


2014

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Recommended Citation

Patrick Daley, "Civil Asset Forfeiture: An Economic Analysis of Ontario and British Columbia", (2015) 5:3 online: UWO J Leg Stud 2<<http://ir.lib.uwo.ca/uwojls/vol5/iss3/2>>.

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Civil Asset Forfeiture: An Economic Analysis of Ontario and British Columbia

Abstract

This paper compares and analyzes the incentive structure of Ontario and British Columbia's civil asset forfeiture regimes. Part one surveys the American civil forfeiture experience to draw out theoretical considerations from American academia and inform a discussion of Canadian law. Part two compares the Ontario and British Columbia civil forfeiture regimes and identifies institutional incentives and barriers embedded in the framework of the forfeiture regimes in each province. Part three uses empirical data to explain how Ontario and British Columbia's incentive structures affect civil forfeiture's use. The paper argues there is an optimal allocation of resources towards the use of civil forfeiture, and that such optimization is ultimately influenced by the province's incentive structure. Finally, part four undertakes a discussion of the potential effects that the inefficient use of civil forfeiture may have on the broader economy.

This article is helpful for readers seeking to learn more about:

- civil asset forfeiture, law and economics, economics, civil forfeiture, economics, public enforcers, organizational behaviour, incentive-driven behaviour, legislative remedies, law enforcement resources, institutional frameworks, procedural incentives, financial incentives, institutional barriers

Topics in this article include:

- comparative analysis, adoptive forfeiture, equitable sharing, inefficient forfeiture, allocation of proceeds, administrative forfeiture, social welfare, grey market actors, private property rights, rent-seeking, Ontario, British Columbia, United States

Authorities cited in this article include:

- *Comprehensive Crime Control Act of 1984*, Pub L No 98-473, §1762, 98 Stat 1976.
- *Civil Remedies Act, 2001*, SO 2001, c 28.
- *Civil Forfeiture Act*, SBC 2005, c 29.

Keywords

Civil asset forfeiture, law and economics, civil forfeiture, economics, public enforcers, organizational behaviour, incentive-driven behaviour, legislative remedies, law enforcement resources, institutional frameworks, procedural incentives, financial incentives, institutional barriers, comparative analysis, adoptive forfeiture, equitable sharing, inefficient forfeiture, allocation of proceeds, administrative forfeiture, social welfare, grey market actors, private property rights, rent-seeking, Ontario, British Columbia, United States

CIVIL ASSET FORFEITURE: AN ECONOMIC ANALYSIS OF ONTARIO AND BRITISH COLUMBIA

PATRICK DALEY*

INTRODUCTION

Civil forfeiture is a statutory remedy designed to recover the proceeds of unlawful activity, as well as property used to facilitate unlawful activity.¹ Civil forfeiture laws allow the state to initiate a civil action against property itself.² The remedy has become increasingly prevalent in common law jurisdictions since the 1970s.³ Modern civil forfeiture laws were first implemented in the United States with the passage of the *Comprehensive Crime Control Act (CCCA)* in 1984.⁴ In Canada, Ontario became the first province to implement civil forfeiture legislation with the passage of the *Civil Remedies Act (CRA)* in 2001. Subsequently, British Columbia (BC) instituted the *Civil Forfeiture Act (CFA)* in 2006.⁵

The proliferation of civil forfeiture legislation in Canada raises important economic questions. Civil forfeiture allows the state to infringe on private property rights without laying a criminal charge or securing a conviction.⁶ Although this state power benefits society by recouping costs imposed on the public through individual criminal acts, I argue that the excessive or “inefficient” use of civil forfeiture may lead to a decline in the wellbeing of society or “social welfare” by eroding private property rights. Further, I argue that the public agencies tasked with enforcing these laws, or “public enforcers,” are incited to expend additional law enforcement resources in the form of time, money, and personnel to employ civil forfeiture. This results in an

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¹ Jeffrey Simser & James McKeachie, *Civil Asset Forfeiture* (Toronto: Thomson Reuters, 2012) 1-1–1-2.

² *Ibid.*

³ *Ibid.* (see 1-6–1-10 for an overview of international civil forfeiture regimes).

⁴ *Ibid.* Although the *CCCA* had the *Racketeer Influenced Corrupt Organization Act* as its predecessor, the *CCCA* was the first comprehensive piece of forfeiture legislation, and, as such, it is a landmark in forfeiture law in the US.

⁵ *Civil Remedies Act, 2001*, SO 2001, c 28 [CRA]; *Civil Forfeiture Act*, SBC 2005, c 29 [CFA]. Five other Canadian provinces have civil forfeiture legislation, but this paper will focus on Ontario and BC.

⁶ Ministry of the Attorney General, News Release, “Civil Forfeiture in Ontario 2007 – An Update on the *Civil Remedies Act, 2001*” (August 2007) at 4 [CRA Update].

inefficient allocation of resources and ultimately directs resources away from other legitimate enforcement concerns.

I argue that the institutional framework established around civil forfeiture is the primary determinant in the likelihood of its inefficient use by public enforcers. More precisely, I argue there is a positive relationship between incentives embedded within the framework of civil forfeiture laws and the frequency of their use. Throughout this paper, I identify and discuss two main incentives that are conducive to the use of civil forfeiture: procedural incentives and financial incentives.⁷ In operation, the greater the incentives contained within the institutional framework, the more public enforcers will use forfeiture laws. Conversely, where institutional barriers are present, public enforcers will use this remedy less frequently.⁸ Thus, by identifying institutional incentives and barriers, I will analyze the behaviour of public enforcers in relation to civil forfeiture.

In part one of this paper, I survey the American experience with civil forfeiture and extract theoretical considerations from the wealth of American academic literature in an effort to inform a discussion of Canadian civil forfeiture laws. In part two, I undertake a comparative analysis of the civil forfeiture regimes in Ontario and BC and identify institutional incentives and barriers embedded in the framework of civil forfeiture in each province. In part three, I empirically analyze the use of civil forfeiture in Ontario and BC to determine the effect that each province's incentive structure has on the use of civil forfeiture. The fourth and final part contains a theoretical discussion of the effects that the inefficient use of civil forfeiture may have on the broader economy.

This paper will proceed under several assumptions. First, there is a market for law enforcement, in which resources such as time, money, and personnel are scarce.⁹ Second, there is an optimal allocation of law enforcement resources for various uses to maximize social welfare.¹⁰ Third, public enforcers of civil forfeiture laws are self-interested actors who seek to enhance their own utility by maximizing benefits and minimizing costs.¹¹ In practice, I suggest there is an optimal level of civil forfeiture beyond which there is an inefficient allocation of law enforcement resources, producing

⁷ The term "procedural incentive" is used to denote administrative or process-based incentives that reduce the cost of pursuing forfeiture. "Financial incentive" is used to denote monetary benefits that accrue to the organization of a public enforcer, or a party that a public enforcer would seek to confer a monetary benefit upon. This discussion certainly does not suggest that these are the only types of incentives that influence behaviour. However, for the sake of analytical precision, these will be the two primary types of incentive to be discussed.

⁸ "Institutional barriers" are procedural impediments to the use of civil forfeiture that increase the cost of proceeding with a forfeiture action.

⁹ Harold L Votey Jr & Llad Phillips, "Police Effectiveness and the Production Function for Law Enforcement" (1972) 1 J Legal Stud 423.

¹⁰ Nuno Garoupa & Daniel Klernan, "Optimal Law Enforcement with a Rent-Seeking Government" (2002) 4 Am L & Econ Rev 116 at 117.

¹¹ *Ibid.* "Public enforcer" is used to denote those public agents responsible for administering civil forfeiture laws.

a decline in social welfare. It is assumed that self-interested public enforcers derive utility from the use of civil forfeiture. Therefore, public enforcers will employ forfeiture when the benefits of using the remedy outweigh the costs. This could ultimately lead to the inefficient use of forfeiture.

PART 1 – THE AMERICAN EXPERIENCE: KEY THEORETICAL CONSIDERATIONS

The American experience with civil forfeiture gives rise to considerations that Canadian policymakers should take into account. This section will survey the American experience and identify variables that cause inefficient civil forfeiture.

1.1 – Adoptive Forfeiture and the Institutional “Path of Least Resistance”

The American institutional framework of civil forfeiture creates a procedural incentive to pursue the method of forfeiture that provides the lowest barriers to success. The *CCCA* provides local and state law enforcement agencies with two routes to pursue forfeiture: state law or federal law. The *CCCA* allows local and state enforcers to transfer the assets they seize to federal law enforcement agencies through a process known as “adoptive forfeiture.”¹² Federal law enforcement officials can take possession of these assets and initiate federal forfeiture actions so long as the “conduct giving rise to the seizure is in violation of federal law and . . . federal law provides for forfeiture.”¹³ In this way, the American institutional framework of civil forfeiture creates a procedural incentive for public enforcers to pursue the method of forfeiture that provides the lowest barriers to success or the “path of least resistance.”

American academics have conducted empirical research on this point and have found that public enforcers will pursue the avenue with the fewest barriers to success, even if it requires transferring the file to another jurisdiction.¹⁴ In practice, where state forfeiture laws impose greater barriers to success relative to federal law—by raising the standard of proof or shifting the burden of proof onto the state—there is a corresponding increase in the use of federal forfeiture law.¹⁵

American research provides compelling evidence demonstrating that self-interested public enforcers respond to procedural incentives embedded within the framework of civil forfeiture by adopting methods that minimize the costs associated with forfeiture and increase the likelihood of successful forfeiture actions. This incentive-driven behaviour results in a pattern in which enforcement converges with the

¹² Institute for Justice, Media Release, “Policing for Profit” (March 2010) online: <http://www.ij.org/images/pdf_folder/other_pubs/assetforfeituretoemail.pdf> [Institute for Justice].

¹³ *Ibid.*

¹⁴ Jefferson Holcomb, Tomislav Kovandzic & Marian Williams, “Civil asset forfeiture, equitable sharing, and policing for profit in the United States”, (2011) 39 J Crim J Educ 273 at 282.

¹⁵ Institute for Justice, *supra* note 12.

“path of least resistance.” Applying this analysis to the Canadian context, *ceteris paribus*, public enforcers will likely respond to procedural incentives embedded within the Canadian framework in a manner similar to their American counterparts. Parts two and three of this paper identify the procedural incentives available to public enforcers, and subsequent behavioural responses, to determine if this conclusion holds true in Canada.

1.2 – Equitable Sharing: Incentivizing Inter-Agency Cooperation through Retention of Proceeds

A crucial element of civil forfeiture reform in the 1980s was the introduction of “equitable sharing.” As discussed, the *CCCA* allows for the transfer of assets through adoptive forfeiture. Beyond the procedural advantages, local and state agencies are further incented to transfer seized assets to federal agencies to obtain the equitable sharing of proceeds from the disposition of assets forfeited. Through equitable sharing, local and state agencies receive 80 per cent of the assets obtained from adoptive forfeitures. The federal government retains the remaining 20 per cent to offset costs associated with federal operations.¹⁶ Equitable sharing is attractive to law enforcement agencies because the majority of states place restrictions on how civil forfeiture funds can be spent. In effect, this diverts funds away from law enforcement.¹⁷ Under federal law, any proceeds redistributed from forfeiture actions must be used for law enforcement purposes. Thus, public enforcers at the local level are able to circumvent the restrictions that state laws place on the use of funds from forfeiture.¹⁸ The financial incentives to circumvent state law and engage in equitable sharing with the federal government have had a substantial impact on decision-making processes for local and state law enforcement, such that “[t]he formula for the distribution of proceeds to law enforcement is a determining factor in motivating forfeiture-focused investigations and in choosing the forum for conducting forfeiture proceedings.”¹⁹

In support of the foregoing argument, empirical research demonstrates there is a significant relationship between the percentage of forfeiture revenue retained by public enforcers under state law and the use of equitable sharing that circumvents state law in those jurisdictions.²⁰ States with generous state forfeiture laws receive significantly

¹⁶ United States Department of Justice, Manual, “A Guide to Equitable Sharing for State and Local Law Enforcement Agencies” (March 2009) online:

<<http://www.justice.gov/usao/ri/projects/esguidelines.pdf?>> [Department of Justice].

¹⁷ Eric Blumenson & Eva Nilsen, “Policing for Profit: The Drug War’s Hidden Economic Agenda” (1998) 65 U Chicago L Rev 35 at 52 (“[m]ost state laws provide public enforcers with a less favorable percentage of the assets than federal law, or require sharing the assets with other state agencies. Some states... require seized assets to be paid into the state’s general fund or some non-law enforcement agency, with none earmarked for police”).

¹⁸ Department of Justice, *supra* note 16 at 16.

¹⁹ Blumenson & Nilsen, *supra* note 17 at 55.

²⁰ Holcomb, Kovandzic & Williams, *supra* note 14 at 283.

lower amounts of equitable sharing payments from the federal government than do states that limit or prevent the proceeds kept by public enforcers.²¹ This research illustrates that where financial incentives are offered to public enforcers, they are likely to significantly alter their behaviour in an attempt to maximize revenues from civil forfeiture. In parts two and three, I identify the financial incentives available to public enforcers under Canadian civil forfeiture regimes and determine the behavioural responses to these incentives.

1.3 – Civil Forfeiture & Institutional Funding: Expanding the Scope of the Enforcement Mandate

A final theoretical consideration that can be drawn from the American experience with civil forfeiture is that when institutional budgets are tied to forfeiture activity, public enforcers will respond by increasing proceeds of forfeiture to meet budgetary necessities.²² Public enforcers accomplish this by increasing their policing efforts to capture greater proceeds from asset forfeiture.²³ In the American context, the emphasis is on policing drug crimes, which present robust opportunity for the seizure of cash and property.²⁴ The empirical data demonstrate that when institutional funding is linked to forfeiture activity, public enforcers respond by increasing proceeds of forfeiture.²⁵

These findings are consistent with theories of organizational behaviour in the public sector: self-interested actors will attempt to maximize the size and budget of their agencies, which provides benefits through higher salaries, greater job security, better resources, and increased power and prestige.²⁶ Further, the American data align with my central argument that self-interested public enforcers will respond to incentives to maximize their utility. A central implication of this research is that enforcers will likely employ forfeiture as much as possible in order to acquire sufficient revenue and ensure organizational survival, thus creating the possibility of inefficient forfeiture. This incentive effectively expands the mandate of public enforcers to encompass organizational survival and fiscal stability. As a result, the decision-making process for

²¹ *Ibid* at 280.

²² John L Worral, “Addicted to the drug war: The role of civil asset forfeiture as a budgetary necessity in contemporary law enforcement” (2001) 29 J Crim J Educ 171 at 176, 181.

²³ Katherine Baicker & Mireille Jacobson, “Finders keepers: Forfeiture laws, policing incentives, and local budgets” (2007) 91 Journal of Public Economics 2113 at 2115.

²⁴ Brent D Mast, Bruce L Benson & David W Rasmussen, “Entrepreneurial Police and Drug Enforcement Policy” (2000) 104 Public Choice 285 at 287. The CCCA is used for a wide variety of offences: see Department of Justice, *supra* note 16 at 1-2 for the range of agencies, which use the CCCA. However, at the time of implementation, the CCCA was intended primarily as a tool against the “war on drugs” that began in the early 1980s in the US.

²⁵ Institute for Justice, *supra* note 12 at 12-13.

²⁶ *Ibid* at 11-12.

pursuing forfeiture incorporates external considerations outside of crime control and general deterrence.

Applied to the Canadian context, in situations where institutional funding of public enforcers is tied to forfeiture proceeds, it is possible that we will see a behavioural response that ensures organizational survival and fiscal stability.

1.4 – Conclusions Regarding the American Experience

In conclusion, there are several crucial lessons that can be taken from the American experience with civil forfeiture and that can inform a discussion of Canadian forfeiture regimes:

1. Public enforcers will respond to procedural incentives embedded within the framework of civil forfeiture by adopting methods that minimize the costs associated with forfeiture and increase the likelihood of successful forfeiture actions.
2. Public enforcers will respond to financial incentives by seeking to maximize revenue.
3. Where institutional funding is tied to forfeiture activity, public enforcers will likely increase forfeiture activity to ensure organizational survival and fiscal stability.

PART 2 – COMPARATIVE ANALYSIS OF THE INSTITUTIONAL FRAMEWORKS OF ONTARIO AND BC

2.1 – Ontario

2.1.1 – Institutional Framework

In Ontario, the Civil Remedies for Illicit Activities Office (CRIA) is responsible for enforcing the *Civil Remedies Act (CRA)*.²⁷ The CRIA operates as an arm of the Ministry of the Attorney General (MAG), resulting in several consequences to the incentive structure for public enforcers in Ontario.²⁸ First, the CRIA receives institutional funding from the MAG. As such, there is no requirement for self-funding from forfeiture revenue.²⁹ Second, the CRIA does not have to achieve a financial target.³⁰ Third, the CRIA does not have operational independence. The process for civil forfeiture begins when a public agency, such as the police or a government ministry,

²⁷ *CRA Update*, *supra* note 6 at 7.

²⁸ *Ibid.*

²⁹ *Ibid.* at 9-10.

³⁰ Sunny Dhillon, “When the province goes after ill-gotten gains, who pays?” *The Globe and Mail* (25 January 2014), online: The Globe and Mail <<http://www.theglobeandmail.com/news/british-columbia/when-the-province-goes-after-ill-gotten-gains-who-pays/article16498212/?page=all>>.

submits the relevant information to independent Crown counsel.³¹ The MAG then decides whether the statutory criteria in the *CRA* have been met, and whether a proceeding should be commenced. If the MAG approves a case, the CRIA will commence a proceeding.

Based on the American experience, it follows that guaranteed institutional funding, the absence of financial targets, and a lack of operational independence reduce the incentives for the CRIA to pursue forfeiture for purposes outside the scope of the CRIA's crime control mandate. Further, oversight by the MAG constitutes an institutional barrier to the use of forfeiture.

2.1.2— *Legislative Remedy: A Traditional Court-Based Model*

I will now proceed with an overview of the civil forfeiture action in Ontario. Once a proceeding is commenced, an *ex parte* preservation notice is issued to secure the property in question.³² Having secured the property, the CRIA will then serve notice of the proceeding to potential claimants.³³ The CRIA can bring a proceeding by action or written application.³⁴ The proceedings are conducted *in rem*, or against the property itself, and the owner or possessor of the property in question is not required to join the proceeding.³⁵ The proceedings are determined on a balance of probabilities standard of proof.³⁶ Thus, the CRIA bears the onus of establishing that the property is more likely than not a proceed or instrument of unlawful activity. Unlawful activity is defined in the *CRA*.³⁷ Further, the CRIA need only show that the provenance or use of property relates to types or patterns of unlawful activity. It need not prove specific acts of unlawful activity to bring a successful action or application.³⁸

The fact that all forfeiture actions in Ontario must proceed through the courts constitutes a procedural barrier to the use of forfeiture. Litigation is expensive and time-consuming, raising the costs of pursuing a forfeiture action.

2.1.3 – *Allocation of Proceeds*

Having successfully brought an action against property, the *CRA* creates a special purpose account for proceeds of forfeiture that are deposited to Ontario's Consolidated Revenue Fund.³⁹ Any money, or property converted into money, seized under the *CRA* can be distributed out of the Consolidated Revenue Fund for a number

³¹ *CRA* Update, *supra* note 6 at 9.

³² For an overview of the operation of the *CRA*, see Simser & McKeachie, *supra* note 1 at 8-9–8-13.

³³ *Ibid* at 8-10.

³⁴ *Ibid* at 8-11.

³⁵ *CRA*, *supra* note 5, s 15.6.

³⁶ *Ibid*, s 16.

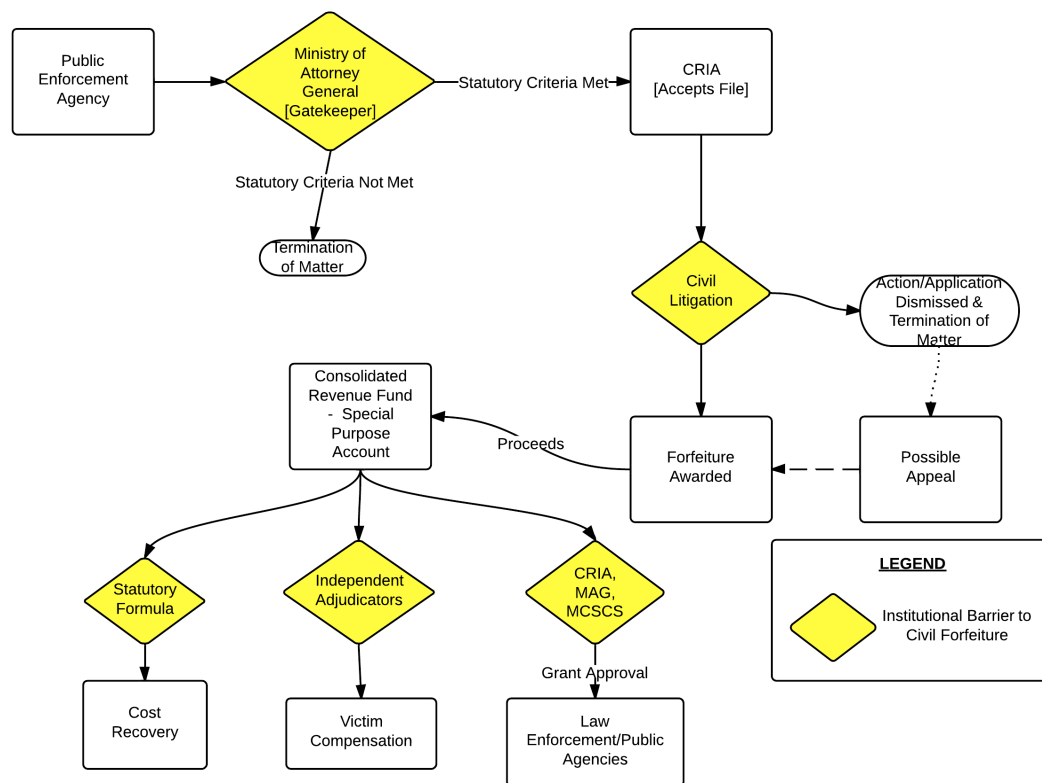
³⁷ *Ibid*, s 2.

³⁸ Simser & McKeachie, *supra* note 1, at 8-76.

³⁹ *CRA*, *supra* note 5, s 6.

of prescribed expenditures.⁴⁰ In practice, the funds are disbursed in a multi-step process.⁴¹ First, a public notice regarding claims for compensation is published. It is directed to victims, municipal corporations, and public bodies. Independent adjudicators determine claims for compensation, and all available money is used to compensate victims before other distributions are made.⁴² The MAG may recover remaining money for costs relating to the administration of the *CRA*. Such costs are determined according to a set formula contained in section 6(3.4) of the *CRA*.⁴³ Further, money may be paid out in grants to various public agencies designated by the *Act*.⁴⁴ The criteria for receiving grants are established by the MAG. Agencies seeking to receive a grant must meet these criteria and submit a project proposal outlining how the grant will prevent victimization or assist victims of unlawful activity.⁴⁵ A panel consisting of members from the CRIA office, the MAG, and the Ministry of Community Safety and Correctional Services (MCSCS) screens all disbursements from this fund.⁴⁶

Figure 1 – Flowchart Overview of the CRIA Process in Ontario



⁴⁰ *Ibid.*, s 15.

⁴¹ *CRA Update*, *supra* note 6 at 9-10.

⁴² *Ibid.*

⁴³ *CRA*, *supra* note 5.

⁴⁴ *CRA Update*, *supra* note 6 at 10.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

2.1.4 – Conclusion

In identifying incentives for the inefficient use of civil forfeiture, several institutional barriers in the Ontario model become apparent. First, the MAG oversees all cases that the CRIA pursues. Second, all forfeitures must proceed through the courts. Finally, there is oversight for each avenue of payment out of the special purpose account, namely the independent adjudication of compensation claims, a set formula for the recovery of costs, and a multi-agency panel for the allocation of grants.

2.2 – BC

2.2.1 – Institutional Framework

The first major distinction differentiating the civil forfeiture regime in Ontario from that of BC is the specialized institutional structure established in BC for the enforcement of the *CFA*. Unlike Ontario, which pursues civil forfeiture under the purview of the MAG, BC has a separate Civil Forfeiture Office (CFO). The CFO operates independently of the provincial Attorney General's office and pursues its own cases.⁴⁷ While the CFO will collaborate with public and law enforcement agencies to investigate referred case files, the director of the CFO has sole discretion over whether or not to proceed with a file.⁴⁸ This is a procedural incentive to use forfeiture. In comparison, in Ontario, the MAG oversees which cases the CRIA can pursue, which constitutes an institutional barrier to forfeiture.

A further consequence of operating as an independent agency is that the CFO does not share funding with the Attorney General's office. Instead, it has its own funding structure for which it is accountable.⁴⁹ At its inception, a key decision of the CFO was to establish a mandate that it would be self-funding.⁵⁰ In addition to raising sufficient revenue to cover operating expenses, the CFO has set a mandatory annual budget target.⁵¹ The key outcome of this funding structure is that the CFO is required to operate for profit. The operating expenses of the CFO are lower than the budget targets that the province sets, with the surplus retained by the CFO.⁵² It is evident that the institutional framework of the CFO has several interrelated incentives: the dual financial incentives of for profit operation coupled with its self-sufficient funding structure; and the necessary independence and discretion to decide which case files to pursue, which constitutes a procedural incentive. Drawing on the discussion contained

⁴⁷ British Columbia, Ministry of Public Safety and Solicitor General, *Civil Forfeiture Office: A Two Year Status Report*, PSSG 08-023 (Victoria: CFO, August 2008) at 8 [CFO Report].

⁴⁸ *Ibid.*

⁴⁹ *Ibid* at 9.

⁵⁰ *Ibid* at 3, 8.

⁵¹ Dhillon, *supra* note 30.

⁵² CFO Report, *supra* note 47 at 3, 9.

within parts 1.1 and 1.2, it is apparent that such procedural and financial incentives may influence the behaviour of the CFO.

2.2.2 – Legislative Remedies: Hybrid Administrative and Civil Model

The second key difference between the Ontario and BC models of civil forfeiture is that BC has an administrative remedy built into its legislative scheme that allows the CFO to circumvent the judicial process.⁵³ To commence an administrative forfeiture proceeding against identified property under the *CFA*, the director must have reason to believe:⁵⁴

1. the property is a proceed or instrument of unlawful activity;
2. the fair market value of the property is \$75,000 CAD or less;
3. the property is in BC and in the possession of a public body; and
4. there is no protected interest holder in relation to the property.

Having independently determined that the statutory criteria are met, the director must then fulfill a statutory notice obligation. Notice must be given in three forms under section 14.04(1)(a)-(c):

- (a) in the provincial personal property register, unless the property is cash or not eligible for registration;
- (b) in writing to the person from whom the property was seized, any person claiming to be legally entitled to the property, any person the director believes may be a registered or unregistered interest holder in the property, and the public body in possession of the property; and
- (c) published in a newspaper of general circulation in the area where the property was seized, and in the provincial Gazette.⁵⁵

Notice is deemed effective in one of two ways: (1) by publication of notice within a general circulation newspaper and the provincial Gazette pursuant to section 14.04(1)(c), or (2) when seven days have passed since notice addressed to one of the parties outlined in section 14.04(1)(b) has been deposited for registered mail.⁵⁶ Once notice is deemed effective, interested parties have 60 days to file a notice of dispute.⁵⁷ If no notice is filed, the property is forfeited to the director.⁵⁸

⁵³ *CFA*, *supra* note 5, Part 3.1.

⁵⁴ *Ibid.*, ss 14.01, 14.02.

⁵⁵ *Ibid.*, s 14.04.

⁵⁶ *Ibid.*, ss 14.04(3), 14.06.

⁵⁷ *Ibid.*, s 14.01.

⁵⁸ *Ibid.*, s 14.09.

The property in question is forfeited to the province without independent oversight as to whether the statutory criteria for forfeiture are met.⁵⁹ I suggest that the administrative remedy contained within the *CFA* constitutes a procedural incentive that may contribute to an inefficient use of civil forfeiture in BC. The procedural advantages this provides the CFO are substantial and, as with their American counterparts, would likely lead self-interested public enforcers to make use of civil forfeiture whenever possible.

If an individual seeks to file a dispute with the administrative action, they must provide notice accompanied with: (1) a solemn declaration that identifies the nature of the person's interest in the property, (2) their reason for disputing the forfeiture, and (3) their signature made before a commissioner for taking affidavits for BC.⁶⁰ Where an individual has filed a dispute, the director must proceed by way of action, and the parties will proceed to litigate the matter before a court, thus adjoining the administrative remedy with the civil process.⁶¹ The civil remedy contained within the *CFA* operates in a similar fashion to that of the *CRA*. There are no major differences between the Ontario and BC civil remedies.⁶²

2.2.3 – Allocation of Proceeds

A final key difference in the structure of civil forfeiture is the distribution of proceeds of forfeiture in BC. In both Ontario and BC, there is a special fund set aside in the provincial Consolidated Revenue Fund for the proceeds of forfeiture actions.⁶³ There are three main purposes for which monies from this account can be paid: (1) administration of the *Act*, (2) victim compensation, and (3) crime prevention and remediation programs.⁶⁴ The primary difference between Ontario and BC is the discretion that the CFO has over the distribution of proceeds from the fund. Unlike in Ontario, where the MAG has oversight of the disbursement of funds, the director of the CFO has sole discretion as to how funds are paid out.⁶⁵ Further, unlike the *CRIA*, which does not draw its operating budget from forfeiture funds, the CFO is able to retain proceeds on an annual basis for a “rainy day fund” to cover the cost of future operating

⁵⁹ In the case of administrative forfeiture where the value of property is under \$75,000, the relative cost of defending a forfeiture action to the value of property means it is often not economically sensible to defend such a claim. As a result, there is a high level of settlement with the CFO (see Dhillon, *supra* note 30).

⁶⁰ *CFA*, *supra* note 5, ss 14.01, 14.07.

⁶¹ Simser & McKeachie, *supra* note 1 at 4-44–4-45.

⁶² *CFA*, *supra* note 5, Part 4.

⁶³ *Ibid*, s 26.

⁶⁴ *Ibid*, s 27.

⁶⁵ British Columbia, Ministry of Public Safety and Solicitor General, Civil Forfeiture Office, *Payment Out of Special Account Policy*, Policy, JAG-2012-02245 (Victoria: CFO, 1 June 2011) at 8.

expenses.⁶⁶ The key outcome of this structure is the creation of a financial incentive that allows the CFO to retain proceeds of forfeiture upon payment out of the fund.

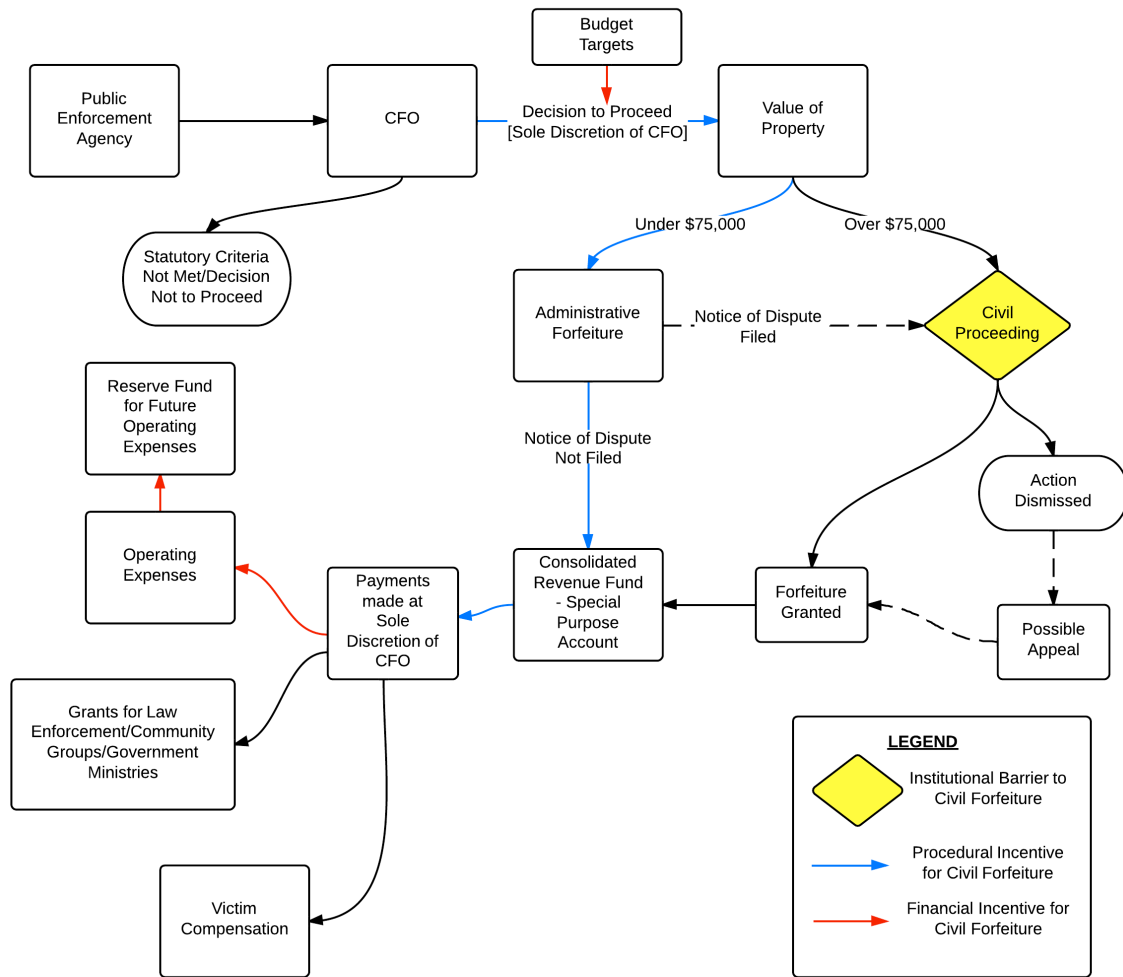
As demonstrated in part 1.2, where institutional funding is tied to forfeiture revenue, public enforcers will respond to financial incentives by increasing revenue to ensure fiscal stability and organizational survival. Allowing the Director of the CFO to have full discretion over the payment of funds out of the Consolidated Revenue Fund creates a financial incentive to accumulate proceeds of forfeiture to meet future operating expenses.

2.2.4 – Conclusion

Under the *CFA*, the procedural and financial incentives embedded in the framework of civil forfeiture are substantially greater than those found in Ontario.

⁶⁶ Ministry of Justice and Attorney General, Media Notes, GCP-2013-00151 “Civil Forfeiture Grant to Touchstone Family Assn’s Street Smarts Project, Richmond Q&As” (4 March 2012) [Ministry of Justice and Attorney General].

Figure 2 – Overview of CFO Process in BC



2.3 – Hypotheses

Based on the analysis of BC's institutional framework conducted in parts 2.1 and 2.2, and informed by the American experience, I have formulated four hypotheses:

1. Discretion over which files to pursue will lead to greater forfeiture activity by the CFO compared to the CRIA.
2. The financial incentives established for the CFO—budget targets combined with a requirement to be self-funded—will lead to enhanced financial performance by the CFO.
3. The availability of administrative forfeiture will lead to an increase in forfeiture activity.
4. The linking of institutional funding with forfeiture revenues, combined with discretion over allocation of proceeds, will lead the CFO to retain substantial funds to ensure organizational survival and fiscal stability.

PART 3 – EMPIRICAL ANALYSIS

In this section of the paper, I will identify empirical data that can help determine whether the incentives identified in part two influence the behaviour of these agencies. To frame the analysis presented below, it is necessary to keep in mind the relative population size of BC compared to Ontario, 4.6M and 13.6M, respectively.⁶⁷ This key fact provides support for the contention that BC is disproportionately employing civil forfeiture, as will be discussed below.

3.1 – The Effect of Discretion over which Cases are Pursued on Forfeiture Proceedings

Figure 3 – Comparison of Civil Files Initiated in BC and Ontario, 2006–2012⁶⁸

	Total Civil Cases Pursued (2006–2012)	Average Number of Cases/Year (Civil)	Total Combined Civil and Administrative Cases Pursued (2006–2012)	Average Number of Cases/Year (Combined)
CFO (2006–2012)	588	84	869	124
CRIA (2006–2012)	580	83	–	–

Figure 3 illustrates the number of cases pursued through the civil remedy in Ontario and BC between 2006 and 2012. These data represent the first seven years the laws were in place in BC, and years six to twelve in Ontario. The average annual caseload for civil forfeiture is almost identical in both provinces. As discussed in part 2.2.3, I suggest that the institutional independence of the CFO influences the behaviour of public enforcers in BC to commence more cases than in Ontario. On its face, the civil data presented in Figure 3 do not support this conclusion. However, the temporal context should be kept in mind when viewing Figure 3. Years six to twelve of the operation of the CRIA represent a more mature office that has experience initiating cases and working with other public agencies. In contrast, the data for the CFO

⁶⁷ Statistics Canada, *Population by year, by province and territory (Number)* (Ottawa: StatCan, 26 September 2014) online: Statistics Canada <<http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/demo02a-eng.htm>>.

⁶⁸ For CFO figures, see BC Justice Reform Initiative, Final Report, “A Criminal Justice System for the 21st Century: Final Report to the Minister of Justice and Attorney General Honourable Shirley Bond” (27 August 2012) at 166 [BC Justice Reform Initiative, Final Report]. For CRIA figures, see Letter from Julie Evans, Legal Director, Civil Remedies for Illicit Activities Office to Patrick Daley, Faculty of Law, Western University (March 31, 2014), available upon request.

represent years one to seven of its operation—a time when the CFO was still developing institutional competencies and relationships with its public agency partners. With this in mind, the CFO still initiated an almost identical annual average number of cases. As a result, I suggest that the civil data alone are inconclusive.

When examining the aggregate civil and administrative data, the CFO initiated substantially more cases than the CRIA. It should be noted that the number of administrative cases was taken from 2011–2012, the first two years during which the administrative remedy was available to the CFO. When considering the aggregate data, it is evident that the CFO has initiated substantially more forfeiture files than the CRIA. This supports my hypothesis that the procedural incentives available to the CFO influence public enforcer behaviour.

3.2 – Financial Incentives

Figure 4 – Comparison of BC's Annual Proceeds from Forfeiture and Budget Targets Established for CFO⁶⁹

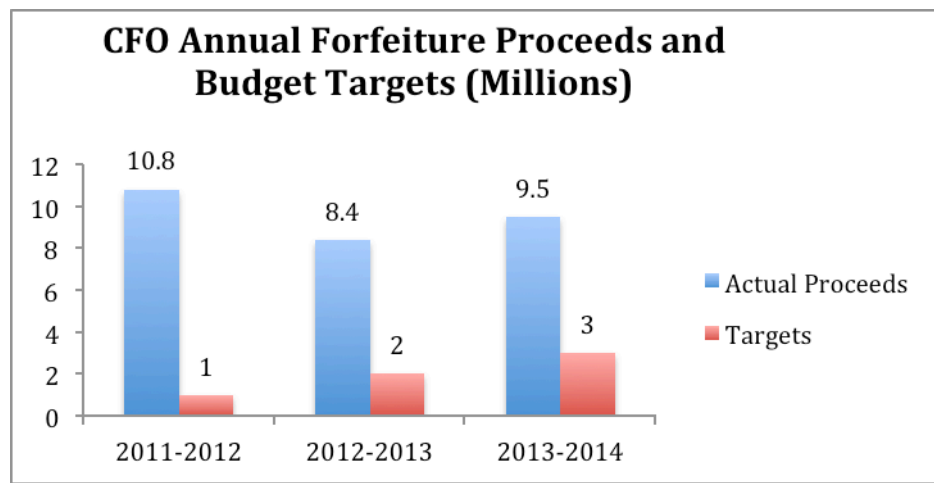


Figure 4 establishes that proceeds from forfeiture have consistently exceeded the CFO's annual budgetary target. As discussed in part 2.2.1, I argue that the financial incentive to turn a profit contained within the structure of the CFO will influence behaviour and generate sufficient revenue to meet and exceed budgetary targets. Figure 4 supports this contention emphatically, with the CFO exceeding its budgetary target by \$9.8M, \$6.4M, and \$6.5M, respectively, in the last three years.

⁶⁹ Dhillon, *supra* note 30.

Figure 5 – Comparison of Total and Annual Average Proceeds from Forfeiture in BC and Ontario⁷⁰

	Total Proceeds	Number of Years	Annual Average Proceeds
CFO	\$41,000,000	9 (2006–2014)	\$4,555,555
CRIA	\$39,000,000	14 (2001–2014)	2,785,714

Figure 5 demonstrates that BC generated greater annual average proceeds from forfeiture than Ontario, and has generated \$2M more in proceeds from forfeiture in just over half the time that Ontario's laws have been in place. This comparison suggests that in the absence of financial targets and institutional funding considerations, the CRIA is less incented to increase forfeiture activity to enhance proceeds from forfeiture.

The data presented in this section demonstrate that the CFO is much more productive in generating overall forfeiture revenue than the CRIA. The divergent financial incentives established by the presence or absence of budgetary targets is a significant explanatory mechanism for the differing financial performance. Further, I suggest that the institutional funding structure of the CFO is a second substantial factor for this result. The greater the revenues generated, the greater the proportion of revenue available to the CFO to retain for future operating expenses. This ensures fiscal stability and organizational survival. The allocation of the proceeds of forfeiture by the CFO is discussed below in part 3.4, but this incentive clearly contributes to the overall generation of forfeiture revenues in order to allocate sufficient funds for this purpose.

To supplement this analysis, there are two further considerations that should be kept in mind when analyzing the disparate financial performance of the CFO and CRIA. First, because of the oversight at the payment stage in Ontario, there is reduced incentive to increase proceeds from forfeiture because the CRIA is not able to retain proceeds and has no discretion as to where they are allocated.⁷¹ A secondary explanation for this result is that there may be a reputational incentive on the part of the CFO to meet and exceed these targets, an incentive not present for the CRIA. As discussed in part 1.3, self-interested public enforcers respond to non-monetary

⁷⁰ *Ibid.*

⁷¹ See part 2.1, above, for the CRIA's payment process. The retention of proceeds by the CFO is discussed in part 3.4.

incentives, such as power and prestige.⁷² To conclude, I suggest that each of these explanations account, in part, for the divergent financial performance of the CRIA and CFO.

3.3 – Impact of Administrative Forfeiture

Figure 6 – Split between Civil and Administrative Files Commenced, 2006–2012 and 2011–2012⁷³

	Files Commenced
Civil Forfeiture (2006–2012)	588
Administrative Forfeiture (2011–2012)	281

Figure 6 offers insight into the number of cases commenced by the CFO under administrative forfeiture versus civil forfeiture. A substantial number of administrative forfeiture cases were initiated in the first two years this remedy was available. These newly initiated files constituted almost 50 per cent of the civil forfeiture files initiated in the previous seven-year period. Figure 6 illustrates a strong behavioural response to the availability of this procedural incentive, as demonstrated by the use of administrative forfeiture.

⁷² Institute for Justice, *supra* note 12 at 12.

⁷³ BC Justice Reform Initiative, Final Report, *supra* note 68 at 165-166.

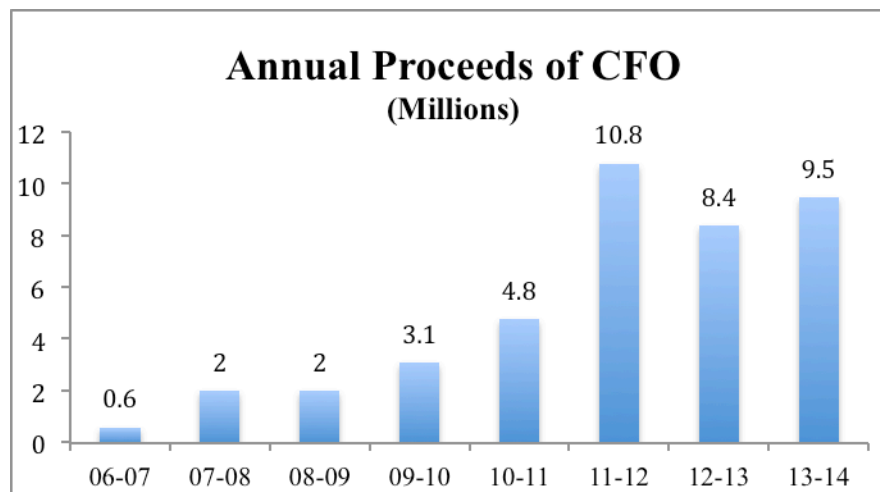
Figure 7 – Annual Proceeds of CFO (2006–2014)⁷⁴

Figure 7 demonstrates that during the fiscal year after which administrative forfeiture was introduced (2011–2012), there was a \$6M increase in the proceeds of the CFO. These data imply that there is a behavioural response by the CFO to this new procedural incentive. However, a report provided by the BC Justice Reform Initiative states that administrative forfeiture contributed only \$911,000 in its first year of operation. This amounts to just one-sixth of the increase in proceeds.⁷⁵ Therefore, the proportion of proceeds from administrative forfeiture does not account for the bulk of the increase in proceeds.

On its face, the jump in proceeds in the 2011–2012 period supports my hypothesis regarding the impact that administrative forfeiture would have on forfeiture activity. However, contradictory data suggest that other factors must be at play. A potential cause of this discrepancy is that the full value of the property seized by administrative forfeiture was not fully reflected in the 2011–2012 data because files were still working their way through the administrative process. Despite the discrepancy between the increase in the value of proceeds seized and the share of the portion of the increase attributable to administrative forfeiture, it is evident that the increase in forfeiture proceeds is sustained after 2011–2012. This suggests that administrative forfeiture continued to contribute to an increase in the value of proceeds on an annual basis after its introduction.

In sum, the data relating to the CFO's response to the availability of administrative forfeiture illustrates that the behaviour of the CFO was substantially influenced by this procedural incentive. This is demonstrated by the greater number of forfeiture files commenced through this avenue and by the corresponding increase in

⁷⁴ Dhillon, *supra* note 30.

⁷⁵ BC Justice Reform Initiative, Final Report, *supra* note 68.

revenue. Ultimately, these data provide support for my contention that administrative forfeiture leads to an aggregate increase in forfeiture activity.

3.4 – Institutional Funding

Figure 8 – CFO Allocation of Proceeds from Forfeiture⁷⁶

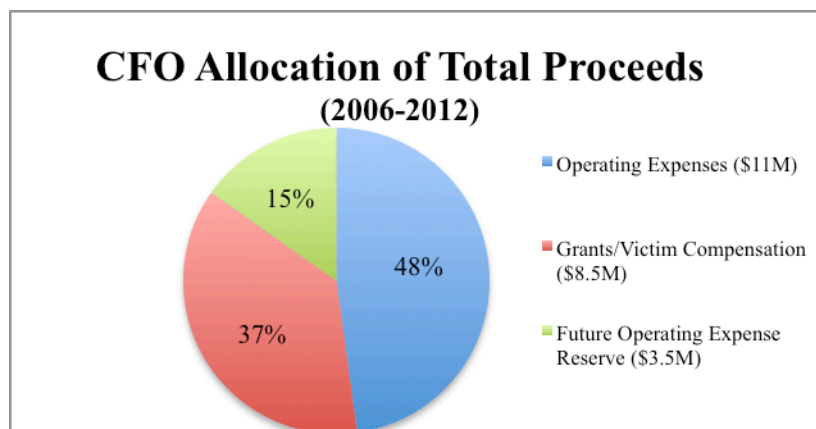


Figure 8 demonstrates that from 2006–2012, a sizeable portion of revenues (15 per cent) went to a “rainy day fund” to cover future operating expenses. Almost half of proceeds were allocated to fund the CFO, while just over one-third were paid out to third parties in the form of grants and compensation. In sum, the CFO retained almost two-thirds (63 per cent) of the proceeds derived from forfeiture.

These data suggest that the CFO responds to financial incentives when it comes to exercising discretion over the payment of revenues. In such cases, it directs a significant portion of proceeds to operational expenses, as well as a “rainy day fund” to ensure organizational survival and fiscal stability. This is consistent with the hypothesis established in part 2.3, which provides that where institutional funding and forfeiture revenues are tied to one another, public enforcers will respond to ensure organizational survival and fiscal stability.

3.5 – Conclusion

The empirical data presented in part three provide some evidence that procedural and financial incentives influence the behaviour of public enforcers of forfeiture laws in Canada. Further, given the relative population sizes of BC and Ontario, the greater use of civil forfeiture in BC reinforces the argument that the institutional framework of civil forfeiture in BC influences the behaviour of public actors. In Ontario, the actions of public enforcers are more constrained.

⁷⁶ Ministry of Justice and Attorney General, *supra* note 66.

Although this analysis demonstrates basic support for my argument, it is subject to several qualifications. First, the analysis conducted is not systematic and does not seek to isolate each variable in the use of civil forfeiture while controlling for exogenous variables. Throughout this analysis, I have explicitly acknowledged that the incentives I have identified are interrelated and thus, it is not possible using the methods I have employed to determine which incentive is responsible for a particular outcome in behaviour. This presents an inherent limitation. Further, this paper does not utilize proprietary data sets of the CFO and CRIA. Instead, it relies largely on third-party publications from which the data are drawn.

Ultimately, my goal in conducting this analysis was to demonstrate the broad contours of the responses that sophisticated public enforcers have in relation to complex incentives. I believe that the data presented provide sufficient support for many of the propositions set forth in parts one and two, and as such, warrant future research with an enhanced data set and the benefit of a more comprehensive statistical analysis.

PART 4 – IMPLICATIONS OF INEFFICIENT USE OF FORFEITURE

Part four of this paper provides a brief overview of the impact that the inefficient use of forfeiture may have on the broader market. This discussion will be largely theoretical and is intended to offer future areas of inquiry that can be explored through more extensive research.

4.1 – Misallocation of Law Enforcement Resources

The first implication of the inefficient use of forfeiture laws is the misallocation of law enforcement resources. This paper has discussed at length the incentives available to public enforcers to encourage the use of forfeiture. Presuming these incentives are effective in changing behaviour, we should observe a shift in the allocation of resources towards forfeiture and away from other uses, ultimately moving away from equilibrium in the market for law enforcement resources.⁷⁷

As shown in Figure 9, as the incentives for forfeiture increase, the allocation of law enforcement resources for this purpose increases as well, moving away from equilibrium, or the optimal amount of enforcement. This results in fewer resources being allocated to other policing strategies, leading to a non-optimal employment of available law enforcement resources.⁷⁸ The American context is informative in this regard: forfeiture-driven increased enforcement of drug laws reduced police efforts to thwart property crimes, resulting in an increase in the latter.⁷⁹ Thus, where there is an

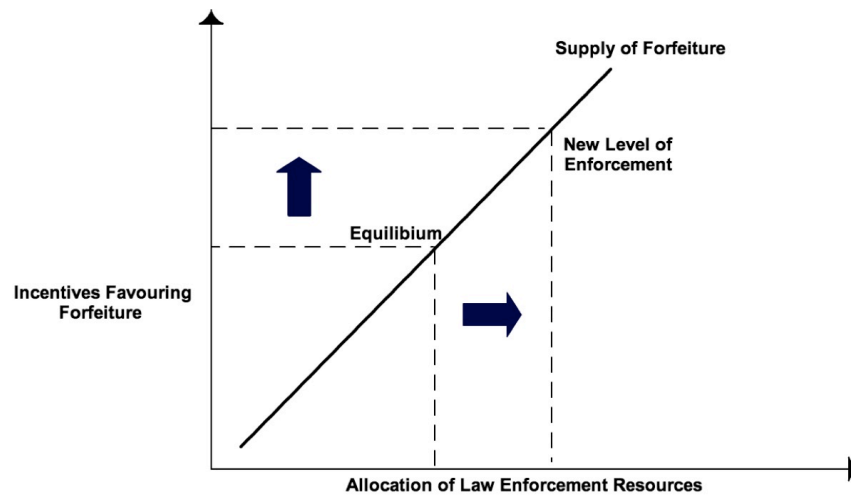
⁷⁷ Donald Boudreaux & Adam Pritchard, “Civil Forfeiture as a ‘Sin Tax’” (1 January 1996) online: The Independent Institute < http://www.independent.org/publications/policy_reports/detail.asp?id=3>.

⁷⁸ Bruce L Benson, David W Rasmussen & David L Sollars, “Police Bureaucracies, Their Incentives, and the War on Drugs” (1995) 83 Public Choice 21 at 26.

⁷⁹ *Ibid.*

increase in the use of civil forfeiture, public enforcers tend to focus on certain types of criminal activity at the expense of others, leading to a decline in overall social welfare.

Figure 9 – Supply of Forfeiture



4.2 – Freezing Rental Markets: Third-Party Liability and Asset Forfeiture

The proliferation of forfeiture laws may result in increased transaction costs for market actors who rent or lease their assets, making it more costly to conduct business and potentially creating a “freeze” in these markets.⁸⁰ For example, additional costs may be imposed on vendors as a result of the greater due diligence they must conduct on potential customers. Further, vendors may incur increased monitoring costs to mitigate the risk of their assets being used illegally. For the buyer, there may be increased transaction costs as a result of complying with additional due diligence as well as a greater price for the use of third-party assets, resulting from vendors pricing in this additional risk. I argue that these costs may result in a freeze in rental markets, especially in those segments of the economy where forfeiture actions frequently involve third-party liability, and where these costs are particularly pronounced.⁸¹

Real estate is a salient context for this discussion since financial institutions, landlords, title holders, mortgage holders, leasing companies, rental companies, and property service suppliers all face the risk that their interests in a property may be compromised as a result of its use in illegal activity.⁸² In BC, where the CFO has been

⁸⁰ For a discussion of the effects of forfeiture laws on property markets in BC, see Karl Wilberg, “Keep a Sharp Lookout—Civil Forfeiture and Seeing the Risks in Suspicious Real Estate Transactions” (Paper delivered for the Continuing Legal Education Society of British Columbia at the Residential Real Estate Conference, December 2011) [unpublished].

⁸¹ *Ibid.*

⁸² *Ibid.* at 1.2.7.

aggressive in pursuing rental property used in the drug trade at the expense of the aforementioned interest holders, there has been an increase in the costs associated with the real estate market as a result of enhanced requirements for due diligence.⁸³ As such, a key implication of the inefficient use of forfeiture is the potential “freeze” in rental and leasing markets that may occur as a result of the increase in transaction costs. Further, there may be a general rise in price for the use of assets due to vendors pricing in greater risk associated with the use of their assets.

4.3 – Impact of Rent-Seeking on the Market: Allocation of Resources from Private to Public Use

On a theoretical level, it is evident that civil forfeiture can be considered a form of rent-seeking by which the government designs enforcement and punishment with the goal of appropriating the rents of the criminal market.⁸⁴ Economists use the term “rents” to refer to excess returns that market actors obtain due to their positional advantages.⁸⁵ In the context of public agencies, empirical evidence demonstrates that government bureaucracies that appropriate resources from the private sector, by virtue of their position, harm economic growth.⁸⁶ A key question arises from an examination of the literature: How does the appropriation of resources from private to public use, as a result of forfeiture, influence the broader economy?

I propose that inefficient civil forfeiture is more likely to bring about the appropriation of resources from private to public use in the absence of criminal activity. This is a result of a lower standard of proof in civil actions and the greater frequency of use by self-interested public enforcers. As such, it is likely that in some cases, when civil forfeiture is used inefficiently, there will be a transfer of resources from productive, legitimate uses in the private sector to the public sector, in which they may not be used as efficiently. Conversely, in the context of the market for civil forfeiture in equilibrium, where presumably only criminal activity is being caught, resources from criminal activity will be appropriated for more productive public uses. Therefore, civil forfeiture itself does not hinder economic growth. However, its inefficient use is problematic as it has the potential to shift resources away from productive private activity.

⁸³ *Ibid.*

⁸⁴ See Garoupa & Klerman, *supra* note 10 at 117.

⁸⁵ Lucian Bebchuk & Jesse Fried, *Pay Without Performance — the Unfulfilled Promise of Executive Compensation* (Cambridge: Harvard University Press, 2004).

⁸⁶ Luca Spinesi, “Rent-seeking bureaucracies, inequality, and growth” (2009) 90 *Journal of Development Economics* 244 at 254.

4.4 – Grey Market Actors

A further consideration when discussing the impact of forfeiture on the broader market is the costs imposed on “grey market” actors. Such actors operate in the margins of the market, providing goods or services that are technically legal but may be subject to a changing legal or regulatory environment that could subsequently render their activity illegal.⁸⁷ I submit that the proliferation of civil forfeiture may lead to the deterrence of grey market actors. Where the law has not provided clarity on what constitutes criminal activity, grey market actors will incur increased operating risks.

The deterrence of grey market actors is a double-edged sword. Certain grey market actors do not contribute to overall economic growth but, instead, hinder the operation of the economy. This is exhibited by the grey market for the sale of products through distribution channels unauthorized by the manufacturer or brand owner, which hinders the economy as a result of the counterfeiting and violating of intellectual property rights; the diversion of buyers from authorized distribution channels; the erosion of brand equity as a result of unauthorized distribution; and the costs imposed on legitimate distributors of products.⁸⁸ However, it can be argued that in some situations, grey market actors provide value to the economy and promote economic growth. Some innovative business practices will likely test the boundaries of the law before they are more widely accepted, and such innovation provides value to the economy.⁸⁹ If actors are deterred from innovating because of the risk of forfeiture, this source of innovation is lost. Thus, private actors who operate on the margins of the economy may be providing a valuable function in the market. Inefficient use of civil forfeiture legislation may lead to a decline in these benefits.

4.5 – Erosion of Property Rights

A final implication of the use of civil forfeiture relates to a fundamental precept of economic thought: the erosion of private property rights leads to economic stagnation. It is a well-developed proposition in economics that strong protections for property rights

⁸⁷ Matthew Myers, “Incidents of Gray Market Activity among U.S. Exporters: Occurrences, Characteristics, and Consequences” (1999) 30 *Journal of International Business Studies* 105 at 106. The term “grey market” is typically associated with the unauthorized import of goods into a market, and their sale at a price less than that offered by authorized distributors. While technically legal, these importers may experience legal or regulatory barriers that may prevent them from engaging in such activity. I use the term “grey market” more generally in this section, as discussed above, to denote actors who operate in market segments that do not have clarity on their legality.

⁸⁸ Kersi D Antia et al, “How Does Enforcement Deter Gray Market Incidence?” (2006) 70 *Journal of Marketing* 92 at 92.

⁸⁹ Examples of this type of innovation are new, digital-age “crowd-sourcing” services that bypass mainstream market channels to offer goods or services, like car sharing or apartment rentals, but which circumvent traditional regulatory mechanisms, leading them to be deemed illegal (see Bill Bradley, “Airbnb Ruled Illegal in New York” *Next City* (21 May 2013) online: *NextCity* <<http://nextcity.org/daily/entry/airbnb-ruled-illegal-in-new-york>>).

are positively related to economic growth.⁹⁰ Entrepreneurs will not invest if they are unable to keep the fruits of their investment.⁹¹ With the proliferation of the use of civil forfeiture, I suggest that there is the potential for the erosion of property rights as a result of the state's ability to seize private assets in the absence of criminal convictions. Ultimately, this analysis does not seek to draw a conclusion as to whether or not property rights are being eroded. It is, however, clear from the anecdotal forfeiture evidence that there is reason to be concerned for the potential erosion of private property rights.⁹²

CONCLUSION

Civil forfeiture is a useful tool to deter crime and suppress the conditions that contribute to it. However, when the institutional framework supporting forfeiture laws encourages decision-making based on considerations outside of a crime control mandate, there is the potential for inefficient use of forfeiture. In particular, I believe that BC's experience with forfeiture laws demonstrates that the institutional framework of forfeiture must be carefully crafted to ensure that the incentives available to public enforcers are consistent with the spirit of the law. The framework must encourage restraint and careful deliberation when confiscating the property of private actors. As illustrated in part four, significant policy concerns may arise from the inefficient use of forfeiture. Ultimately, there has been limited discussion on the impact of these laws in Canadian academia. The arguments raised in this paper provide evidence that the time is ripe for a review of civil forfeiture regimes in Canada as well as a review of the benefits and costs that these regimes impose on the Canadian marketplace.

⁹⁰ For an overview of the literature on this subject, see Stijn Claessens & Luc Laeven, "Financial Development, Property Rights, and Growth" (2003) 58 *The Journal of Finance* 2401 at 2404-2406.

⁹¹ Simon Johnson, John McMillan & Christopher Woodruff, "Property Rights and Finance" (2002) 92 *The American Economic Review* 1335 at 1335.

⁹² See Dhillon, *supra* note 30 for such anecdotal evidence.