

ADDENDUM

Civil Forfeiture Law in the United States

The structure and scope of federal civil forfeiture law in the United States is quite similar to the structure and scope of Civil Forfeiture Act (CFA) in British Columbia.

While the scope of the forfeiture laws in the US tend to vary from one federal offense to another, as a general proposition, federal law, like the CFA, authorizes the forfeiture of the proceeds and instrumentalities of a criminal offense.

Federal civil forfeitures also break down into administrative (or uncontested) forfeitures, and judicial forfeiture proceedings that the Government must commence if anyone contests the administrative forfeiture action. Administrative forfeiture may be employed when the property is personal property having a value of \$500,000 or less; such proceedings almost invariably begin with the physical seizure of the property and the sending of notice to potential claimants who must respond within a set period of time or else the property will be declared forfeit by default.

Once the time to file a claim expires without the filing of any valid claim, the seizing agency declares the property forfeited to the United States. Such declarations have the same force and effect as a judicial order, and give the Government clear title to the forfeited property. Once such a declaration is entered, it is not subject to judicial review other than on the ground that the Government did not provide adequate notice of the forfeiture proceeding and the right to file a claim.

If someone does file a claim in an administrative forfeiture proceeding, the federal prosecutor must commence a judicial forfeiture action, which may be either a civil *in rem* action against the property, or a criminal prosecution of the property owner in which the Government is seeking the forfeiture of the property as part of the defendant's sentence. If the property has not already been seized when the judicial action is commenced, the court may – on a showing of probable cause – order the seizure or restraint of the property pending resolution of the civil judicial proceeding.

Civil forfeiture proceedings in the United States are most frequently resolved after a period of discovery – involving the exchange of documents, responses to written interrogatories, and the depositions of witnesses. Many cases are

resolved on a motion to dismiss the challenge to the forfeiture for lack of standing; others are resolved pre-trial on motions for summary judgment.

If the case goes to trial, the claimant has the right to demand a trial by jury at which the Government has the burden of establishing the forfeitability of the property on a balance of the probabilities. Again, this is similar to the procedure under the CFA. One possible difference in the procedure, however, concerns the defenses that the claimant is allowed to make: In the US, once the Government establishes the forfeitability of the property, the burden shifts to the claimant to show, also on a balance of the probabilities, that he/she is an innocent owner of the property and/or that the forfeiture of the property would be “grossly disproportional to the gravity of the offense” in violation of the Excessive Fines Clause of the Eighth Amendment to the US Constitution.

Finally, if the Government prevails in the judicial forfeiture action, title passes to the Government which will then liquidate the property, use the proceeds to compensate any victims of the underlying offense, and deposit any balance in an Assets Forfeiture Fund which is allocated to the various federal and state law enforcement agencies for law enforcement purposes.

On the other hand, if the claimant prevails, the Government must immediately release the property to the successful claimant and is liable for the claimant’s costs and attorney’s fees.