ALBERTA AND ONTARIO: CIVILIZING THE MONEY-CENTERED MODEL OF CRIME CONTROL

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THE EXAMINATION OF CONTEMPORARY crime management strategies reveals an emerging trend in crime control. That trend consists of the increasing reliance on a money-centered model of control. This model seeks to cope with crime by attacking its financial underpinnings, the money and the assets linked to the commission of offences. To this growing money-centered edifice, late in 2001 the provinces of Alberta and Ontario added a new element. They sanctioned the use of civil legal mechanisms, as opposed to the criminal law, to erode the financial basis of crime.[1] Fitting into an existing national strategy, these devices mark the civilizing of the money-centered model of crime control in Canada, and where the Alberta and Ontario legislatures have ventured, other provinces are certain to follow.

This article identifies this emerging trend and locates the provincial initiatives firmly within its boundaries. It maps out the development of this contemporary strategy, recognizing the provincial laws as the most recent evolutionary phase. It proceeds with an inquiry into the conceptual underpinnings of the civil model and considers whether the formal provincial structures accord with their foundational premises. It continues with a preliminary investigation of whether this model is fettered by any constitutional limitations. Given the probability that the civilizing trend will continue, this article concludes with a series of structural considerations that should be taken into account when constructing civil money-centered models of control.

I. THE MONEY-CENTERED MODEL OF CRIME CONTROL

The money-centered model of crime control describes the contemporary attempt to regulate criminal activity by attacking its financial underpinnings. Receiving concrete definition over the course of the past two decades through confiscation regimes, anti-money

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[1] *Victims Restitution and Compensation Payment Act*, S.A. 2001, c. V- 3.5 [*Victims Restitution Act*]; remedies for *Organized Crime and Other Unlawful Activities Act,* 2001, S.O. 2001, c.28 [*Organized Crime Act*].

laundering laws and, most recently, civil proceedings, the development of this model is informed by an analytical framework that loosely parallels the fundamentals of commercial enterprises. Commercial ventures prosper through the realization of profit and the subsequent reinvestment and expansion, whereas a reduction in profits causes the businesses to atrophy. Similar premises underlie the money-centered model: that the pursuit of profit fosters crime, the reinvestment of profits enables expansion of the criminal enterprise, and a decline in profit and the disabling of reinvestment results in crime reduction. Organized around this analogy, the money-centered model consists of an assault on financial resources linked to criminal activity.

Only certain kinds of crime are amenable to this analytic framework, crimes having significant financial elements to them. The model was initially conceived to deal with the profitable crime of illegal drugs. For years, national and international actors had sought, and failed, to exert any appreciable restraint over the illegal drugs industry. Failure was attributed to the enormous profits and the fact that traditional crime control devices were not designed to tackle profitability.[2] Recognizing the limits of conventional mechanisms, crime control was modernized through the fashioning of legal devices that took the financial undercurrents of the drug business into account. Some of the earliest architecture of the contemporary model appears in international law.[3] The United States, long beleaguered by domestic drug problems, was quick to adopt a money-centered model.[4] The model has, however, expanded beyond the boundaries contemplated at its inception, stretching beyond drug crimes to include all manner of criminal activity. In that expansion, little thought has been given to restricting application of the device to profitable crime.

The prominence of the money-centered model is reflected in the responses to the terrorist incidents of September 11, 2001. Immediately following the attacks, the connections between terrorism and criminal assets were drawn. Legal responses predicated on that connection were instantaneous and predictable. The United Nations Security Council immediately called for the suppression of terrorist financing.[5] The United States redoubled its efforts to suppress money laundering and was swift to approve a law that characterizes money laundering as

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[2] William C. Gilmore, *International Efforts to Combat Money Laundering* (Cambridge, U.K.: Grotius, 1992) at ix – xi; see generally, William C. Gilmore, *Dirty Money: The Evolution of Money-Laundering Counter Measures* (Strasbourg: Council of Europe Press, 1995).

[3] *Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, 20 December 1988, 28 I.L.M.493.

[4] 21 U.S.C. § 881.

[5] SC Res. 1373, UN SCOR, UN Doc. S/RES/1373 (2001).

unpatriotic.[6] Canada drafted anti-terrorism legislation targeting the funding of terrorist activity.[7] Terrorism quickly usurped the drug trade as the evil to be excised, with the money-centered model the tool of expurgation.

While graphic images of terrorism and the tying of terror to 'criminal money' stimulate interest in the money-centered model, the political appeal of this model is intuitively strong. Its persuasive content derives from the repeated linkages of money and crime. With the drug trade, money becomes the reason to commit the crime. Traffickers profit while the public suffers the social consequences of drug abuse and drug-related violence. With terrorism, money facilitates the means for committing the crime, enabling terrorist activity and its horrific social costs. This twinning of drugs, and now terror, with financial assets explains the eagerness to embrace this model. On the other hand, little attention has been paid to the question of whether the model actually succeeds in controlling the problems it was conceived to confront. If the United States' experience with this model in the drug context is an indication, it appears that the model fails. While the model succeeds in shifting money from individuals to the state, it has not exerted any noticeable influence on the American trade in illegal drugs.[8]

Whether the model works or not has not precluded its implementation. Canada, along with most other nations, supports the money-centered model of crime control. Within Canada, as well as within foreign jurisdictions, three distinct developmental stages mark its evolution. The first stage consists of criminal forfeiture, or confiscation, laws. Canada implemented this stage in the late 1980s with the enactment of a criminal forfeiture regime.[9] Stage two comprises the criminalization of money laundering and the adoption of money laundering prevention and detection mechanisms. Money laundering, the act of concealing the proceeds of crime, became an offence in 1989.[10] After a bit of a false start in 1991, Canada introduced a comprehensive

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[6] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001, Pub. L. 107-56, Sec. 1, Oct. 26, 2001, 115 Stat. 272 (codified as amended in scattered section of 5, 8, 18 & 42 U.S.C.).

[7] *Anti-terrorism Act*, S.C. 2001, c.41.

[8] E. Blumenson & E. Nilson, "Policing for Profit: The Drug War's Hidden Economic Agenda," (1998) 65 U. Chicago Law Review 35, at 37-40.

[9] R.S.C. 1985, c. C-46, s. 462.5 (Criminal Code). These provisions reflect the codification of Bill C-61 of 1987, *An Act to Amend the Criminal Code, the Food and Drugs Act and the Narcotic Control Act* proclaimed on January 1, 1989: S.I./88-230 C. Gaz. II.

[10] *Criminal Code*, supra note s.462.31 (introduced by Bill C-61, *An Act to Amend the Criminal Code, the Food and Drugs Act and the Narcotic Control Act*, 1st Sess., 33rd Parl., 1987 which came into force 1st of January 1989).

money-laundering prevention and detection mechanism in 2000.[11] Stage three is the introduction of the most recent element of the money-centered model, the use of civil proceedings, as opposed to the criminal process, to recover assets connected to crime.

Each stage of the model tackles the financial element of crime. Stage one, the forfeiture process, facilitates the process of recovering criminal property. In part, that facilitation occurs through the application of the civil standard of proof to forfeiture proceedings. Once convicted of an offence, the right to recover criminal property requires simply the satisfaction upon a balance of probabilities that the property is linked to an offence.[12] In part, that facilitation is due to the state's extensive powers to seize and freeze alleged criminal assets to secure their availability to satisfy a forfeiture order.[13] Forfeiture differs from stage three of the money-centered model because the right to take property is triggered by a criminal conviction.[14] Stage three has no such requirement. As contemplated by Canadian law, the criminal forfeiture process might aptly be described as a collection vehicle; a legal device that ensures that, upon conviction, assets linked to criminal offences can be readily captured by the state.

Stage two targets money laundering, which is typically defined as the act of disposing or concealing assets derived from, or linked to, criminal activity. Prior to criminalization, money laundering was not a criminal offence: criminal liability attached to the underlying offence from which the money derived – the drug trafficking or the illegal arms trading. It did not extend to the laundering of the proceeds. With the prohibition on money laundering, the financial aspect of the crime incurs criminal culpability, a liability that is not dependent on the underlying offence.

Money laundering prevention and detection laws complement criminalization. These consist of the imposition of a range of reporting requirements and client identification requirements on financial institutions and others who handle financial transactions.[15] The laws

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[11] *Proceeds of Crime (Money-Laundering) and Terrorist Financing Act*, S.C. 2000, c. 17. The 2000 Act supercedes the *Proceeds of crime (Money-Laundering) Act*, S.C. 1991, c.26.

[12] *Criminal Code*, supra note 10 s. 462.27

[13] *Criminal Code*, supra note 10 s. 462.32 – s. 462.35

[14] *Criminal Code*, supra note 10 – note provision on conviction as the trigger.

[15] *Proceeds of Crime (Money-Laundering) and Terrorist Financing Act*, S.C. 2000, c.17, s.6 (duty to create and retain financial records); s.7 (duty to report financial transactions where there are reasonable grounds to suspect that a money laundering or terrorist financing offence has occurred); s.9 (duty to report prescribed transactions); s.12 (duty to report the export or import of currency or monetary instrument). A lengthy set of regulations provides the details of the money laundering prevention and detection mechanism: Canada S.O.R./2001-

and regulations are designed to increase the transparency of the financial system, enabling the detection of money laundering as well as discouraging its occurrence. Institutions and others who handle financial transactions are vehicles for money laundering, receiving funds of spurious origins, converting them into other financial forms and returning the transformed property to the launderer or transmitting it to foreign havens. Prior to the prevention and detection apparatus, these financial institutions enjoyed a considerable degree of opacity to investigative scrutiny, cloaked, in part, by the doctrine of bank secrecy and the rules of financial privacy.[16] Financial actors were under no legal obligation to detect, track or prevent money laundering. The prevention and detection system applies to entities engaged in financial dealings, the reporting requirements lending visibility to the source, frequency, and destination of financial transactions suspected of links to money laundering and the underlying predicate offences associated therewith.

The concept of *civilizing* the money-centered model of crime control emerges with the third stage of the money-centered model. While continuing to focus on the financial underpinnings of crime, this stage countenances the use of civil proceedings to recover property linked to crime. A civil legal process, as opposed to a criminal process, is deployed. Civil proceedings, of course, invoke a different collection of legal protections than do criminal trials. As a general rule, the procedural and substantive safeguards governing civil actions are less demanding than those applicable to a criminal process. As such, the positing of a crime control device that operates outside of the conventional framework of criminal law circumvents the more stringent collection of legal rights. It is this stage of the money-centered model that recently took root in two Canadian provinces.

II. ALBERTA AND ONTARIO: CIVILIZING THE MONEY CENTERED MODEL

While the package of laws that form the money-centered model of crime control emanate from the federal Parliament, the civil element of the model originates in provincial law. Late in 2001, Alberta passed the *Victims Restitution and Compensation Act*.[17] Two weeks later, Ontario endorsed the *Remedies for Organized Crime and Other Unlawful Activities*

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317 (*Proceeds of Crime (Money-Laundering) Suspicious Transactions Reporting Regulations*); Canada S.O.R./2002-184 (*Proceeds of crime (Money-Laundering) and Terrorist Financing Regulations*).

[16] Guy Stessens, *Money Laundering* (Cambridge, U.K.: Cambridge University Press, 2000) at 143-157.

[17] *Victims Restitution Act*, *supra* note 1.

Act.[18] Structurally, these laws differ significantly. They are, however, comparable in substance.

A. The Substantive Nature of the Regimes

Each of the provincial laws confers broad powers to use civil proceedings to divest property connected to unlawful activity. The Ontario *Act* empowers the state, through the office of the Attorney General, to bring an action to forfeit property linked to unlawful activity.[19] "Unlawful activity" is defined by reference to the *Canadian Criminal Code*, to other criminal enactments, and to provincial laws.[20] The Alberta *Act* confers onto the provincial Minister of Justice and the Attorney General of Canada the power to commence an action, with respect to property acquired by illegal means, for the purpose of obtaining restitution or compensation for victims of crime.[21] Acquisition by "illegal means" refers to the acquisition of property in contravention of federal criminal laws and provincial laws.[22] Each regime explicitly rejects criminal culpability, as determined through criminal proceedings, as a pre-requisite to an action to forfeit property or to obtain restitution or compensation.[23] Reinforcing this refutation of criminal liability, both instruments prescribe the civil standard of proof as the standard that governs proceedings.[24]

While scarcely identical, the Alberta and the Ontario laws share a common theme in permitting the taking of assets linked to crime upon satisfaction of the civil standard of proof. The Ontario law enables the forfeiture of the proceeds of crime.[25] It also permits the forfeiture of the instruments of crime, the forfeiture of possessions likely to be used in the commission of future offences and those likely to result in the acquisition of further criminal property.[26] The forfeited property is paid into a special fund upon which the Minister of Finance may draw to pay compensation to the victims of crime, to compensate the province for expenses incurred in bringing the civil action, as well as expenses related

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[18] *Organized Crime Act*, *supra* note 1.
[19] *Organized Crime Act*, *supra* note 1, s.3.
[20] *Organized Crime Act*, *supra* note 1, s.2.
[21] *Victims Restitution Act*, *supra* note 1, s.3.
[22] *Ibid.*, s.1(2)
[23] *Organized Crime Act, supra* note 1, s. 17: *Victims Restitution Act, supra* note 1, s. 13(4).
[24] *Organized Crime Act, supra* note 1, s. 16: *Victims Restitution Act, supra* note 1, s. 14.
[25] *Organized Crime Act*, supra note 1.
[26] *Organized Crime Act, supra* note 1, s. 8.

to remedying the effects of unlawful activity.[27] The Alberta law permits the restraint of property and subsequent conduct of a disposal hearing.[28] At that hearing, victims, described as property victims, may apply for the return of property or for compensation for the loss of property.[29] Any property not claimed at the hearing may then be paid out in the form of grants, for the benefit of victims and others to compensate for losses arising from the commission of unlawful acts.[30]

Like the antecedent immediate recourse to the money-centered model, the timing of these initiatives evokes suspicion. The swift action taken by the provinces following the terrorist attacks of September 11, 2001, suggests that the provincial laws are not part of a broader money-centered model of crime control but, rather, are a knee-jerk response to a specific, though singularly vicious and destructive, crime. This conclusion, while tempting, is inaccurate. Seeds of the civil approach embedded in the provincial regimes germinated long before September 2001. Ontario's exploration of civil remedies began in the late 1990s with its penultimate proposals released to the public in the spring of 2001.[31] The legislative history of the Alberta plan is terse, a short six weeks between first reading and final passage, although interest in the civil model likewise predates the renewed interest in terrorism. Early in 1999, Alberta's then Deputy Attorney General expressed an interest in the use of civil proceedings to confront crime and convened a committee to investigate its potential.[32] The committee developed a legislative model, the final form of which was approved by the Alberta legislature in November 2001. Clearly terrorism invigorates interest in facilitating the recovery of property linked to crime. It also contributes to a social climate in which public order concerns help smooth the passage of radical crime control mechanisms. But the recent centrality of terrorism

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[27] *Organized Crime Act*, supra note 1, s. 6 & s. 11.

[28] *Organized Crime Act, supra* note 1, s. 4 & s. 9. The Alberta Act contains three parts, the latter two of which are concerned with restitution and compensation orders arising in conjunction with criminal convictions: *Victims Restitution Act, supra* note 1, Part 2 & Part 3.

[29] *Victims Restitution Act, supra* note 1, s. 10 – s. 13, s. 15 & s.16.

[30] *Victims Restitution Act, supra* note 1, s.17.

[31] Ontario, *Taking the Profit out of Crime: Lessons Learned* (Summary Report on Ontario's Organized Crime Summit) (Queen's Printer: Toronto, 2000); "Organized Crime Assets" National General news (5, December, 2000) (Q.L.); "Ontario Mob Assets" National General News (1 May 2001) (Q.L.); Government of Ontario, News Release, "Harris Government Announces Steps to enhance Community Safety" (1 May 2001).

[32] Letter from Gregory Lepp to Michelle Gallant (September 9, 2002) (pursuant to Access to Information request dated July 9, 2002). In 1994, the then Attorney General Paul Bourque expressed his interest in civil models: Paul Bourque, "Provincial Responses to Municipal crime Concerns" (1994) 37 Crim. L.Q. 89.

to public order and security debates was not the catalyst for exploring the civil model.

Rather than an explicit reaction to terrorism, the provincial laws are best understood as an extension of the money-centered model of crime control pursued at the federal level. Building on the national model, the provincial laws target property, the quintessential stamp of a money-centered model. The regimes focus on property linked to illegal activity, or as favored by the Ontario drafters, property linked to unlawful activity: illegal or unlawful activity is more commonly known as "crime". Their civil, as opposed to criminal, character emerges through the rejection of criminal culpability, the hallmark of a criminal legal model, as a pre-requisite to any legal action against property. This is reinforced by the unequivocal endorsement of the civil standard of proof. Moreover, telling, but of little substantive relevance, restitution, compensation, and remedies, the descriptive terms used in the titles of the provincial instruments, are commonly associated with civil proceedings, rather than with criminal prosecutions.

Perhaps the most convincing evidence that the provincial *Acts* constitute the third stage of the money-centered strategy of crime control is their remarkable similarly to civil crime control devices implemented in foreign jurisdictions. The United Kingdom has confiscation and anti-money laundering devices akin to those operative in Canada.[33] It recently integrated civil proceedings into its crime-management strategy.[34] Ireland, an early advocate of civil proceedings, made civil proceedings the centerpiece of its crime control tactics. [35] As early as the 1970s, the United States federal government added civil forfeiture to its armory of asset-focused crime control tactics.[36] None of these foreign regimes makes a criminal conviction a prerequisite to a civil action to recover tainted property. All endorse the civil standard of proof and all are directly linked to crime control. Unimpeded by a constitutional division of powers, all unambiguously link the civil powers to broader national money-centered crime control strategies.[37]

Locating the new Alberta and Ontario legislation within the broader context shows that the provincial initiatives are not aberrations or isolated occurrences. They follow an emerging global trend towards the civilizing of crime control, complementing and reinforcing the national money-centered model. Given their embryonic state in Canadian law, it is premature to characterize their developments as a

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[33] *Proceeds of Crime Act* 2002 (U.K.) c. 29 s. 6.
[34] *Ibid.* Part 5.
[35] *Proceeds of Crime Act*, 1996 (Ireland) No. 30 [*Proceeds of Crime Act* (Ireland)]
[36] 21 U.S.C. § 881.
[37] While the United States is a federal state, jurisdiction over the criminal law and the accompanying civil powers is shared.

shift in crime control methods. Yet the attraction of using civil vehicles to implement the money-centered model is powerful because of their reliance on the civil standard of proof. This standard is significantly less onerous than its correspondent in criminal law, the standard of beyond a reasonable doubt. The ramification of the difference in evidential standards is self-evident: it is easier to satisfy on a balance of probabilities that property derives from crime than to prove beyond a reasonable doubt that someone is guilty of a crime. The obvious inference is that if competing mediums are available with which to marshal an attack on the financial underpinnings of crime, the provincial civil route will be preferred. It is reasonable to anticipate a proliferation of the Alberta and Ontario models.[38]

B. The Conceptual Framework and Structural Attributes

Strict principles of efficiency dictate a preference for a civil money-centered model of crime control. The evidential threshold of a balance of probabilities is more easily crossed than the criminal standard of proof of beyond a reasonable doubt. The enforcement of any crime control initiative would be greatly facilitated by trading the criminal standard for its civil law counterpart. However, the conceptual justifications for the civil model do not draw directly on the principles of efficiency. Nor do they necessarily draw on the failure of the federal criminal money-centered model to realize its crime control objectives. Rather, the provincial models are a direct appeal to remedial justice, founded on the rights of the victims of crime for financial redress for injury caused by criminal activity.[39]

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[38] Manitoba recently indicated its intention to endorse the civil model of crime control: Government of Manitoba, News Release, "Manitoba Creating Hostile Environment for Organized Crime: MacIntosh (29 November 2002).

[39] The term "remedial justice" is often used interchangeably with corrective justice. Reference to the remedial character of the law is most often used in the judicial context with regards to the distinction between a punitive measure and a remedial measure sought by the state. There, the context is public law, the mediation of interests between the state and private individual actors. Corrective justice is more common in the theoretical analysis of the realm of private law, the mediation of interests between private parties. Where the remedial justice and corrective justice converge is in their underlying reliance on civil proceedings, as opposed to the criminal process, for the determination of the outcome of a dispute. Therefore, while the language of remedial justice is used throughout, it relies, on concepts more commonly familiar to the rubric of corrective justice. In this, the understanding of the framework of remedial justice is informed, in part, by the framework applicable to corrective justice as set forth by Ernest Weinrib's in his chapter on correction justice: Ernest Weinrib, *The Idea of Private Law* (Cambridge, Mass: Harvard University Press, 1995) c. 3.

The criminal money-centered model represents a punitive justice model of control, framed by principles of criminal law in which convictions, and the concomitant criminal standard of proof, precede the sanction, the taking of property. The civil model, shepherded through civil proceedings and regulated by the civil standard of proof, symbolizes remedial justice. Responding to the interests of the victims of crime, remedial justice seeks to restore the pre-offence social equilibrium. That restoration generally occurs through the provision of compensation, a reallocation of financial resources from those who have caused injury to those who have suffered that injury. Resort to a civil model is rationalized along these lines. Seeking not to punish accused persons but to remedy a wrong, the province serves as the repository for a type of class action, realizing the compensatory claims of individual victims and, through its intervention, redistributing the financial awards to the victims of crime.

In formalizing their remedial justice models, the Alberta and the Ontario laws overtly acknowledge that there may be competing interests in property derived from crime. Both regimes preserve the interests of innocent owners, persons who hold, or purchase, property unaware of its specious origins.[40] The Alberta model goes further than the Ontario device by specifically conceding the rights of individuals victims, whether their rights to particular property or their more generic right to compensation for injuries occasioned by crime, through the provision that intercession by the state does not trump individual entitlements.[41]

This appeal to the remedial justice is influential. Its central themes recur in the policy debates surrounding the civil model of control.[42] But the civil model crafted by the provinces does not fit easily into a conventional remedial justice framework. Ordinarily, the right to a

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[40] *Organized crime Act*, supra note 1, s. 17: *Victims Restitution Act*, supra note 1, s. 18.

[41] *Victims Restitution Act*, supra note 1, s. 50.

[42] The debates in the legislative assemblies of Alberta and Ontario are replete with references to the need to compensate the victims of crime as well as the non-punitive character of the civil models of crime control: see, for example, Alberta, Legislative Assembly, *Official Report of the Debates* (*Hansard*) (19 November 2001) at 1091 (Mr. Hancock) ("Under this act a legal action can be commenced to return the illegally obtained property to the victim even if there is no criminal charge or conviction, because the focus on the act is the civil compensation of victims, a provincial purpose, not the criminal punishment of offenders, a federal purpose.); Ontario, Legislative Assembly, 20 February 2001 (Mr. Simser), online: <http://www.ontla.on.ca/hansard/37_parl/session1/J038> ("With respect, I think that posits a civil remedy in a very narrow way. Certainly there are torts that are designed to repair and restore.")

remedy derives from the bipolar relationship between a victim and a defendant. A victim's ability to enforce a civil claim requires a tangible link, a causal connection, between the defendant's action and the injury or loss sustained by the victim. Neither the state, nor anyone else, has any generic entitlement to property derived from criminal offences. Reliance on a collective, or a class, action somewhat eases the fit. Any victim of crime can seek a civil remedy from a defendant: the provincial models mediate the relationship between the victims and defendants, collectively pursuing the rights of individual victims to compensation, the proceeds of crime flowing through the state to the individual victims. On the other hand, crimes such as drug offences present a conflict for the remedial justice framework, a point rendered particularly germane by the notoriety of drug moneys in the debates surrounding the money-centered model of control. Both parties to drug transactions, the trafficker and the purchaser, commit criminal offences. The complicity of the purchaser vitiates any civil entitlement: there is no obvious victim with a cognizable claim to property derived from drug offences. In the same vein, it is arguable that the state's repressive control tactics causes the violence and social damage regularly tied to drug trafficking. In seeking to recover property derived from drug offences under the civil model, it may be the state, not the defendant, who owes compensation.

Another difficulty in the uncritical acceptance of the suitability of the provincial models to a remedial justice frame work relates to the substance of the civil actions contemplated by the provincial laws. Under the Alberta law, property can be recovered by the state upon proof that it derives from illegal activity. Ontario enables the forfeiture of property upon proof that it derives from unlawful activity. Implicit in this particular structure is the proportionality element of remedial justice. With the exception of punitive damages, the amount of financial compensation owed by a defendant is directly proportional to the injury suffered by the victim. The defendant pays no more or less than the amount required to restore the pre-offence *status quo*. The collective action model does not presume to measure compensation in this manner. Instead, it measures compensation by reference to the amounts gleaned from the crime and not by reference to the victims. It would be futile to attempt to quantify with any degree of precision the actual injury caused by the trade in illegal arms: it is possible to know with some degree of certainty the extent to which someone profited from that enterprise.

An element of the Ontario regime puts the quantification component of remedial justice into question. In addition to the action to forfeit property derived from crime, the Ontario model creates the power

to forfeit the instruments of crime.[43] The instruments of unlawful activity means: "…property that is likely to be used to engage in unlawful activity that, in turn, would be likely to, or is intended to result in the acquisition of other property or in serious bodily harm to any person."[44] Rather than envisioning the recovery of money gained from the crime business, this provision connotes the blanket forfeiture of any and all property linked to criminal wrongdoing. There are two distinct ways in which the forfeiture of the instruments of crime violates a remedial justice framework. Firstly, whereas the first action is, by definition, limited in its scope, this one is not. Remedies are usually tailored to a specific act of wrongdoing. The measurement of that tailoring can be the extent of the victim's injury or, in the case of the first forfeiture action provided by the Ontario law, quantified by reference to the revenues derived from crime. In this sense, the remedy agrees with the wrongdoing. The forfeiture of the instruments of crime, however, is not tailored to any underlying wrongful act. An expensive vehicle qualifies as an instrument of crime, something that is likely to be used to transport drugs so to result in the acquisition of other property, in this case, increased drug proceeds. The prospective crime might be a minor drug transaction, such as a single sale of marijuana that results in a profit of $1,000. The recovery of that profit is in no way proportionate to the forfeiture of, say, a $40,000 vehicle. When the compensatory remedy of $40,000 is measured against the proceeds of crime, one is hard pressed to argue that the forfeiture restores the *status quo*. The forfeiture of the instruments of crime enters into the realm of punitive justice, a sanction imposed for criminal conduct. If it is an instrument of punitive justice, its imposition should be governed by the criminal model of control, preceded by a criminal conviction, and determined in accordance with the criminal standard of proof.

The other manner in which forfeiture of the instruments of crime deviates from a remedial justice model is in its prospective character. Remedies generally respond to previous criminal episodes, remedying the pre-offence social balance by affording financial compensation to victims. Prospective remedies are rare, restricted to civil injunctions and granted only in exceptional circumstances.[45] Nor do injunctions forfeit property interests. Simply stated, this genre of prospectivity simply does not fit into a civil model of crime control. Together, this prospective character and the distinct lack of proportionately appear to push an action for the forfeiture of the instruments of crime outside of the territory of remedial justice.

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[43] Organized Crime Act, *supra* note 1, s. 8.
[44] *Organized Crime Act, supra* note 1, s. 7.
[45] See generally, Jeffery Berryman, *The Law of Equitable Remedies* (Toronto: Irwin Law, 2000) at 114 – 117.

III. CONSTITUTIONAL CONSTRAINTS: A PRELIMINARY INVESTIGATION

The distinction between punitive and remedial justice, between criminal and civil proceedings, invites the question of constitutional competence, that is, whether the civil model of crime control is properly the subject of provincial legislative jurisdiction. It also invites inquiry into whether it conforms to the dictates of the *Canadian Charter of Rights and Freedoms*.[46] The lengthy and detailed content of the Alberta and the Ontario laws requires a comprehensive constitutional analysis that is beyond the scope of this article. Rather, this section offers a preliminary investigation into the contours of constitutional limitations relevant to a civil model of crime control.

Of the classes of subjects falling within provincial legislative competence, jurisdiction over property and civil rights, section 92(13) of the *Constitution*, is the strongest head on which to fasten the Alberta and Ontario laws.[47] Reliance on this constitutional power was repeatedly cited during the legislative debates. For the purposes of the constitutional inquiry, that classification relies on construing the laws as regulating entitlements to property, whether title to money, to physical assets, or to some other proprietary interest. A legal action brought under either of the provincial regimes probes title to property and denies that title upon proof that the property derives from crime. The provincial laws also create civil remedies, a classic civil right that is within provincial constitutional competence.[48]

The difficulty in anchoring the laws in property and civil rights, or in fact, in any other arena of provincial constitutional competence, is the collision with the criminal law power, section 91(27), assigned to the federal Parliament.[49] The provincial regimes undoubtedly regulate property in the sense that they either respect or divest property rights depending on the strength of the link to criminal activity. By the same token, the provincial laws focus on the proceeds of unlawful or illegal behavior, classically understood as the proceeds of crime and properly a matter of federal jurisdiction.

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46 Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (U.K.), 1982, c.11 (*Charter*)

47 *Constitution Act*, 1867 (U.K.), 30 & 31 Vict., c. 3 [*Constitution Act*]

48 G.M. Leasing

49 *Constitution Act, supra* note 47.

Criminal laws have three necessary ingredients: a criminal purpose, a prohibition and a penalty.[50] The provincial schemes do not fully possess any of these ingredients. While crime control clearly drives the enactment of the provincial laws, the legislation pursues non-criminal remedial purposes such as compensation and redress for the victims of crime. Neither regime contains prohibitions. Rather, the regimes create civil causes of action. The Alberta law does contain penalties, although the presence of penal powers in a provincial law is not fatal to constitutional validity.[51] Section 92(15) of the *Constitution* confers onto the provinces the power to impose penalties to enforce otherwise valid provincial laws. Though a law possesses certain criminal attributes, if the pith and substance of the law lies within the realm of property and civil rights, it is within provincial competence. Provincial laws that criminalize the use of disorderly houses and require the closure of premises used for prostitution have been upheld as properly within the provincial jurisdiction over property.[52]

The provincial civil models undoubtedly reflect a dual constitutional character: on the one hand, property and civil rights, and on the other, criminal law. Pursuant to the double-aspect doctrine, there is arguably a permissible constitutional overlap between the use of the civil law by the provinces to capture criminal proceeds and the federal use of the criminal law to recover the proceeds of crime.[53] The provinces are within their competence in regulating the use of property and creating civil remedies, whereas the federal Parliament is within its area of competence in facilitating the recovery of the proceeds of crime. Moreover, an equivalency in constitutional character, in the pith and substance of the law, between its provincial and federal subject matter is not sufficient to render the law an unconstitutional exercise of provincial power.[54]

These considerations indicate the constitutional competence of the provinces of Alberta and Ontario to enact their civil models of crime control. In the overarching debate over the constitutionality of civil models of control, this constitutional division of powers somewhat lacks relevance. The exhaustive distribution of legislative competency means

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[50] *Canadian Federation of Agriculture v. Attorney General of Canada, subnom the Margarine Reference*, [1951] A.C. 179.

[51] *Victims Restitution Act*, supra note 1, s. 6(6).

[52] *Bedard v. Dawson*, [1923] S.C.R. 681. Contrast with *R. v. Westendorp*, [1983] 1 S.C.R. 43.

[53] *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161

[54] Hogg, at 361. The constitutional doctrine of paramountcy would, however, apply to the extent of any inconsistency: Multiple Access.

that the constitutional power to enact a civil model would avail to either the provincial legislatures or the federal Parliament.[55]

Alternatively, the *Charter* analysis reveals few constitutional constraints. Given the centrality of property to the money-centered model, an infringement of property rights would be the most likely grounds upon which to launch an attack against the Alberta and Ontario laws, but the *Charter* does not apply to protect property rights.[56] Section 7 of the *Charter* protects life, liberty and security of the person but does not extend to property rights. In his analysis of the breadth of section 7, Hogg concludes "section 7 affords no guarantee of compensation or even of a fair procedure for the taking of property by government."[57] Even if the *Charter* guaranteed property rights, the divestiture of property linked to crime would not necessarily violate that right. Legal mechanisms substantially similar to the provincial laws have been examined by the European Court of Human Rights for violations of Article 1 of the First Protocol to the European Convention on Human Rights and Fundamental Freedoms.[58] Article 1 expressly protects property rights. Civil remedies against criminal property were found to be consistent with Article 1.[59] In its deliberations, a key question for the European Court was the balancing of individual property rights with the public interest in crime control. Provided the regime granted property owners a reasonable opportunity to contest the governmental action, the European Court found the civil approach to be consistent with the property rights protection of the First Protocol.[60]

A potential violation proceeds from the appropriate characterization of the Alberta and Ontario laws for the purposes of the *Charter* inquiry. Facially, the provincial models are civil devices and thus do not attract the collection of *Charter* rights set forth in section 11.[61] Section 11 contains the classic safeguards applicable to criminal

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[55] Without pursuing the inquiry into federal competency, it is doubtful that the enactment of such broad-based civil powers is within federal jurisdiction.

[56] The Canadian Bill of Rights affords some protection for property rights but it applies to federal, not provincial, law.

[57] Peter W. Hogg, Constitutional Law of Canada, 6th ed. (Toronto: Carswell, 2001 at 924. David Mullan appears to move towards a similar conclusion with respect to s. 7 in his recent analysis of the relationship between the *Charter* and administrative law: David Mullan, "The Charter and Administrative Law" (Paper presented at the Pitblado Lectures, December 2002) [unpublished]

[58] Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Paris, 20.III.1952, Article 1.

[59] Raimondo and Italy cases [Draft Note: need full citation]

[60] *Ibid.*

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

processes such as the right to trial without delay, the presumption of innocence, and the right against double jeopardy. These rights apply to "anyone charged with a criminal offence".[62] The compliance question is whether the civil actions based on allegations of criminal activity amount to "charged with an offence". A preliminary investigation reveals that, with the exception of one aspect of the Ontario laws, the provincial actions are unlikely to invoke this set of criminal procedural safeguards.

The application of section 11 does not require that someone be formally charged with an offence. In *R. v. Wigglesworth,* the Supreme Court of Canada defines two different situations in which, absent a formal charge, the rights of a criminal process are nonetheless triggered.[63] The first situation is where the proceedings are, by their very nature, criminal. The second is where the proceedings involve the imposition of "true penal consequences."[64] Classically criminal offences such as criminal code offences and violations of provincial laws connote the class of proceedings that are, by their nature, criminal.[65] While the consequences may be slight – a minor traffic violation resulting in an insignificant fine – such acts fit within conventional understandings of criminal offences. Proceedings to divest property linked to criminal offences hardly satisfy this criterion. No one is charged with any offence or in jeopardy of being convicted of anything. Moreover, if the purpose of proceedings is not to mete out punishment but to ensure other objectives, they will not attract the application of section 7.[66] Drawing on the conceptual premises, the Alberta and Ontario laws secure the remedial objective of ensuring that victims of crime are compensated for their injuries.

With respect to the alternate criteria, the existence of true penal consequences, the *Charter* analysis is, in one respect, somewhat more promising for opponents. Although the meaning of true penal consequences has not been exhaustively defined, it includes fines and imprisonment that, by their magnitude, appear to be imposed for the purpose of redressing harm to society.[67] The divesture of unlawfully acquired property is scarcely eligible. Magnitude implies proportionality, an element of severity in the consequence of the proceedings. Under the Alberta and the Ontario models, there is no question of proportionality or the magnitude of the consequence: the magnitude of the remedy, the recovery of the proceeds of unlawful activity, relates directly to the magnitude of the acquisition, the receipt of the proceeds of crime.

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62 *Ibid.* s.11.
63 *R. v. Wigglesworth*, [1987] 2 S.C.R. 541 [*Wigglesworth*].
64 *Ibid.* at para 24.
65 *Wigglesworth, supra* note 65.
66 See also, *R. v. Shubley*, [1990] 1 S.C.R. 3.
67 *Wigglesworth,* supra note 65.

Restoring the financial *status quo* by divesting unlawfully acquired goods falls outside the field of meaning encompassed by the expression "true penal consequences". However, the second forfeiture process contemplated by the Ontario regimes may trigger section 11 under the "true penal consequences" test. The Ontario law enables the forfeiture of the property derived from crime, as well as the forfeiture of the instrumentalities of crime.[68] The former connotes a conventional civil action, divesting property unlawfully obtained. The latter differs from the generic forfeiture action in enabling the forfeiture of property that is likely to be used to commit illegal acts. The relevant difference is that the inherent proportionality of the generic forfeiture action is lacking: absent is the relativity between the prospective offence and the resulting loss of property.[69] Given this potential disjuncture in orders of magnitude, the forfeiture of the instrumentalities of crime may qualify as "true penal consequences", imposed to redress harm to society rather than to service the immediate ends of remedial justice.

IV. THE STRUCTURAL ATTRIBUTES OF A CIVIL MODEL OF CRIME CONTROL

The political appeal of pursuing criminal assets, the efficacy of using civil proceedings and the apparent deficiency in constitutional constraints portends favourably for the flourishing of the civil money-centered model. Alberta and Ontario have advanced their prototypes: other jurisdictions are likely to follow. Grappling with the difference between the civil and the criminal law, these regimes should be carefully crafted so as to ensure consistency with their remedial justice ideal. For other provincial jurisdictions, the direct adoption of either the Alberta or the Ontario model would be a mistake. In certain respects, they fail. The two provincial regimes are broadly common in their strengths yet unique in their deficiencies. In building a civil legal model of crime control and in replicating a remedial justice framework, certain structural attributes are preferable to others.

A. Structuring Remedial Justice

Adherence to the formal legal structure of conventional civil proceedings is critical to a remedial justice model. That formal structure consists of the allocation of the initial legal burden of proof and the

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[68] *Organized Crime Act*, supra note 1, s. 8.

[69] For this very reason, the lack of proportionality, the United States Supreme Court found this element of the American model inconsistent with the constitutional protection against the leveling of excessive fines: Austin.

application of the correct evidential standard of proof. Until recently, the United States, a country with a lengthy history of incorporating civil mechanisms into their money-centered strategy, relied on a model that distorted the procedural rules of a conventional civil legal process.[70] The traditional structure of a civil process allocates the initial legal burden of proof to the party bringing the action. That burden is discharged upon satisfaction of the civil evidential standard of proof on a balance of probabilities. Under the American forfeiture model, the state bore the initial burden of proof, but discharged that burden upon proof to the standard of probable cause.[71] Probable cause is the evidential standard that governs the issuance of warrants.[72]

It is significantly lower than a balance of probabilities standard, or in American parlance, a preponderance of the evidence standard. Having established probable cause for the forfeiture, the burden then shifted to the defendant to prove, by a preponderance of the evidence, the legitimacy of his entitlement. Effectively, under this structure, the defendant was required to prove the lawful origins of the property: unlawful entitlement was assumed, not proven by the state

The Alberta and the Ontario civil models manage to replicate the legal structure of a conventional civil trial. The laws allocate the initial legal burden to the state and contemplate the discharge of that burden upon proof to the evidential standard of probabilities. The state, the party initiating the proceeding, shoulders the burden of demonstrating, by a balance of probabilities test, that the property it seeks to take derives from crime. Consistent with the foundational structure of conventional civil proceedings, other provincial civil money-centered models should judiciously mirror this framework.

With this structure in place, remedial justice ought to protect the interests of innocent owners of property; namely, persons who acquire, own or purchase property derived from crime unaware of its criminal origins. In one of the few articles to examine the civil model of crime control, Davis canvasses the effects of forfeiture on third parties.[73] He concludes that the impacts are significant and the existing laws offer inadequate protection. Provincial models should protect the interests of innocent property owners, particularly in light of the potential breadth of a civil model of crime control.

Given that proportionality is a critical element of remedial justice, blanket forfeiture actions such as Ontario's enabling of the forfeiture of

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[70] Civil Assets Forfeiture Reform Act of 2000, Pub. L. No. 106-185, 114 Stat. 202 (codified as amended in scattered sections of 18 U.S.C. § 983).

[71] *Ibid.* §

[72] *United States v. One 1984 Cadillac*, 888 F.3d 1133 at 1135 – 1136 (6th Cir. 1989)

[73] Kevin Davis, "The Effects of Forfeiture on Third Parties," McGill L.J. (2003).

the instruments of crime should not form part of a civil money-centered model. Unlimited in scope, they share no affinity with a conventional civil action because there is no proportionality between the quantity of property forfeited and the underlying offence. Moreover, functionally, the forfeiture of the instruments of crime is arguably redundant. There is a high degree of probability that, in the context of profitable crime, any instruments of crime constitute the proceeds of previous offences. If the revenues of criminal enterprise nurture its expansion, previously acquired unlawful gains are reinvested in the criminal operation. The present instruments of crime likely constitute the invested proceeds of past offences. As such, they are amenable to attack under the generic power to forfeit the proceeds of offences.[74]

Finally, Alberta seeks to fortify its remedial measures through criminal enforcement powers.[75] The regime provides that a failure to comply with orders issued under the law incurs criminal culpability. Effectively, the failure to abide by a civil order attracts criminal culpability. Civil remedies are not ordinarily enforced through recourse to criminal proceedings. Grafting a criminal enforcement measure onto a civil money-centered device detracts from its civil character. Such measures should not form part of a civil model of crime control.

B. Additional Structural Concerns

The previous concerns are directed towards the preservation of the integrity of remedial justice, ensuring that the structure of civil model remains consistent with its non-punitive underpinnings. There are two additional considerations that should inform construction. Unlike the features discussed previously, these do not relate to the distinction between criminal and the civil law.

Firstly, apart from an overarching interest in maintaining order in civil society, neither law enforcement nor the state from which it emanates should have any vested financial interest in enforcing particular crime control initiatives. Vested interests vitiate objectivity, encouraging certain courses of enforcement at the expense of others.[76] The ancient practice of *qui tam* litigation, a doctrine that encouraged private law enforcement by sharing the rewards of forfeitures with the enforcers, fell into disrepute long ago for its corruptive capacity.[77] Civil

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[74] *Organized Crime Act, supra* note 1, s. 3.
[75] *Victims Restitution Act*, supra note 1, s. 6(6).
[76] E. Blumenson & E. Nilson, supra note 8, at 56 – 79.
[77] L. Harper, *The English Navigation Acts: A Seventeenth Century Experiment in Social Engineering* (New York: Columbia University Press, 1939) at 97 – 101 & 114 – 115.

models of crime control should neither be perceived, nor structured, as revenue-generating devices. While neither of the provincial models link successful actions to the budgetary resources of law enforcement agencies nor to particular government departments, the Ontario model retains a vestige of *qui tam* litigation in that the state may claim an interest in the property garnered through the civil device.[78] Although modest, a state interest in forfeited revenues tends to jeopardize objectivity in the enforcement of provincial laws.[79] Further, it intimates that the model serves, in part, the financial interests of the state rather than the rights of victims. This easily slides into the argument that the civil regimes are revenue-raising instruments, an indirect form of taxation.[80] The preferred structure is one which reserves all property garnered through the administration of a civil regime to the exclusive use of the victims of crime and other non-governmental organizations ministering to the interests of the victims. The model might countenance assigning management of the model, including the distribution of recovered proceeds, to a separate and distinct agency.

Secondly, a very important point has been forgotten in the fervor to devise contemporary money-centered civil models of crime control. The original rationale for the money-centered approach was the control of profitable crime, crimes with a significant profit element to them. It was the profits of the illegal drug trade that demanded the reshaping of crime control devices. Neither of the provincial models paid heed to that original premise. In their application, the laws do not attempt to discern between significant quantities of drug moneys and a few tainted drug dollars. The second component of the money-centered model, the money laundering prevention and detection mechanism, recognizes a distinction between profitable and less profitable crime by linking the duty to report financial transactions to a prescribed statutory amount. This limit is, in part, informed by administrative convenience: it is not feasible to track the course of all financial transactions. It also marks an attempt to discern between significant and insignificant criminal activity. At a

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78 Ontario: whether they should be entitled to the costs of the action is also problematic. It is, however, generally consistent with the stipulations of conventional civil actions.

79 Subjectivity features in the administration of other public laws, such as taxation, where effective enforcement services state resources. However, subjectivity is less problematic in the context of taxation than it is in the context of crime control.

80 While there is no objection to taxing the proceeds of crime, the civil action is not structured in accordance with a taxation regime. Taxation levies a tax on income, meted out in accordance with a defined rate structure. These regimes divest, rather than tax, property derived from crime.

minimum, it orients the monitoring structure towards monetarily relevant criminal activity.[81]

Such thresholds are important elements of a civil money-centered model. That importance is not simply one of consistency with its foundational premise. That importance derives from the breath of the application of the civil model, applying to virtually any money linked to crime, and its potential effect on the impecunious. The money-centered approach was not born to confront minor shop-lifting, nor petty thefts, nor welfare frauds. It emerged as a response to significant criminal business and their reinvestment of financial rewards into the underlying enterprise. Without any minimum threshold, there is the distinct possibility that this model will be applied to the indigent, compounding the marginalization of the poor, those least able to conceal their proceeds of crime. This potential is implicit in a money-centered civil model that fails to discriminate between significant and insignificant criminal moneys. The concept of significant financial criminal benefits should be fully integrated into the legal structure of the civil model. While this concern could be addressed administratively through a policy of enforcing the civil model against assets that exceed a prescribed threshold amount, that leaves administration to the discretion of the enforcers. The orientation of the structure is best enshrined in law.

V. CONCLUSION

There is some value to evoking civil legal processes to confront the financial element of crime but neither the Alberta nor the Ontario models proves satisfactory. In developing a civil approach to crime management, other provinces should model their legislative devices along the line suggested therein.

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[81] For example, the Irish legislation draws this distinction: Proceeds of Crime Act (Ireland) at s. 2 & s. 3 (establishing a £ 10,000 threshold).