Property, Civil Forfeiture and the *Charter*

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ABSTRACT

This paper seeks to address the undecided issue of how evidence obtained in violation of a *Charter*-protected right is to be dealt with in civil forfeiture proceedings. In arriving at the answer, the governing jurisprudence in this area of the law will be canvased to provide a contextual background that informs the parameters of this discussion. However, it will ultimately become clear by the end of this paper that evidence obtained in violation of a *Charter*-protected right should be dealt with by way of section 24(2) of the *Constitution Act, 1982*, and the use of the *Grant* test.

Civil forfeiture is the process by which the state commences legal action to obtain property that was seized as an instrument or proceeds of unlawful activity. Although property can be forfeited through a number of different mechanisms, the scope of this paper is limited to forfeiture proceedings commenced by way of civil action under provincial legislation with a focus on British Columbia. However, the case law presented in this paper will examine appellate court decisions from across the country due to the scarce attention this area of the law has received. These cases will highlight the fruitless endeavours of litigants to undermine civil forfeiture proceedings through the use of common law principles and the *Charter*. Finally, commentary will be provided on the direction future research in this area of the law should take.

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I. INTRODUCTION

On March 12, 2013, the British Columbia Supreme Court ordered William Khan Munnue to forfeit his home at the end of his civil forfeiture hearing. The Court found Mr. Munne's use of the home as a marijuana grow operation constituted an instrument of unlawful activity. As such, he was ordered to surrender the property to the Director of Civil Forfeiture.[1]

Civil forfeiture is the process by which the state commences civil proceedings *in rem* to obtain property that was seized as an instrument or proceeds of unlawful activity. Although the definition of unlawful activity varies across jurisdictions, it is broadly defined as an act or omission that is an offence under an act of Canada or another Canadian province or territory.[2] However, due to the numerous civil forfeiture statutes across the country, this paper will generally focus on British Columbia's *Civil Forfeiture Act*.[3]

The civil forfeiture landscape in BC has recently undergone some new developments. First, the BC Legislature passed the *Civil Forfeiture Amendment Act, 2023* on May 11, 2023, in response to the Cullen Commission's final report.[4] The commission was established by the Lieutenant Governor of BC to inquire into and report on money laundering in the province.[5] One of the Cullen Commission's key recommendations was to introduce unexplained wealth orders to combat "the accumulation of illicit wealth by organized crime groups and others involved in serious criminal activity."[6] With the new amendments, the Director of Civil Forfeiture can now seek an unexplained wealth order in relation to properties that it suspects are the proceeds of unlawful activity.[7] The effect of the order is to compel the respondent or responsible officer of the impugned property to demonstrate the nature of their interest in the

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1 *British Columbia (Director of Civil Forfeiture) v Kazan*, 2013 BCSC 388 at paras 119-121.

2 See Appendix A for a comparison of how the terms are defined differently across each jurisdiction.

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

4 Bill 21, *Civil Forfeiture Amendment Act, 2023*, 4th Sess, 42nd Parl, British Columbia, 2023 (assented, May 11, 2023).

5 *Commission of Inquiry into Money Laundering in British Columbia – Final Report* (Vancouver: Cullen Commission, 2022) at 49.

6 *Ibid* at 1616, 1618.

7 *Civil Forfeiture Act, supra* note 3, s 11.09.

property, as well as how it was acquired, among other things. Failure to comply with the order results in a presumption that the impugned property is the proceeds of unlawful activity.[8] The property can then be forfeited in the usual course of civil proceedings by virtue of the amendments to the *Civil Forfeiture Act*, which now permit an adverse inference to be made against the property.[9]

The second drastic change to the legal landscape involves the British Columbia Court of Appeal's decision to uphold the constitutional validity of the "future use" provisions in the *Civil Forfeiture Act*.[10] The "future use" provisions relate to instruments of unlawful activity defined under section 1(b) of the *Civil Forfeiture Act* as "property that is likely to be used to engage in unlawful activity that may (i) result in the acquisition of property or an interest in property, or (ii) cause serious bodily harm to a person."[11] The Director of Civil Forfeiture relied on these provisions to target the clubhouses of the Hells Angels Motorcycle Club.[12] The trial judge found these provisions exceeded their constitutional authority and were *ultra vires* the province.[13] Upon appeal, however, this finding was overturned.[14]

While these recent developments are related to civil forfeiture, they go beyond the scope of what this paper seeks to achieve. This paper will instead address how the *Charter of Rights and Freedoms* impacts civil forfeiture proceedings.[15] More specifically, the focus is on the unanswered question of how evidence obtained in violation of a *Charter*-protected right should be dealt with in civil forfeiture proceedings. By the end of this paper, it will be clear that the section 24(2) framework outlined in *R v Grant* remains the most likely test to be used, subject to some modification, in resolving civil forfeiture proceedings where the evidence was unconstitutionally obtained.[16]

To arrive at this conclusion, some context will be necessary to inform the parameters of this discussion. First, the various existing forfeiture regimes will be surveyed, followed by a discussion of the lack of

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8 *Ibid*, s 19.07(2).

9 *Ibid*, s 19.09(2).

10 *British Columbia (Director of Civil Forfeiture) v Angel Acres Recreation and Festival Property Ltd*, 2023 BCCA 70 at para 93 [*Angel Acres Recreation*]. Leave to appeal SCC granted, June 13, 2013. Docket No 35134.

11 *Civil Forfeiture Act*, *supra* note 3, s 1(b).

12 *British Columbia (Director of Civil Forfeiture) v Angel Acres Recreation and Festival Property Ltd*, 2020 BCSC 880 at para 1295.

13 *Ibid* at para 1465.

14 *Angel Acres Recreation*, *supra* note 10.

15 *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [*Canadian Charter*].

16 *R v Grant*, 2009 SCC 32 [*Grant*].

constitutional protection of property rights. An in-depth discussion of the unsuccessful strategies and tactics employed by defendants of civil forfeiture proceedings will then take place. This will involve canvassing cases from all jurisdictions in Canada due to the little attention this area of the law has received from appellate courts. These cases will set the stage for the main issue this paper is ultimately concerned with answering.

II. The Various Forfeiture Regimes Across Canada

A. Provincial Legislation

Civil forfeiture proceedings are structured to operate almost identically across all jurisdictions in Canada. Each Province can initiate the process in one of two ways. First, forfeiture of the proceeds and instruments of unlawful activity can be sought through the commencement of formal civil proceedings in court. This involves launching a civil action *in rem* against the property in question. Consider, for example, section 3 of British Columbia's *Civil Forfeiture Act*, which provides an example of the property the Director may seek forfeiture of.

Application for forfeiture order

3 (1) The director may apply to the court for an order forfeiting to the government

(a) the whole of an interest in property that is proceeds of unlawful activity, or

(b) the portion of an interest in property that is proceeds of unlawful activity.

(2) The director may apply to the court for an order forfeiting to the government property that is an instrument of unlawful activity.[17]

Alternatively, the state may also seek forfeiture by way of administrative means. Like formal proceedings, each Province has legislative provisions that permit the Director of Civil Forfeiture to administratively seek forfeiture of property. This can be done as long as it provides the public with sufficient notice. For example, section 14 of British Columbia's *Civil Forfeiture Act* states:

Part 3.1 — Administrative Forfeiture of Subject Property

. . .

Application of this Part

14.02 (1) This Part applies if

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17 *Civil Forfeiture Act*, *supra* note 3, s. 3.

(a) the director has reason to believe that

(i) the whole or a portion of an interest in property, other than real property, is proceeds of unlawful activity, or

(ii) property, other than real property, is an instrument of unlawful activity,

(b) the director has reason to believe that the fair market value of the property referred to in paragraph (a) (i) or (ii) is $75 000 or less,

(c) the property referred to in paragraph (a) (i) or (ii) is in British Columbia and is in the possession of a public body, and

(d) the director has no reason to believe that there are any protected interest holders in relation to that property.[18]

. . .

Notice of forfeiture under this Part

14.04 (3) Notice under subsection (1) (c) must be

(a) published in a newspaper of general circulation in British Columbia and circulating in or near the area in which the subject property was seized, or

(b) published in the *Gazette*.[19]

B. Federal Legislation

While the focus of this paper is on BC's *Civil Forfeiture Act*, the forfeiture provisions of *The Controlled Drugs and Substances Act* ("*CDSA*") and the *Criminal Code* are noted here to inform the reader's perspective, as the following cases will draw on some provisions of the *CDSA* and the *Criminal Code*. As such, it is worth highlighting the language of the relevant sections to be discussed. Consider, for example, section 16 of *The Controlled Drugs and Substances Act*, which states:

Forfeiture of property

16 (1) Subject to sections 18 to 19.1, if a person is convicted, or discharged under section 730 of the *Criminal Code*, of a designated substance offence and, on application of the Attorney General, the court is satisfied, on a balance of probabilities, that non-chemical offence-related property is related to the commission of the offence, the court shall

(a) if the prosecution of the offence was commenced at the instance of the government of a province and conducted by or on behalf of that

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18 *Ibid*, s 14.02.

19 *Ibid*, s14.03.

government, order that the property be forfeited to Her Majesty in right of that province to be disposed of or otherwise dealt with in accordance with the law by the Attorney General or Solicitor General of that province; and

(b) in any other case, order that the property be forfeited to Her Majesty in right of Canada to be disposed of or otherwise dealt with in accordance with the law by the member of the Queen's Privy Council for Canada that is designated by the Governor in Council for the purposes of this paragraph.[20]

Property related to other offences

16 (2) Subject to sections 18 to 19.1, if the evidence does not establish to the satisfaction of the court that property in respect of which an order of forfeiture would otherwise be made under subsection (1) is related to the commission of the designated substance offence of which a person is convicted or discharged, but the court is satisfied, beyond a reasonable doubt, that the property is non-chemical offence-related property, the court may make an order of forfeiture under subsection (1) in relation to that property.[21]

Similarly, it is also worth noting the language of section 490 of the *Criminal Code*, which permits the Crown to seek forfeiture of offence-related property.

490.1 (1) Subject to sections 490.3 to 490.41, if a person is convicted, or discharged under section 730, of an indictable offence under this Act or the *Corruption of Foreign Public Officials Act* and, on application of the Attorney General, the court is satisfied, on a balance of probabilities, that offence-related property is related to the commission of the offence, the court shall

(a) if the prosecution of the offence was commenced at the instance of the government of a province and conducted by or on behalf of that government, order that the property be forfeited to Her Majesty in right of that province to be disposed of or otherwise dealt with in accordance with the law by the Attorney General or Solicitor General of that province; and

(b) in any other case, order that the property be forfeited to Her Majesty in right of Canada to be disposed of or otherwise dealt with in accordance with the law by the member of the Queen's Privy Council for Canada that is designated by the Governor in Council for the purpose of this paragraph.[22]

As the noted legislation above indicates, the state can seek forfeiture of the offence-related property in numerous ways, regardless of the legislative scheme the proceedings are commenced under. Unfortunately for defendants, there is little protection in the way of property rights in Canada that can be used against the state to shield their property and assets. A discussion on the lack of constitutional protection of property rights and

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20 *Controlled Drugs and Substances Act*, SC 1996, c 19, s 16(1).
21 *Ibid*, s 16(2).
22 *Criminal Code*, RSC 1985, c C-46, s 490.1.

their history will now ensue to inform the reader on why litigants have sought to raise arguments based on common law principles instead of the *Charter*.

III. Section 7 of the *Charter* & the Lack Property Rights in Canada

Property rights in Canada are notably absent from the *Charter*. While the exact reasons are largely a matter of debate, their deliberate exclusion is not. Before the constitution was repatriated in 1982, there was mutual interest between the Liberal Party of Canada and the Conservative Party of Canada to enshrine property rights under the *Charter*.[23] In fact, early drafts of the constitution included property rights in the *Charter*. However, these provisions did not survive subsequent debate due to continued opposition from provincial governments.[24]

Some of these provincial governments were concerned with constitutionally entrenching property rights. They feared doing so would undermine their power and control over property and civil rights under section 92(13) of *The Constitution Act, 1867*.[25] For example, the Attorney General of Saskatchewan pressured the Liberal government of Canada to back down from its efforts to include property rights due to concerns it had about limiting foreign ownership of land. This political maneuver, among others, resulted in the sacrifice of property rights from the *Charter* in order to garner the support of the dissenting provinces.[26] Although Prime Minister Trudeau could have unilaterally patriated the constitution, he wanted to avoid creating the appearance of imposing the constitution upon the provinces.[27] As such, property rights never made their way back into the final draft of the *Charter*. Since then, subsequent attempts to introduce property rights into section 7 have failed. First, the British Columbia legislature tried in 1983, followed by the House of Commons in 1988.[28]

In the context of civil forfeiture proceedings, this has forced defendants to mount creative defences based on common law principles and the

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23 *Dwight G Newman and Lorelle Binnion, The Exclusion of Property Rights from the Charter: Correcting the Historical Record*, 2015 52-3 Alberta Law Review 543, 2015 CanLIIDocs 113, < canlii.ca/t/6wc>, retrieved on 2023-04-17 at 554-555.

24 *Ibid* at 552.

25 *Ibid* at 555.

26 *Ibid* at 556.

27 *Ibid* at 553.

28 *British Columbia, Legislative Assembly, Official Report of Debates (Hansard)*, 32nd Parl, 4th Sess (21 September 1982) at 9299; *House of Commons Debates*, 33rd Parl, 2nd Sess, No 12 (29 April 1988) at 14989.

Charter. For example in *Ontario (Attorney General) v. 8477 Darlington Crescent*, the defendant sought to rely on section 7 of the *Charter* in arguing his liberty interest was violated when the court ordered forfeiture of property pursuant to Ontario's forfeiture act, the *Civil Remedies Act*.[29] The defendant claimed ordering forfeiture based on the civil burden of proof of "on a balance of probabilities" was inconsistent with the principles of fundamental justice enshrined under section 7 of the *Charter*.[30]

The Ontario Court of Appeal rejected this argument, finding no property rights within section 7 of the *Charter*.[31] Even when section 7 is engaged, the Court found no supporting common law authority that requires a change in the standard of proof from "on a balance of probabilities" to the more onerous "beyond a reasonable doubt."[32] The Supreme Court of Canada ("SCC") also limited the application of section 7 to human beings in *Irwin Toy* because corporations and other artificial entities are incapable of enjoying the protections described under section 7, namely, life, liberty and security of the person.[33] As a result, defendants of civil forfeiture proceedings must rely on challenges that do not involve section 7 of the *Charter* because of the in *rem* nature of civil forfeiture proceedings.

A. The Canadian Bill of Rights

The *Canadian Bill of Rights* is one area that does offer some protection of property. Specifically, section 1(a) provides the following:

Recognition and declaration of rights and freedoms

> 1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,
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> (a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;[34]

While the *Canadian Bill of Rights* does offer some protection over property, it is important to note its limitations. First, it only applies to federal legislation and cannot override or supersede other laws. Although

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29 *Ontario (Attorney General) v 8477 Darlington Crescent*, 2011 ONCA 363 at para 53.
30 *Ibid*.
31 *Ibid* at para 54.
32 *Ibid* at paras 54-55.
33 *Irwin Toy Ltd V Quebec (Attorney General)*, [1989] 1 SCR 927 at 1003.
34 *Canadian Bill of Rights*, SC 1960, c 44, s 1.

any federal legislation that conflicts with the *Canadian Bill of Rights* is to be held inoperative, the SCC also held in *The Queen v Drybones* that any impugned legislation can supersede the *Canadian Bill of Rights*, as long as Parliament expressly indicates so.[35] The issue in *Drybones* was the contravention of section 94(b) of the *Indian Act*, which created an offence for an Indian to be intoxicated off reserve, and section 2 of the *Canadian Bill of Rights*. In reaching their decision, the SCC clarified the limits of the *Canadian Bill of Rights*. Specifically, it indicated the ease with which the *Canadian Bill of Rights* can be overridden so long as Parliament expresses an unambiguous intention for the impugned legislation to operate notwithstanding the *Canadian Bill of Rights*.[36] Finally, the *Canadian Bill of Rights* is not constitutionally entrenched like the *Charter*.

B. Provincial Statutes

Some provinces like Alberta and Quebec have enacted their own statutes to safeguard property rights, such as the *Alberta Bill of Rights* and the Quebec *Charter*.[37] However, such legislation is neither universal across Canada nor constitutionally entrenched like the *Charter*. As a result, defendants have tried turning to common law principles in an attempt to undermine civil forfeiture proceedings.

IV. Legal Challenges

Litigants have attempted to thwart civil forfeiture proceedings in a number of ways without resorting directly to a *Charter* right. Instead, these attempts have revolved around tangential legal concepts that impact a defendant's *Charter* rights at trial.

A. Issue Estoppel

Issue estoppel is a common law doctrine that prevents a legal issue from being re-litigated. The rationale behind this concept was outlined by the SCC in *R v Mahalingan*.[38] In that decision, the Court held that out of fairness to the accused, they should not be called upon to answer questions already decided in their favour. By compelling the accused to do so, the Court stated this could lead to inconsistent findings that would undermine

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35 See generally *The Queen v Drybones*, [1970] SCR 282.

36 *Ibid*.

37 *Alberta Bill of Rights*, RSA 2000, c A- 14; *Charter of Human Rights and Freedoms*, CQLR, c C-12.

38 *R v Mahalingan*, 2008 SCC 63 at para 16 [*Mahalingan*].

the integrity and coherence of the criminal law.[39] The Court also emphasized how "the institutional values of judicial finality and economy" are essential to maintaining the confidence of the justice system.[40] Once an issue has been litigated, it should be final and only subject to review upon appeal.[41]

In the forfeiture context, a defendant who faces simultaneous civil and criminal proceedings may seek to rely on issue estoppel to prevent the same legal issue from being heard twice. This is precisely what Mr. Vellone tried to do in the following case.

In *R v Vellone*, the accused sought to rely on this legal concept during a hearing in which the state was seeking forfeiture of his home as offence-related property.[42] Mr. Vellone was charged with a series of drug-related offences under the *CDSA*. The Crown claimed Mr. Vellone's home facilitated drug sales by operating as a "stash house," where narcotics and money were stored in between transactions.[43] At trial, Mr. Vellone was successful in bringing a motion to exclude evidence obtained in violation of his section 8 *Charter* rights.[44] The result of this was the exclusion of the impugned evidence pursuant to section 24(2) of the *Charter*. An acquittal was subsequently found on all but one of the charges, which he resolved by way of a guilty plea.[45]

Mr. Vellone then sought to prevent admission of the evidence during his forfeiture hearing by asserting issue estoppel. However, to succeed with issue estoppel in criminal law, the accused must demonstrate the following requirements outlined by the SCC in *Mahalingan*:

> (1) the issue must have been resolved in the accused's favour in the previous criminal proceedings;
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> (2) the issue decided must be final; and
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> (3) the parties must be the same in both proceedings.[46]

During the forfeiture hearing, the trial judge re-engaged in a section 24(2) analysis to determine the admissibility of evidence despite her earlier

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39 *Ibid* at para 45.
40 *Ibid* at para 46.
41 *Ibid.*
42 See generally *R v Vellone*, 2020 QCCA 665, leave to appeal to SCC refused, 2021 CanLII 15594 [*Vellone*].
43 *Ibid* at paras 7, 22.
44 *Ibid* at para 7.
45 *Ibid.*
46 *Mahalingan, supra* note 38 at paras 52-56.

ruling that favoured Mr. Vellone. The Quebec Court of Appeal upheld the trial judge's decision to conduct a section 24(2) analysis afresh, agreeing with her reasoning that the criminal trial and forfeiture proceedings serve distinct purposes.[47] The trial judge found Mr. Vellone's prosecution was concerned with determining guilt and the loss of liberty.[48] By contrast, the forfeiture hearing did not share the same punitive emphasis. Instead, the forfeiture proceeding was concerned with taking offence-related property out of circulation.[49] As a result, the trial judge found issue estoppel did not apply and proceeded to perform a section 24(2) analysis *de novo*.[50]

The onus then shifted to Mr. Vellone to demonstrate "that having regard to all of the circumstances, admission of the evidence would bring the administration into disrepute" pursuant to the three-part *Grant* analysis under section 24(2).[51] At trial, the judge found the first two factors of the *Grant* test favoured exclusion while the final factor favoured the admission of the evidence.[52] During the forfeiture hearing, she dispensed with an analysis of the first two factors because they still militated against inclusion.[53] On the final factor, however, she found the administration of justice would be brought into disrepute if the offence-related property were permitted to continue circulating.[54] As a result, she placed more weight on the final factor and admitted the evidence, despite the first two factors that favoured exclusion.

Although Mr. Vellone's matter arose out of provisions under the *CDSA* rather than a provincial forfeiture act, this case is nonetheless persuasive in attempting to answer the question this paper seeks to address. *Vellone* is helpful in illuminating what could potentially happen if a *Charter* breach has already been established and a judge was faced with determining the evidentiary question in a civil setting.

B. Section 24(2)

In addition to raising issue estoppel, Mr. Vellone tried to challenge the admissibility of the evidence by relying on the finality of the section 24(2) finding at trial. He claimed that the exclusion of evidence ruling under section 24(2) at trial prevented the Crown from relying upon the same

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47 *Vellone*, *supra* note 42 at paras 55-56.
48 *Ibid* at para 55.
49 *Ibid*.
50 *Ibid* at para 49.
51 *Grant*, *supra* note 16 at para 45.
52 *Vellone*, *supra* note 42 at paras 57-60.
53 *Ibid* at para 61.
54 *Ibid* at para 62.

evidence during the forfeiture proceedings.[55] While the Court acknowledged that orders made under section 24(2) within the same proceeding are generally final, they also held exceptions do exist.

The Court referred to *R v Calder,* where the SCC held reconsideration of section 24(2) may be justified when a material change in the circumstances has occurred.[56] However, the Quebec Court of Appeal held that the exceptions outlined in *Calder* only apply to applications for review of orders made within the same proceeding.[57] Unfortunately for Mr. Vellone, the Court of Appeal found his criminal trial to be separate from the forfeiture hearing, as the latter took place under a provision of the *CDSA*.[58] The Court accordingly ruled against him on this argument.

C. Stay of Proceedings

The Director of Criminal Property and Forfeiture v Gurniak et al is another forfeiture case that demonstrates the ingenuity of defendants to raise legal arguments premised on common law doctrines and the *Charter*.[59] In *Gurniak 1*, the defendant was facing parallel proceedings in criminal and civil court. He brought a motion for a stay of proceedings against the civil matter on the basis that his right to silence would be jeopardized during his criminal trial. In particular, he feared the parallel proceedings would affect his *Charter*-protected rights under sections 7 and 11.[60]

The motion's judge granted the stay of proceedings, finding that while rare and exceptional circumstances are normally required to grant a stay of proceedings, the threshold should be lowered where parallel proceedings are underway.[61] The motion's judge based her decision on several grounds.

First, she found that the Director of Civil Forfeiture is distinct from other litigants in that it would not suffer prejudice from a delay in obtaining a remedy.[62] Second, she believed the relationship between the Director and the police would result in a coordinated effort to undermine the fairness of the accused's criminal prosecution.[63] Her concern was that the police would share information with the Crown that it gained through the civil

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55 *Ibid* at paras 23, 25.
56 See generally *R v Calder*, [1996] 1 SCR 660.
57 *Vellone, supra* note 42 at para 32.
58 *Ibid*.
59 See generally *The Director of Criminal Property and Forfeiture v Gurniak et al*, 2020 MBCA 96 [*Gurniak 2*].
60 *The Director of Criminal Property and Forfeiture v Gurniak et al*, 2019 MBQB 80 at para 33 [*Gurniak 1*].
61 *Ibid* at para 32.
62 *Ibid* at paras 27, 28,40.
63 *Ibid* at para 28.

proceeding.[64] Finally, she found the *Charter* and *Manitoba Evidence Act* were inadequate in protecting the defendant from the risk of derivative evidence.[65]

The Manitoba Court of Appeal disagreed with the motion judge's ruling, finding she erred in applying the proper legal test.[66] Ordinarily, the test from *RJR-MacDonald* is used to determine whether a stay of proceedings should be granted.[67] However, the three-part test from that case is not used when criminal and civil proceedings are being heard concurrently.[68] Instead, the Court examines "whether there are exceptional or extraordinary circumstances which show that the right of the applicant on the criminal charge cannot adequately be addressed by the rules governing the civil proceeding or a remedy available to an accused in their criminal process."[69] The Court also found no presumption in favour of a stay of proceedings simply due to the existence of parallel proceedings.[70] In fact, the presumption is the opposite: that the proceedings can be dealt with fairly and that the applicant bears the burden of demonstrating otherwise.[71]

Mr. Gurniak then tried arguing derivative evidence could be obtained from the civil proceedings that would incriminate him during prosecution.[72] He claimed affidavits or compelled testimony would end up in the hands of the Crown.[73] Additionally, he was worried that such evidence may reveal defence strategy or further crimes that have not yet come to the attention of law enforcement.[74] Ultimately, he argued this would undermine trial fairness, and a stay of proceedings should be entered as a result.[75]

The Court of Appeal acknowledged Mr. Gurniak's concerns in *Gurniak 2* but held sufficient protections exist to prevent the defendant's criminal trial from being prejudiced by the ongoing parallel proceedings. First, the Court held there is a distinction between use immunity and derivative use immunity.[76] Use immunity prevents the direct admission of evidence

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64 *Ibid.*
65 *Ibid* at paras 34-36.
66 *Gurniak 2*, *supra* note 59 at paras 39-42.
67 *Ibid* at para 38.
68 *Ibid* at para 39.
69 *Ibid* at para 40.
70 *Ibid.*
71 *Ibid.*
72 *Ibid* at para 47.
73 *Ibid.*
74 *Ibid* at para 48.
75 *Ibid* at para 49.
76 *Ibid* at para 50.

obtained through compelled testimony.[77] For example, the Court referenced, and the defendant conceded, that the *Charter* and the *Canada Evidence Act* prevent self-incrimination. Specifically, section 13 of the *Charter* provides:

> A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.[78]

Additional safeguards were identified in the *Canada Evidence Act* and *The Manitoba Evidence Act* by the Court that prevent self-incrimination in subsequent proceedings. These provisions serve to restrict the use of answers provided during litigation to the proceedings at hand.[79] They are reproduced here for ease of reference:

Canada Evidence Act

Incriminating questions

5(1) No witness shall be excused from answering any question on the ground that the answer to the question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person.[80]

Answer not admissible against witness

5(2) Where with respect to any question a witness objects to answer on the ground that his answer may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person, and if but for this Act, or the Act of any provincial legislature, the witness would therefore have been excused from answering the question, then although the witness is by reason of this Act or the provincial Act compelled to answer, the answer so given shall not be used or admissible in evidence against him in any criminal trial or other criminal proceeding against him thereafter taking place, other than a prosecution for perjury in the giving of that evidence or for the giving of contradictory evidence.[81] [Emphasis added]

The Manitoba Evidence Act

Incriminating questions

6(1) No witness shall be excused from answering any question, or producing any document, upon the ground that the answer thereto or the production thereof may tend to criminate him, or may tend to establish his liability to a legal proceeding at the instance of the Crown or of any person.[82]

Evidence not to be used

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77 *Ibid.*

78 *Angel Acres Recreation, supra* note 10, s 13.

79 *Vellone, supra* note 42 at para 51.

80 *Canada Evidence Act*, RSC 1985, c C-5, s 5(1).

81 *Ibid,* s 5(2).

82 *The Manitoba Evidence Act*, CCSM c E150, s 6(1).

> 6(2) If, with respect to any question or the production of any document, a witness objects to answer or to produce upon any of the grounds mentioned in subsection (1), and if but for this section or any Act of the Parliament of Canada, the witness would have been excused from answering that question or from producing that document, then although the witness is, by reason of this section or any Act of the Parliament of Canada, compelled to answer or to produce, the answer so given or the document so produced shall not be used or receivable in evidence in any legal proceeding against him thereafter taking place.[83] [Emphasis added]

Similar to use immunity, derivative use immunity exists to prevent the evidence or testimony of witnesses from being used against them indirectly.[84] In *Thompson Newspapers Ltd. v Canada (Director of Investigation and Research)*, Justice L'Heureux-Dubé defined derivative evidence as "all facts, events or objects whose existence is discovered as a result of a statement made to the authorities."[85] Moreover, in the same decision, Justice Wilson held, "[t]here is a direct causal relationship between the compelled testimony and the derivative evidence. ... [C]ausality is the *sine qua non* of derivative evidence."[86] The concern with derivative use immunity is the gathering of evidence from statements and testimony given by litigants in their effort to defend the civil suit against them.[87] In *Thompson Newspapers Ltd.*, the Court refers to the text of Justice Sopinka with regard to onus and proof, where the text states:

> The Supreme Court of Canada, in the cases of *R. v. S. (R.J.) and British Columbia (Securities Commission) v. Branch*, [1995] 2 SCR 3, considered the question of the use to which evidence discovered as a result of a witness' testimony can be put. If the evidence would not have been discovered but for the compelled testimony of the witness, such derivative evidence will be excluded from the trial.[88]

The Manitoba Court of Appeal also held section 7 of the *Charter* has been interpreted to prevent the use of any incriminating evidence in subsequent trials, referring once again to the text of Justice Sopinka.[89]

In light of the existing statutory and common law protections, the Manitoba Court of Appeal dismissed Mr. Gurniak's appeal.[90] The Court also stated derivative use immunity only applies where such evidence actually exists.[91] This extends to include potential disclosure through civil

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83 *Ibid*, s 6(2).
84 *Gurniak 2*, *supra* note 59 at para 52.
85 *Thompson Newspapers Ltd V Canada (Director of Investigation and Research)*, [1990] 1 SCR 425 at 574 [*Thompson Newspapers*].
86 *Ibid* at 484.
87 *Gurniak 2*, *supra* note 59 at para 52.
88 *Thompson Newspapers*, *supra* note 85 at 573-574.
89 *Gurniak 2*, *supra* note 59 at para 56.
90 *Ibid* at para 69.
91 *Ibid* at para 59.

proceedings, such as a forfeiture hearing.[92] In Mr. Gurniak's case, speculation and hypothetical concerns of compelled testimony from the civil action spilling over to the criminal trial do not meet the threshold for a stay of proceedings.[93]

Finally, before the Court allowed the Director's appeal, it held that other protections, such as the implied undertaking rule exist. In *Juman v Doucette*, the SCC elaborated on the implied undertaking rule. The issue in *Juman* was whether *bona fide* disclosures of transcripts of civil proceedings could be disclosed to the police.[94] In that case, the Vancouver Police Department ("VPD") and the Attorney General of British Columbia ("AGBC") sought to obtain the trial transcripts involving a daycare worker who was being sued for negligence.[95] The SCC ultimately held that *bona fide* disclosures of the kind that the VPD and AGBC were requesting violated the implied undertaking rule.[96]

The implied undertaking rule prevents pre-trial discovery from being used for purposes extraneous to the civil process in which the statements or evidence arise.[97] The consequences of breaching the undertaking can result in serious remedies, such as a stay or dismissal of the proceeding, striking a defence, or even contempt.[98] There are only exceptional circumstances where the implied undertaking rule can be overridden.[99]

For example, where the applicant seeking to use the information outside of the civil proceedings demonstrates on a balance of probabilities that a public interest exists that is of greater weight than the values the implied undertaking rule protects,[100] such values include ensuring the parties are forthcoming and complete with their responses during discovery.[101] Protecting the privacy of the parties to the litigation from exposure of embarrassing, defamatory, or salacious gossip likewise qualifies.[102]

Alternatively, one possible situation where disclosure could be made with little prejudice to the examined party is where the disclosure involves the same parties.[103] In these circumstances, the SCC reasoned that

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92 *Ibid* at para 58.
93 *Ibid* at para 73.
94 *Juman v Doucette*, 2008 SCC 8 at para 1.
95 *Ibid*.
96 *Ibid* at para 58.
97 *Ibid* at para 4.
98 *Ibid* at para 29.
99 *Ibid* at para 30.
100 *Ibid* at para 32.
101 *Ibid* at para 26.
102 *Ibid* at para 24.
103 *Ibid* at para 35.

prejudice to the examinee in such circumstances would be non-existent. Another possible exception involves impeaching the witness for prior inconsistent statements, as does public safety.[104] Finally, the police may seek a warrant to obtain the material; however, doing so would require the police to satisfy the necessary judicial requirements.[105]

To summarize, Mr. Gurniak's case represents another creative attempt to undermine civil forfeiture proceedings through the use of common law doctrines. Although it provides contextual information surrounding previous attempts by litigants to thwart civil forfeiture proceedings, it does not address the larger issue of how a court should procedurally or substantively navigate a *Charter* breach.

V. BIFURCATION

During a forfeiture hearing, a defendant can apply to the court to sever a *Charter* breach motion from the remainder of the proceedings. This process is known as bifurcation or severance. For example, rule 12-5(67) of the *BC Supreme Court Rules* authorizes the court to hear a particular issue before others. Specifically, it states, "the court may order that one or more questions of fact or law arising in an action be tried and determined before the others."[106]

This allows the parties to sidestep the onerous and difficult task of proving their matter warrants a stay of proceedings. Bifurcation also allows the parties to deal exclusively with the *Charter* infringement without having to comply with the rules of discovery pertaining to the rest of the civil forfeiture matter.[107] One of the benefits of severing the proceedings is to limit the potential exposure of incriminating evidence from the civil process and to prevent inadvertent disclosure of defence or trial strategy.[108]

Whether bifurcation is granted in forfeiture proceedings in BC depends on a number of factors set out by the British Columbia Court of Appeal in *Lloydsmith*.[109] For example, the court must consider trial fairness, convenience, efficiency, the presence or absence of prejudice, and most importantly, whether doing so is in the interests of justice.[110] The interests of justice have been interpreted as establishing the legitimacy of the

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104 *Ibid* at paras 40-41.
105 *Ibid* at para 6.
106 *Supreme Court Civil Rules*, BC Reg 168/2009, r 12-5(67).
107 *Director of Civil Forfeiture v Lloydsmith*, 2014 BCCA 72 at para 22 [*Lloydsmith*].
108 See generally *British Columbia (Director of Civil Forfeiture) v Cronin*, 2016 BCSC 284 [*Cronin*].
109 *Lloydsmith*, *supra* note 107.
110 *Ibid* at para 25.

evidence in advance of the other issues.[111] This means whether the *Charter* issue should be dealt with first to determine if the entire civil forfeiture claim can be resolved on the basis of a successful *Charter* infringement application.[112]

The standard to be applied in assessing the likelihood of a successful *Charter* breach application when bifurcation is ordered falls on two considerations. First, whether the available evidence raises obvious questions about the conduct of the investigation.[113] Second, whether it is "at least arguable" that the applicant's *Charter* rights were breached by the police in the course of obtaining the evidence.[114]

While bifurcation can be advantageous, it is not appropriate in every case. Courts have declined to order bifurcation when a full evidentiary record is needed or where doing so will not result in any meaningful gain in efficiency of court proceedings.[115] Where bifurcation has been ordered, delaying the pre-trial discovery procedures to determine the legitimacy of the seizure of property was consistent with the principles of "proportionality, efficiency and fairness."[116]

To illustrate the concept, consider *Director of Civil Forfeiture v Conrad*.[117] In that case, Mr. Conrad's co-defendant, Mr. Grandison, sought bifurcation of the proceedings against $59,685 cash that was seized from him during a vehicle stop. Mr. Grandison was the driver of the vehicle and alleged that he was arbitrarily detained.[118] The officers removed Mr. Grandison from the vehicle and handcuffed him for officer safety despite lacking reasonable suspicion that he committed an offence.[119] Mr. Grandison alleged that he was not informed of the reasons for arrest, nor was he provided with his section 10(b) *Charter* rights to retain and instruct counsel.[120] As such, Mr. Grandison argued the absence of lawful authority to detain or arrest him meant the search was equally unlawful.[121]

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111 *Civil Forfeiture (Director) v Johnson*, 2015 BCSC 1217 at para 57.

112 *Cronin, supra* note 108 at para 5.

113 *British Columbia (Director of Civil Forfeiture) v Thandi*, 2018 BCSC 215 at para 25.

114 *British Columbia (Director of Civil Forfeiture) v Judd*, 2020 BCSC 1508 at para 46; *British Columbia (Director of Civil Forfeiture) v Chevalier*, 2021 BCSC 584 at para 29.

115 See generally *British Columbia (Director of Civil Forfeiture) v Hells Angels Motorcycle Corp*, 2013 BCSC 2575; *British Columbia (Director of Civil Forfeiture) v Ceylan*, 2020 BCSC 1745.

116 *British Columbia (Director of Civil Forfeiture) v Ieraci*, 2020 BCSC 605 at para 61.

117 *Director of Civil Forfeiture v Conrad*, 2023 BCSC 185, leave to appeal to BCCA granted on April 25, 2023.

118 *Ibid* at para 18.

119 *Ibid.*

120 *Ibid* at para 19.

121 *Ibid* at para 20.

In determining whether bifurcation should be granted, the Court was satisfied that it was "at least arguable" that the *Charter* breaches could lead to the exclusion of evidence against the money seized.[122] The Court did, however, say the police were correct in stopping the 2-seater vehicle due to the presence of the third passenger.[123]

The Court then went on to list a number of other uphill battles that Mr. Grandison would face but declined to comment on the likelihood of his success with the *Charter* application. In the end, the Court found the interests of justice, specifically efficiency, would be best served by granting bifurcation. However, the question of how a successful *Charter* breach application impacts the exclusion of evidence analysis went unanswered. Until a court rules on the issue, one may only speculate as to its outcome.

VI. *CHARTER* BREACHES AND THE EXCLUSION OF EVIDENCE

Should one succeed in establishing a *Charter* breach, this raises the important question of what should happen to the impugned evidence. Section 6 of British Columbia's *Civil Forfeiture Act* offers one possible avenue of resolution, as it empowers a court to grant the following relief.

Relief from forfeiture

> 6 (1) If a court determines that the forfeiture of property or the whole or a portion of an interest in property under this Act is clearly not in the interests of justice, the court may do any of the following:
>
> (a) refuse to issue a forfeiture order;
>
> (b) limit the application of the forfeiture order;
>
> (c) put conditions on the forfeiture order.[124]

Section 6 of BC's *Civil Forfeiture Act* is just one example of several other relief provisions that exist in civil forfeiture legislation across the country. However, section 6 merely authorizes the court to refuse ordering forfeiture of the impugned property; it does not necessarily address the exclusion of improperly obtained evidence.

Once a *Charter* breach has been demonstrated, section 24(2) is engaged, and an analysis of the legal test from *R v Grant* is required. The court would then have to balance the following three avenues of inquiry from *Grant* to

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122 *Ibid* at para 61.
123 *Ibid* at para 62.
124 *Civil Forfeiture Act*, *supra* note 3, s 6.

determine whether "admission of the evidence would bring the administration of justice into disrepute."

> (1) the seriousness of the state's offending conduct;
>
> (2) the impact of the breach on the accused's Charter-protected interests; and
>
> (3) society's interest in the adjudication of the case on the merits.[125]

The issue with applying the *Grant* framework to civil forfeiture proceedings is that the SCC specifically mentioned the truth-seeking function of the criminal trial process in that decision.[126] Specifically, under the third inquiry, the question posed is whether the truth-seeking function of the criminal process would be better served by the admission or exclusion of the impugned evidence.[127]

Applying the *Grant* test to a forfeiture hearing would then raise some important considerations. First, as seen in *Vellone*, the subject of the forfeiture hearing is real property, as the property itself was not facing any criminal charges.[128] This makes the hearing akin to a civil process, and the Court of Appeal even acknowledged it in its ruling.[129] Second, the purposes of the two hearings are also distinct, something that the trial judge relied on in *Vellone*, which the Court of Appeal agreed with when the trial judge conducted her 24(2) analysis *de novo*. At trial, combatting the continued circulation of offence-related property was identified as the purpose of the forfeiture hearing in that case.[130] Again, this is to be contrasted with the truth-seeking function of the criminal process stated in *Grant*.[131]

While the civil forfeiture proceedings are undeniably related to unlawful activity, the BC *Civil Forfeiture Act* authorizes the Director to proceed in the absence of a prosecution. Section 18(a) of the Act permits the finding of unlawful activity even if no person is charged with an offence that falls under the provided definition.[132] Further, section 18(b) allows a finding of unlawful activity even where a person is acquitted of all charges.[133] In these circumstances, the forfeiture hearing is solely concerned

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125 *Grant*, *supra* note 16 at para 50.
126 *Ibid* at para 79.
127 *Ibid*.
128 *Vellone*, *supra* note 42.
129 *Ibid* at para 41.
130 *Ibid* at para 55.
131 *Grant*, *supra* note 16 at para 59.
132 *Civil Forfeiture Act*, *supra* note 3, s 18(a).
133 *Ibid*, s 18(b).

with removing the offence-related property from continued circulation in the criminal underworld, a separate and distinct purpose from what the Court in *Grant* articulated. Further, the Minister of Public Safety and Solicitor General of British Columbia made the following comments about the Act's purpose during its second reading:

> With this new legislation we will be taking the profit out of illegal activity. It will be another tool to deter and prevent fraud, theft and a host of other illegal activities, and it will enable the recovery of ill-gotten gains and will assist in providing compensation to eligible victims.
> The moneys recovered through forfeiture will compensate eligible victims and will be used to support further crime prevention initiatives. The moral and legal underpinnings of civil forfeiture are very clear. Civil forfeiture is similar to the civil remedy against unjust enrichment. It takes back assets derived from illegal conduct. No one should be allowed to get rich as a result of breaking the law. No one, I hope, can or will seriously argue that point.[134]

The British Columbia Court of Appeal also found the policy rationale for the Act was to:

> (1) to take the profit out of unlawful activity;
>
> (2) to prevent the use of property to unlawfully acquire wealth or cause bodily injury; and
>
> (3) to compensate victims of crime and fund crime prevention and remediation.[135]

Similarly, under section 2 of Manitoba's civil forfeiture act, *The Criminal Property Forfeiture Act*, the stated purpose is to provide civil remedies that will prevent:

> (a) people who engage in unlawful activities and others from keeping property that was acquired as a result of unlawful activities; and
>
> (b) property from being used to engage in certain unlawful activities.[136]

The truth-seeking function of the criminal justice system held in *Grant* is nowhere to be found in the Minister's comments, BC's *Civil Forfeiture Act* or the BC Court of Appeal's ruling. Rather, the stated purposes of civil forfeiture betray the Supreme Court's holding in *Grant*. Yet, applying the *Grant* test outside of its original area of criminal law remains the most likely

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134 *British Columbia, Legislative Assembly, Hansard,* 38th Parl, 1st Sess, Vol 2, No 9 (19 Oct 2005) at 948 <www.leg.bc.ca/documents-data/debate-transcripts/38th-parliament/1st-session/20051019pm-Hansard-v2n9#bill13-2R>.

135 *British Columbia (Director of Civil Forfeiture) v Onn*, 2009 BCCA 402 at para 14.

136 *The Criminal Property Forfeiture Act,* CCSM, c C306, ss 2(a) and (b).

outcome in a civil forfeiture proceeding. Doing so would not be an unprecedented misapplication of the law. For example, the SCC has drawn on legal tests from various areas of the law that do not necessarily coincide with the case it was attempting to resolve. Consider *Dagenais v. Canadian Broadcasting Corp*, where the SCC dealt with the issue of a publication ban concerning one of the Canadian Broadcasting Corporation's television shows.[137]

In that case, Mr. Dagenais and his co-accused were members of the Catholic order who were on trial for the physical and sexual abuse of young Catholic schoolboys.[138] The Canadian Broadcasting Corporation wanted to air its television series *The Boys of St. Vincent*, a fictional television program that depicted the alleged offences that Mr. Daganais and his co-accused were charged with.[139] The SCC created a two-part test to determine when a publication ban should be ordered.[140] That same test was subsequently adopted in *R v Mentuck*, a criminal case in which the Crown sought to prohibit the publication of certain facts it intended to introduce as evidence during the trial.[141] In particular, the Crown brought a motion to ban the publication of:

> (a) the names and identities of the undercover police officers [involved] in the investigation of the accused, including any likeness of the officers, appearance of their attire and physical descriptions;
>
> (b) the conversations of the undercover operators in the investigation of the accused to the extent that they disclose the matters in paragraphs (a) and (c);
>
> (c) the specific undercover operation scenarios used in investigation. . . . [142]

Other courts have taken similar approaches in borrowing legal tests from areas of law outside the case they were trying to decide. The legal test of injunctions from *RJR-MacDonald* is another leading example of when courts have adapted and applied a test to a different legal setting. In *RJR-MacDonald*, an injunction was sought by the tobacco company to temporarily abstain from complying with the packaging and warning requirements mandated under the *Tobacco Products Control Act* while the substantive legal matter was being litigated.[143]

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137 See generally *Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835.
138 *Ibid* at 836-837.
139 *Ibid* at 851-852.
140 *Ibid* at 878.
141 See generally *R v Mentuck*, 2001 SCC 76.
142 *Ibid* at para 6.
143 See generally *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311.

Yet, in *Manitoba Federation of Labour et al. v. The Government of Manitoba*, the Manitoba Court of Queen's Bench applied the same interlocutory injunction test in the labour sphere.[144] The Manitoba Federation of Labour sought an injunction against the Government of Manitoba in relation to an employment dispute, and, as such, the *RJR-MacDonald* test was appropriately used to resolve the Federation's application.

A. A Modified Approach to *Grant*

Following a successful *Charter* breach application, section 24(2) and the *Grant* test are undoubtedly engaged. However, this raises the question of how the test should be interpreted and applied in a civil setting. A modified approach to the *Grant* test is appropriate in the context of civil forfeiture hearings in light of the distinct purposes between criminal and civil proceedings. The question then becomes whether the test should be relaxed to accommodate the civil process. For instance, not only have courts adopted and applied tests of a different legal nature, but they have also watered down the requirements in doing so. In *Doré*, the SCC held that a modified version of the *Oakes* test was to be applied in administrative law proceedings involving discretionary administrative decisions. Such an approach was considered more flexible to meet the needs of administrative law rather than a full section 1 analysis.[145]

Alternatively, courts could simply exercise their discretion by varying the amount of weight and emphasis given to each of the three factors listed in *Grant*, which was what the trial judge did in *Vellone*.[146] Recall that during the criminal trial, the judge found the first two factors of the *Grant* test favoured exclusion and declined to admit the evidence.[147] Yet, when the analysis was conducted again during the forfeiture hearing, she admitted the evidence because she placed greater emphasis on society's interest in the adjudication of the matter on its merits.[148] She was persuaded by an abundance of case law on how the integrity of the justice system would be brought into disrepute by returning offence-related property. [149]

The case of *R v Breton* also offers further support for the re-interpretation of the *Grant* test during a forfeiture hearing.[150] In that case, the Court excluded all of the evidence under section 24(2) and acquitted

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144 See generally *Manitoba Federation of Labour et al v The Government of Manitoba*, 2018 MBQB 125.

145 *Doré v Barreau du Québec*, 2012 SCC 12 at paras 33-43.

146 *Vellone, supra* note 42.

147 *Ibid* at paras 61-62.

148 *Ibid*.

149 *Ibid*.

150 See generally *R v Breton*, 2023 ONSC 2035.

Mr. Breton at trial after it found his section 8 *Charter* rights were violated during a search of his home.[151] The Crown subsequently brought an application to seek forfeiture of the 1.2 million dollars of cash that was seized during the illegal search.[152] In reaching its decision, the Court was persuaded by the Crown's argument that section 24(2) can be revisited during a forfeiture hearing. The Court reasoned that a forfeiture hearing constitutes a change in the jeopardy for the accused that allows for a new section 24(2) analysis to be conducted, citing *Vellone* as persuasive.[153]

As with *Vellone*, the Court in *Breton* found a distinction between the interests of an accused and their property when the determination of guilt and deprivation of liberty are no longer in question.[154] Similar to *Vellone*, the focus was instead on removing potential offence-related property out of circulation.[155] Specifically, the inquiry was about the operation of sections 463.43 and 490(9) of the *Code*.[156] Sections 463.43 and 490(9) direct the Court to consider whether the impugned property was unlawfully possessed when it was seized.[157] In this case, the Court held that society has a right to consider whether the property was unlawfully held and, if so, whether to continue to allow the unlawful possession.[158]

In re-conducting its *Grant* analysis, the Court held that the weight attributed to each branch of the test at trial was influenced by the context of the trial. However, the Court re-evaluated the test based on the circumstances of the forfeiture hearing, where the accused's liberty is no longer at risk.[159] Although the first two branches of the test still militated in favour of exclusion, the third and final branch of the test involving the repute of the administration of justice led to a different outcome. Rather than exclude the evidence again, the Court found that doing so would bring the administration of justice into disrepute.[160] The 1.2 million dollars that was seized could be used in ways that would endanger the public and harm society.[161] Accordingly, the Court found society had a vested interest in the adjudication of whether Mr. Breton lawfully possessed the cash and admitted the evidence.[162]

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151 *Ibid* at paras 3-4.
152 *Ibid* at paras 4-5.
153 *Ibid* at paras 14, 16, 17.
154 *Ibid* at para 9.
155 *Ibid* at para 10.
156 *Ibid* at para 22.
157 *Ibid* at para 23.
158 *Ibid* at para 23.
159 *Ibid* at para 26.
160 *Ibid* at para 30.
161 *Ibid.*
162 *Ibid* at paras 30, 34.

VII. CONCLUSION

In summary, there have been numerous attempts to undermine civil forfeiture proceedings that involved the use of the *Charter* and common law principles. None of these efforts have been successful in establishing a *Charter* breach where the court has had to rule on what the appropriate course of action would be. Although the Quebec Court of Appeal relied on section 24(2) in *Vellone*, the forfeiture hearing originated from criminal rather than civil proceedings. This leads to the question of whether adopting the SCC's legal framework in *Grant* is appropriate. However, the common law has been adapted from one area of law to another when it was appropriate to do so.

Accordingly, applying the *Grant* analysis to resolve an evidentiary issue involving a *Charter* breach would not be an unjustifiable misapplication of the law. While it is true civil forfeiture acts contain their own relief provisions, it must also be remembered that section 24(2) is the remedial provision in the *Charter*.[163] Section 24(2) has been used to deal with evidence obtained in violation of *Charter*-protected rights. Even in applications for bifurcation, the BC Supreme Court has considered the exclusion of evidence under section 24(2) on multiple occasions in its analysis, further suggesting the remedial provision is the correct approach.[164] The question, however, would be how the *Grant* test should be applied. Within the civil forfeiture context, the Court should exercise its discretion to emphasize the importance of some factors over others in reaching its decision, especially when the defendant's liberty is no longer in question.

While instructions from the SCC would be definitive, such guidance is far from imminent. In March 2021, the SCC refused to grant Mr. Vellone leave to appeal his matter.[165] If, however, the matter was granted leave, the SCC could very well have resolved the matter in both criminal and civil forfeiture proceedings simultaneously. In *R v Hills*, the SCC endorsed the use of hypotheticals in a sentencing hearing, permitting the sentencing judge to rule based on hypothetical facts.[166] The SCC could likewise clarify this area of the law if presented with an opportunity to do

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163 *Canadian Charter, supra* note 15, s 24(2).

164 *Director of Civil Forfeiture v Huynh*, 2012 BCSC 740 at para 39; *Civil Forfeiture (Director) v Johnson*, 2015 BCSC 1217 at para 49; *British Columbia (Director of Civil Forfeiture) v Ieraci*, 2020 BCSC 605 at paras 46-48 and *Director of Civil Forfeiture v Conrad*, 2023 BCSC 185 at paras 65-67.

165 *Roberto Vellone v Her Majesty the Queen*, 2021 CanLII 15594.

166 See generally *R v Hills*, 2023 SCC 2.

so by using a hypothetical scenario and inviting counsel and other interested parties to make submissions on the matter.

Until the SCC provides a definitive ruling on how to navigate this area of the law, future research endeavours should consider examining the impact of the exclusion of evidence under section 24(2) in civil forfeiture proceedings. In particular, once this area of the common law develops, future research might consider how the Director could succeed despite an unfavourable section 24(2) ruling. Stated differently, researchers could examine whether a civil claim ends once the evidentiary basis collapses due to the exclusion of evidence under section 24(2).

Although the answer may appear intuitive, the data could suggest the exclusion of evidence under section 24(2) is a moot point in most cases. Recall that civil forfeiture proceedings are commenced *in rem* against the property itself and are assessed on the civil standard of proof of on a balance of probabilities. As such, the Director may have sufficient evidence that survives the section 24(2) ruling to prove its claim. Whether the common law developments in this fashion remains to be seen, in the meantime, it is clear that section 24(2) should be used to resolve issues of improperly obtained evidence in civil forfeiture proceedings. Section 24(2) is part of *The Constitution Act, 1982,* and as such is the supreme law of Canada.[167] The *Grant* analysis thus remains authoritative.

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167 *Constitution Act*, 1982, s 52.

Comparison of Civil Forfeiture Regimes across Canadian Provinces

	BC	AB	SK	MB
ACT	***Civil Forfeiture Act,*** **SBC 2005, C. 29**	***Civil Forfeiture Act,*** **SA 2001, c C-15.2**	***The Seizure of Criminal Property Act,*** **2009, SS 2009, c S-46.002**	***The Criminal Property Forfeiture Act,*** **C.C.S.M. c. C306**
CIVIL FORFEITURE PROVISIONS	3 (1) The director may apply to the court for an order forfeiting to the government (a) the whole of an interest in property that is proceeds of unlawful activity, or (b) the portion of an interest in property that is proceeds of unlawful activity. (2) The director may apply to the court for an order	19.2(1) Subject to subsection (2), the Minister may, with respect to property that is alleged to be an instrument of illegal activity, commence an action under this Part by an application for any one or more of the following purposes: (b) to remove financial incentives to commit illegal acts, including disgorging financial gains from illegal acts; (c) to prevent property that has been used or	3(1) The director may apply to the court for a forfeiture order if the director is satisfied that property is proceeds of unlawful activity or an instrument of unlawful activity.	3(1) If the director is satisfied that property is proceeds of unlawful activity or an instrument of unlawful activity, he or she may commence proceedings in court seeking an order forfeiting the property to the government.

	BC	AB	SK	MB
	forfeiting to the government property that is an instrument of unlawful activity.	is likely to be used in carrying out an illegal act from being used to carry out future illegal acts;		
ADMIN. PROVISIONS	**Part 3.1 — Administrative Forfeiture of Subject Property** 14.02 (1) This Part applies if (a) the director has reason to believe that (i) the whole or a portion of an interest in property, other than real property, is proceeds of unlawful activity, or (ii) property, other than real property, is an instrument of	**Administrative disposition proceeding** 1.3(1) In this section, "bona fide interest holder" means, in relation to property described in subsection (2)(a), a person who has an interest in the whole or a portion of the property in respect of which the person has registered a financing statement in the Personal Property Registry, and who (a) did not directly or	**PART II.1 Administrative Forfeiture Proceedings** 10.2(1) The director may commence administrative forfeiture proceedings against property if: (a) the director is satisfied that the property is proceeds of unlawful activity or an instrument of unlawful activity; (b) the property is personal property;	**Property eligible for administrative forfeiture** 17.2(1) Property may be the subject of administrative forfeiture proceedings under this Part if (a) it is cash or other personal property; (b) it has been seized by a law enforcement agency and is being held by or on behalf of that agency;

	BC	AB	SK	MB
	unlawful activity, (b) the director has reason to believe that the fair market value of the property referred to in paragraph (a) (i) or (ii) is $75 000 or less, (c) the property referred to in paragraph (a) (i) or (ii) is in British Columbia and is in the possession of a public body, and (d) the director has no reason to believe that there are any protected interest holders in relation to that property.	indirectly engage in the carrying out of the illegal act that is the basis for disposal under this Act, or (b) where the property had been acquired subsequent to the acquisition of the property by illegal means, did not know and would not reasonably be expected to know that the property had been acquired by illegal means. (2) The Minister may commence an administrative disposition proceeding under this Part with respect to personal property without having to commence a legal action under Part 1.01 or Part 1.1 if	(c) the property has been seized by a law enforcement agency and is being held by or on behalf of that agency; (d) the director has reason to believe that the fair market value of the property is less than the prescribed amount; (e) subject to subsection (1.1), no other person has a prior registered interest in the property; and (f) the property is not the subject of an application for a forfeiture order pursuant to Part II.	(c) the director has reason to believe that the fair market value of the property does not exceed (i) the prescribed amount, or (ii) if no amount is prescribed, $75,000; (d) all persons who have a prior registered interest in the property consent in writing to proceedings under this Part; and (e) the property is not the subject of proceedings seeking a forfeiture

	BC	AB	SK	MB
	(2) This Part does not apply to property described in subsection (1) of this section if	(a) the Minister has reason to believe that the property is property acquired by illegal means or is an instrument of illegal activity, (b) the Minister has no reason to believe that there are any bona fide interest holders with respect to the property, and (c) the property is located in Alberta and is in the possession of a public body.	**Notice to interested persons** 10.3(1) The director must give written notice of administrative forfeiture proceedings against the subject property to: (a) the person from whom the subject property was seized; (b) the law enforcement agency that seized the subject property; and (c) any other person who the director believes may have an interest in the subject property. (2) A notice pursuant to	order under Part 2.

	BC	AB	SK	MB
			this section must include the following: (a) a description of the subject property; (b) the date the subject property was seized and the place of seizure; (c) the basis on which the director seeks forfeiture of the subject property; (d) a statement that the subject property may be forfeited to the Crown; (e) a statement that a person who intends to oppose forfeiture of the subject property must submit a written notice of dispute to	

	BC	AB	SK	MB
			the director at an address set out in the notice by a deadline date specified in the notice;	
UNLAWFUL ACTIVITY DEFINITION	Part 1 Interpretation "unlawful activity" means an act or omission described in one of the following paragraphs: (a) if an act or omission occurs in British Columbia, the act or omission, at the time of occurrence, is an offence under an Act of Canada or British Columbia; (b) if an act or omission occurs in another	A reference in this Act to an illegal act is a reference to any of the following: (a) anything done or carried out in contravention of, or that constitutes an offence under, an enactment of Canada; (b) anything done or carried out in contravention of, or that constitutes an offence under, an enactment of Alberta; (c) anything done or carried out in contravention of, or that	PART I Interpretation 2 In this Act: (u) “unlawful activity” means an act or omission that is an offence pursuant to: (i) an Act, an Act of any province or territory of Canada or an Act of the Parliament of Canada; or (ii) an Act of a jurisdiction outside Canada, if a similar act or omission would be an offence pursuant to an Act or an Act	"unlawful activity" means an act or omission that is an offence under (a) an Act of Canada, Manitoba or another Canadian province or territory; or (b) an Act of a jurisdiction outside Canada, if a similar act or omission would be an offence under an Act of Canada or Manitoba if it were committed in Manitoba;

	BC	AB	SK	MB
	province of Canada, the act or omission, at the time of occurrence, (i) is an offence under an Act of Canada or the other province, as applicable, and (ii) would be an offence in British Columbia, if the act or omission had occurred in British Columbia; (c) if an act or omission occurs in a jurisdiction outside of Canada, the act or omission, at the time of occurrence, (i) is an offence under	constitutes an offence under, an enactment of another province or territory of Canada; (d) anything done or carried out in contravention of, or that constitutes an offence under, an enactment of a foreign jurisdiction if the thing would have constituted an offence under an enactment of Canada or Alberta had it occurred in Alberta.	of the Parliament of Canada if it were committed in Saskatchewan;	whether the act or omission occurred before or after the coming into force of this Act.

	BC	AB	SK	MB
	an Act of the jurisdiction, and (ii) would be an offence in British Columbia, if the act or omission had occurred in British Columbia, but does not include an act or omission that is an offence (d) under a regulation of a corporation, or (e) under an enactment of any jurisdiction if the enactment or the jurisdiction is prescribed under this Act. (2) For the purpose of			

	BC	AB	SK	MB
	the definition of "proceeds of unlawful activity", "equivalent in value" means equivalent in value as determined or established by the regulations.			

	ON	QB	NS	NFL AND PEI
ACT	***Civil Remedies Act,*** **2001, S.O. 2001, c. 28**	**C-52.2 - *Act Respecting the Forfeiture, Administration and Appropriation of Proceeds and Instruments of Unlawful Activity***	***Civil Forfeiture Act*** **S.N.S. 2007, c. 27**	**N/A**
CIVIL FORFEITURE PROVISIONS	**Forfeiture order** 8 (1) In a proceeding commenced by the Attorney General, the Superior Court of Justice shall, subject to subsection (3) and except where it would clearly not be in the interests of justice, make an order forfeiting property that is in Ontario to the Crown in right of Ontario if the court finds that the property is an instrument of unlawful activity.	4. The Attorney General may apply to a court of civil jurisdiction for forfeiture to the State of any property that is in whole or in part directly or indirectly derived from or used to engage in unlawful activity. The Attorney General may also file an incidental application requesting the court to declare rights in the property unenforceable because they are of a fictitious or simulated nature	**Application for forfeiture order** 5 (1) The Manager may apply to the court for an order forfeiting to Her Majesty in right of the Province (a) the whole of an interest in property that is proceeds of unlawful activity; or (b) the portion of an interest in property that is proceeds of	

	ON	QB	NS	NFL AND PEI
		or because they were acquired out of the proceeds of unlawful activity	unlawful activity. (2) The Manager may apply to the court for an order forfeiting to Her Majesty in right of the Province property that is an instrument of unlawful activity.	

	ON	QB	NS	NFL AND PEI
ADMIN. PROVISIONS	Grounds to seek administrative forfeiture (2) The Attorney General may commence an administrative forfeiture proceeding against property if he or she has reason to believe that the property is proceeds of unlawful activity or an instrument of unlawful activity. 2020, c. 11, Sched. 3, s. 1 (1). Section Amendments with date in force (d/m/y) Commencing administrative forfeiture proceeding 1.3 (1) In order to commence	**N/A**	**N/A**	**N/A**

	ON	QB	NS	NFL AND PEI
	an administrative forfeiture proceeding, the Attorney General must, (a) file notice of the administrative forfeiture proceeding against the property in the registration system established under the Personal Property Security Act; and (b) give written notice of the administrative forfeiture proceeding to, (i) the person from whom the property was seized, (ii) the public body that is holding the property or on			

	ON	QB	NS	NFL AND PEI
	whose behalf the property is being held, and (iii) any other person whom the Attorney General has reason to believe may have an interest in the property. 2020, c. 11, Sched. 3, s. 1 (1).			
UNLAWFUL ACTIVITY	An act or omission that, (a) is an offence under an Act of Canada, Ontario or	An act or omission that is an offence under the Criminal Code (R.S.C. 1985, c. C-46), the Controlled	Interpretation 3 (1) In this Act, (m) "unlawful activity" means	

	ON	QB	NS	NFL AND PEI
	another province or territory of Canada, or (b) is an offence under an Act of a 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, whether the act or omission occurred before or after this Part came into force.	Drugs and Substances Act (S.C. 1996, c. 19) or the Cannabis Act (S.C. 2018, c. 16) is unlawful activity for the purposes of this Act. A penal offence under an Act listed in Schedule 1 is also unlawful activity for the purposes of this Act. This Act applies to property that is in Québec. It is applicable to unlawful activity committed in Québec and to unlawful activity engaged in outside Québec that would also be unlawful activity if engaged in in Québec.	an act or omission described in one of the following subclauses: (i) where an act or omission occurs in the Province, the act or omission, at the time of occurrence, is an offence under an Act of the Parliament of Canada or of the Province, (ii) where an act or omission occurs in another province of Canada, the act or omission, at the time of occurrence, (A) is an offence under an Act of the	

	ON	QB	NS	NFL AND PEI
			Parliament of Canada or of the other province, as applicable, and (B) would be an offence in the Province if the act or omission had occurred in the Province, (iii) where an act or omission occurs in a jurisdiction outside of Canada, the act or omission, at the time of occurrence, (A) is an offence under an Act of that jurisdiction, and (B) would be an offence in the Province if the act or omission had	

	ON	QB	NS	NFL AND PEI
			occurred in the Province, but does not include an act or omission that is an offence under an enactment of any jurisdiction if the enactment or the jurisdiction is prescribed under this Act.	