SCC backs Civil Remedies Act

Defence bar condemns decision

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The criminal defence bar is condemning a Supreme Court of Canada decision backing Ontario's Civil Remedies Act, saying the province now has an easier route to punishing alleged offences after failed criminal proceedings.

Toronto criminal defence lawyer Leora Shemesh calls the CRA a form of "double punishment" for accused.

Leora Shemesh has at least two clients facing the prospect of losing their homes due to Ontario's Civil Remedies Act applications.

"You go to court, the Crown knows full well that the charges are terrible and they can't make out their case because the search was horrible, so they withdraw the charge, and then they bring a Civil Remedies Act application to keep the money that they found on the accused," says Shemesh, who adds that she has at least two clients facing the prospect of losing their homes due to CRA applications.

"It sort of leaves open the possibility that if police get things wrong, they can still make it right by taking people's monies, and homes, and cars, and so forth. So you're being punished in the eyes of the law, or being criminalized, without actually being proven guilty."

Adds Shemesh, "I just think the two systems ought to work more efficiently together. And I just think they're on different railroad tracks, so to speak."

The decision arises from *Chatterjee v. Ontario*. Robin Chatterjee was arrested in March 2003 for breach of probation, according to the decision.

Police searched his car during the arrest and found $29,020 in cash, an exhaust fan, light ballast, and light socket. Police said the items smelled of marijuana, but no drugs were found. Chatterjee was never charged with any crimes related to the money, items, or any activity related to drugs.

The Attorney General of Ontario on May 13, 2003, was granted an order under the CRA to keep the seized money and equipment, and on May 16, 2003, applied under sections of the act for forfeiture of the money as proceeds of unlawful activity and the items as instruments of unlawful activity.

Chatterjee responded by arguing that the CRA is unconstitutional, saying it impinges on the federal criminal law power. The top court disagreed.

"The argument that the CRA is ultra vires is based in this case on an exaggerated view of the immunity of federal jurisdiction in relation to matters that may, in another aspect, be the subject of provincial legislation," the court stated.

"Resort to a federalist concept of proliferating jurisdictional enclaves . . . was discouraged by this court's decisions in *Canadian Western Bank v. Alberta* . . . and *British Columbia (Attorney General) v. Lafarge*

Canada Inc. . . . and should not now be given a new lease on life."

The court noted that the CRA was put in place to discourage crime and compensate victims.
"The former purpose is broad enough that both the federal government (in relation to criminal law) and the provincial governments (in relation to property and civil rights) can validly pursue it," the court stated.
"Crime imposes substantial costs on provincial treasuries.

Those costs impact many provincial interests, including health, policing resources, community stability, and family welfare. It would be out of step with modern realities to conclude that a province must shoulder the costs to the community of criminal behaviour but cannot use deterrence to suppress it."

The court disagreed with Chatterjee's argument that the CRA in rem remedy effectively adds to penalties pursued in the criminal process, thereby interfering with the sentencing regime created by Parliament.

"It is true that forfeiture may have de facto punitive effects in some cases, but its dominant purpose is to make crime in general unprofitable, to capture resources tainted by crime so as to make them unavailable to fund future crime and to help compensate private individuals and public institutions for the costs of past crime," the court wrote.

"These are valid provincial objects. There is no operational conflict between the forfeiture provisions of the Criminal Code . . . and the CRA. It cannot reasonably be said that the CRA amounts to colourable criminal legislation."

Chatterjee's lawyer, Levine Sherkin Boussidan Barristers partner James Diamond, says, "It appears there's certainly a blurring of the lines between federal and provincial jurisdictions. I'm not saying it's the end of federalism as we know it, but it certainly appears that it's leaning that way."

Diamond also points to access to justice issues of the CRA, suggesting that cash-strapped individuals facing the forfeiture of property won't qualify for legal aid. That could make it hard or impossible to afford proper legal representation.

"That is certainly a problem that needs addressing, in my opinion," he says.
Chatterjee's other lawyer, Stevensons LLP partner Richard Macklin, says other provinces will now move forward with similar legislation to the CRA. But he says the constitutionality of the law could be further questioned.

"The instruments of crime section in the bill deals with a situation where someone may be the owner of a property where some drug transaction is going on, for example, and if the home were seized, that would be punishment, as opposed to seizing the drugs or the proceeds from them," says Macklin.

"There's an interesting issue left on proceeds, I suppose, where if the taking of a house that you own free and clear, because a drug transaction went on in there, then you're being punished. And that seemed to be left open by the court."

Blake Cassels & Graydon LLP senior associate Allison Thornton, who represented the intervener Canadian Civil Liberties Association in the case, calls the CRA "criminal law through the back door."

Thornton says the Supreme Court "took a very broad view of property law, and basically from our perspective let the form of the law prevail over its substance."

She says the decision is precedent setting in terms of courts' interpretation of provincial jurisdiction "in suggesting that the provinces do have a very broad general ability to make law that has the objective of deterring and punishing crime."

She adds, "Notwithstanding that, from our perspective, that is the heart and soul of what criminal law is and should be done at the other level of government, where individuals would have the protections they have in a criminal proceeding."

Toronto criminal defence lawyer Peter Zaduk suggests the decision will further clog the province's overburdened courts. He says the average case involving an alleged grow house lasts about seven days.

"There's lots of people that might make a deal and plead guilty, who won't do that now because they stand to lose their houses if they're convicted," says Zaduk. "So you're going to have a big backlog in the courts."

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