to tools of criminal justice, the civil taking of assets need only conform to the lighter rule of law demands of civil processes.

4.2 Proportionality and Civil Devices

Proportionality is a constant of all legal systems although it assumes a variety of different forms. Constitutionally entrenched property rights can usually only be trimmed or displaced by overriding public interests, the displacement necessarily proportionate to the underlying objective. Canadian constitutional law subjects certain legal rights to a proportionality assessment, permitting the abrogation of rights if justifiable in a free and democratic society. In a conventional civil action, an award of damages, or some other remedy, constitutes a proportionate response to the underlying wrongdoing. A victim of fraud seeks to recover financial losses caused by that fraud. The remedy, an award of damages, is commensurate with that loss.

Civil forfeiture is typically thought proportionate given the tenet that the assets taken reflect the assets gained by crime. Proportionality exists between the alleged wrong – the illegal money earned – and the taking.[33] When the taking proves excessive, potentially touching on the rights of innocent property owners, the common interest in crime control, in tackling criminal finance, trumps private legal rights.[34]

There has been limited recognition of a proportionality constraint on civil regulation of tainted finance. Civil regulation is subject to the excessive fines of the US constitution.[35] This requires some proportionate relationship between scope of assets liable to forfeiture and the underlying criminal activities. A mere criminal taint, some modest association between property and crime would not suffice to justify the taking – it would be "excessive".

[31] *Chatterjee v Ontario (Attorney General)* [2009] 1 SCC 624.
[32] *Murphy v GM, PB, PC Ltd, GH, Gilligan v CAB* [2001] 4 IR 113; *Gale and another v Serious Organized Crime Agency* [2011] UKSC 49; *United States v Ursery* [1996] 518 US 267.
[33] D Osgood (1995) 'Crime and Punishment and Punishment: Civil Forfeiture, Double Jeopardy and the War on Drugs' 71 Washington Law Review 489.
[34] *Gilligan v CAB* [1998] 3 IR 185, 237.
[35] *Austin v United States* [1993] 509 US 602.

Some civil regimes have a proportionality component built-in. Under the United Kingdom structure access to the civil process is triggered when the tainted assets exceeds a minimum threshold.[36] In theory, this serves to tailor the civil mechanism to the particular kind of crime, or scale of criminal activity, that underpins the anti-criminal finance strategy – lucrative crime, rather than petty acquisitions, spawned the new approach. Proportionality also features under the rubric of a statutory "interests of justice" test in which the precise scope of the taking lies in the discretion of a court.[37] This yields some relief, in substance reflective of the US injunction against excessive fines.[38]

4.3 The Interaction of Civil Processes and Criminal Proceedings

Allegations of criminal activity, the source of any property liable to seizure, attract criminal prosecutions. The availability of civil mechanisms, particularly given the existence of criminal confiscation legislation, for securing title to tainted wealth invite obvious questions of the inherent fairness of simultaneous, or consecutive, civil and criminal actions evoked by the same set of circumstances.

Despite the failure to secure any constitutional, or rights-based guarantees, applicable to criminal proceedings, including double jeopardy protections, certain civil justice equivalents, constrain forfeiture actions. Classic legal doctrines such as *res judicata*, issue *estoppel* and abuse of process govern the civil actions. A civil action to recover the proceeds of crime might be precluded where the very issue of recovery was the subject of a successful, or failed, criminal legal process.[39] To the extent that these legal concepts apply, they may the place the state in the position of deciding whether to pursue an individual offender or to pursue his or her assets.

4.4 Rule of Law, Instruments of Crime and the Retreat into Doubt

Overarching allusions to remedial justice and the prominence of criminal wealth coupled with the notion that civil regimes touch no more, nor less,

[36] Proceeds of Crime Act (UK) 2002 s 287.
[37] Civil Forfeiture Act [BC] 2005 s 6.
[38] *British Columbia (Director of Civil Forfeiture) v Rai* [2011] BCSC 186
[39] *British Columbia (Director of Civil Forfeiture) v Hyland* (2010) BCCA 148

than the proceeds of crime tends to mute opposition to the civil approach.[40] Analysis of civil regulation's congruency with the rule of law proves heavily shaped by these claims. More pernicious aspects of this trend, arguably incidents that might best be described as legislative excess, can be overlooked.

Civil regulation does not merely aim to recover criminal business revenues. The tendency is to enable the taking of assets "tainted" by crime. The instruments of crime are not criminal revenues. An instrument is tainted by its association with criminal activity and thereby liable to be seized. Further, the tainted quality catches property used in connection with offences that have nothing to do with the accumulation of resources, nothing to do with the business of crime. Under the guise of an anti-criminal finance strategy, provisions have been introduced which enable the home of an alleged sexual offender to be forfeit.[41] Such extensions and applications show that, at least in these respects, the civil approach has strayed too far from its initial moorings; proceeds, profits or material acquisitions of any kinds form no part of these offences. Worryingly, too, some aspects of the civil approach appear to unfairly allocate burdens of proof to an individual holding property liable to forfeiture. Under aspects of Canadian legislation, it appears that, once property is seized, the correctness of the taking is assumed, with the burden of proof lying with the property owner to demonstrate the lawfulness of his entitlement.[42] Rather than a civil trial in which the state must demonstrate that the property derives from, or is linked to, criminal activity, this initial task falls to the property owner.

40 It is notable that in the Canadian context only one of eight civil forfeiture initiatives elicited any significant opposition: Yukon Shelves Civil Forfeiture Act, CBC News, October 26, 2010: available from http://www.cbc.ca/news/canada/north/story/2010/10/26/yukon-civil-forfeiture-act.html.

41 Most Canadian provincial civil forfeiture regimes allow the taking of property linked to the commission of bodily harms; Seizure of Criminal Property Act (Sask) 2005 s 2 (e) defines an instrument of unlawful activity to include "…property that is likely to or is intended to result in the acquisition of other property or in serious bodily harm to a person."

42 Under federal forfeiture law, once monetary instruments are seized as liable to forfeiture alleging they constitute the proceeds of crime, the burden lies with the owner, upon appeal to the Minister, to show that the resource is clean of that connection. This is not specifically stated in the regime. It flows from the ordering of administrative law; see, for example, *Van Phat Hoang v Minister of National Revenue* [2006] FC 182; *Hui Yang v Minister of Public Safety* [2008] FCA 281.

>> 5 TAXATION AS A CIVIL TOOL

Finally, some states have touted, and begun to use, taxation as a tool with which to strike tainted finance. Tax occurs as a part of civil approach since it contemplates taking a piece of criminal earnings through the assessment of a tax. Revenue proceedings, with the exception of a prosecution for a tax offence, are civil processes.

Taxation of crime is not a new idea. In principle, revenues linked to criminal have a long, sometimes checkered, history of exposure to tax liability.[43] Canadian income tax law, for example, applies to particular sources of income, notably employment, property or business income. A criminal enterprise would qualify as a business, its illegal character irrelevant to its taxability as a source of business profits.[44] More intriguing questions in this regard are the scope of deductions to which the criminal entrepreneur might be entitled.[45]

In the main, the invocation of this civil device appears to deal with certain procedural or legal issues inherent in the taxability of criminal wealth rather than creating a new legal provision. Taxing criminal earnings in the United Kingdom proved somewhat difficult given the particular mechanics of the schedular-based tax system. Legislation removes those impediments, facilitating the levying of a tax assessment on a pool of allegedly criminal earnings.[46] Irish legislation equally made it easier to levy and carry out the enforcement of the taxation.[47] Rather than new approaches, taxation exists as a civil mechanism that, while available, has not been particularly vigorously deployed to ensure that criminal businesses contribute to public coffers.

[43] P Alldridge & A Mumford (2005) Tax Evasion and the Proceeds of Crime Act 2002 25 Legal Studies 353 at 356-357. In Ireland, the revenues of illegal activity were held not liable to taxation, a decision which was later altered by statute: *Hayes v Duggan* [1929] 1 IR 406.

[44] *R v Poyton* [1972] CTC 411.

[45] See *Neeb v R* [1997] TCJ No 10 in which defendant sought to deduct the forfeiture of his drug revenues as a business expense; see also Anjaria v The Queen [2007] TCC 746.

[46] A Mumford & P Alldridge (2002) "Taxation as an Adjunct to the Criminal Justice System: the New Assets Recovery Agency Regime" British Tax Review 458 p 461-462.

[47] L Campbell (2006) "Taxing Illegal Assets – The Revenue Work of the Criminal Assets Bureau" 24 Irish Law Times 316.

>> 6. CONCLUSION

A prudent approach to any problem requires certain vigilance in monitoring implementation of possible solutions. While a degree of reliance on civil tools to tackle criminal wealth holds some promise, the development trajectory proves somewhat troublesome, particularly the latter-day gentle nudges of forfeiture beyond the reaches of lucrative criminal activity. Imitation, whether by jurisdictions or judiciaries, is not always a sign of progress.