

CASE STUDY

**STATEGRAFT IN ONTARIO: ATTORNEY GENERAL OF
ONTARIO V. \$10,000**

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Non-criminal asset forfeiture permits law enforcement to seize and keep property that is potentially connected to unlawful activity. Forfeiture has been illegally directed at citizens who are unable to challenge this forfeiture. This is stategraft—state agents using legitimate means to unlawfully take property for the state’s benefit. Focusing on the state’s role highlights illegality.

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INTRODUCTION

Civil forfeiture allows law enforcement to seize and retain real or personal property and to use this property to fund government activities. This case comment proceeds in four parts. Part I outlines Bernadette Atuahene’s stategraft theory and Dick Carpenter’s critique. Part II sets out an overview of Ontario’s civil asset forfeiture legislation and constitutional property protection. Part III details stategraft elements in *Attorney General of Ontario v. \$10,000*.¹ Part IV concludes the case comment.

I. STATEGRAFT DEFINED

Bernadette Atuahene defines “stategraft” to occur when state agents transfer property from often vulnerable populations to the state’s coffers contrary to the state’s own laws.² Atuahene points to Detroit’s illegally inflated property assessments, criminal fines, and civil forfeiture statutes as examples that supplement public coffers.³ Stategraft can undermine property rights through confiscation or destruction and is complete if the

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1. 2014 O.N.S.C. 944 (Can. Ont.) [hereinafter *\$10,000*].

2. Bernadette Atuahene, *A Theory of Stategraft*, 98 N.Y.U. L. REV. 1, 3 (2023).

3. *Id.* at 3, 6, 5.

state is the direct or indirect beneficiary of the illegitimately acquired property.⁴ The illicit extractions and the state's enabling role erodes property rights and the public's trust.⁵

Carpenter critiques Atuahene's claim that civil forfeiture is stategraft. In *Generating Revenue Through Civil Forfeiture*,⁶ he argued that civil forfeiture statutes are legally authorized and remedial forfeiture has been used in criminal, customs, and maritime statutes for hundreds of years.⁷ He claimed that civil forfeiture abuse is not a result of the legislation or corruption but because of a few bad apples who are given almost unlimited powers by the Courts to enforce these laws.⁸ Atuahene warns against focusing only on "bad apples" and asks the reader to focus on illegal state overreach despite legally enacted statutes.⁹ Ultimately, illegality is determined by a Court only if the property owner challenges the confiscation.¹⁰

Both Carpenter and Atuahene agree that the low "reasonable suspicion" standard of proof prevalent in U.S. civil forfeiture laws facilitates property exploitation that generates billions of dollars to state, municipal, and federal government accounts yearly.¹¹ Carpenter suggests that a higher standard of proof, such as a preponderance of the evidence, proving that it is more likely than not that the property is related to criminal conduct or even the criminal standard of proof should be required to protect property owners.¹²

II. PROVINCIAL FORFEITURE LAWS

Several Canadian provinces have enacted civil forfeiture legislation to confiscate property connected to unlawful activity.¹³ Such activity can

4. *Id.* at 13–15.

5. *Id.* at 30.

6. Dick M. Carpenter II, *Generating Revenue through Civil Forfeiture*, 98 N.Y.U. L. REV. ONLINE 205 (2023).

7. *Id.* at 220–21.

8. *Id.* at 221.

9. Atuahene, *supra* note 2, at 14, 34.

10. *Id.* at 18. She details the challenges in addressing stategraft in the Detroit property assessments. *Id.* at 18–22, 34–35.

11. Carpenter, *supra* note 6, at 206; Bernadette Atuahene & Timothy R. Hodge, *Stategraft*, S. CAL. L. REV. 263, 296–98 (2017).

12. Carpenter, *supra* note 6, at 210–12.

13. Victims Restitution and Compensation Payment Act, S.A. 2001, c V-3.5 (Can. Alta.); Seizure of Criminal Property Act, S.S. 2009, c S-46.001 (Can. Sask.); Criminal Property Forfeiture Act, C.C.S.M. 2004, c C306 (Can. Man.); Civil Forfeiture Act, S.N.B. 2010, c C-4.5 (Can. N.B.) ; Civil Forfeiture Act, SNS 2007, c 27 (Can. N.S.); Act Respecting the Forfeiture, Administration and Appropriation of Proceeds and Instruments of Unlawful Activity, SQ 2007, c C-52.2 (Can. Que.). Prince Edward Island,

include activity that would be unlawful under the federal *Criminal Code of Canada*¹⁴ or other federal or provincial statutes. In many provincial forfeiture statutes, the province has to prove a connection to unlawful activity on the balance of probabilities, but it does not have to prove that the owner committed or was found guilty of a particular offence¹⁵. The Ontario civil forfeiture act¹⁶ targets two types of property: 1) “proceeds of unlawful activity,” property acquired directly or indirectly as a result of unlawful activity,¹⁷ and 2) “instrument[s] of unlawful activity,” property that could be used to acquire other property.¹⁸ The burden is on the Attorney General to prove, that it is more likely than not, that the property was unlawfully acquired.¹⁹ Ontario enforces the statute through the Civil Remedies Office, a division of the Ministry of the Attorney General that also prosecutes individuals and businesses under the *Criminal Code* and other federal and provincial statutes.²⁰

There is not a right to property in the Canadian Constitution. In the United States Constitution, the Fourth and Fifth Amendment states:

IV. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.²¹

Newfoundland and Labrador, Northwest Territories and the Yukon have not enacted civil forfeiture legislation as of this writing.

14. Criminal Code of Canada, R.S.C. 1985, c. C-46 (Can.).

15. See, e.g., Victims Restitution and Compensation Payment Act, S.A. 2001, c V-3.5, s 14 (Can. Alta.); Seizure of Criminal Property Act, S.S. 2009, c S-46.001, s 11 (Can. Sask.); Criminal Property Forfeiture Act, C.C.S.M. 2004, c C306, s 17.12 (Can. Man.).

16. Ontario Civil Remedies Act, 2001, R.S.O. 2001, c 28 (Can Ont.).

17. *Id.* at section 2.

18. *Id.* at section 7. Note that these cases are pursued against the property (*in rem*), not against the property’s owner, and are heard before the Ontario Superior Court of Justice.

19. Ontario Civil Remedies Act, *supra* note 16 at s 16. This burden of proof is similar to the US preponderance of the evidence standard. See *R v. Proudlock*, [1979] 1 S.C.R. 525, 526–27.

20. Ontario Civil Remedies Act, *supra* note 16 at s 6(1), 11(1). Forfeited property is converted to money and deposited into a Consolidated Revenue Fund see sections 6(1) and 11(1). Between April 1, 2021, and March 31, 2022, \$604,257.41 was the combined value of revenue from civil forfeiture cases. *Civil Remedies Annual Report 2021-2022*, ONTARIO.CA (Aug. 3, 2022), <https://www.ontario.ca/page/civil-remedies-annual-report-2021-2022> [https://perma.cc/Z9EW-RFNZ]. During this same fiscal period, the Crown received \$1,607,051 for costs arising from forfeiture proceedings and the rest was disbursed as grants to prevent unlawful activities that result in victimization. See *id.*

21. U.S. CONST. amend. IV, § 3.

V. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, **nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.**²²

Although there was extensive discussion to entrench property rights in the *Charter of Rights and Freedoms*, ultimately it was not added.²³ However, there are indirect property protections in section 8 of the *Charter*:

8. Everyone has the right to be secure against unreasonable search or seizure.²⁴

The Supreme Court of Canada has stated that section 8 “protects people not places,”²⁵ however, jurisprudence supports that the *Charter* protects a person’s reasonable expectation of privacy in their premises or property where the seizure took place.²⁶ A Court can assess the claimant’s privacy interest through several factors, such as the claimant’s: presence at the time of the search; possession or control of the property or place searched; ownership of the property or place; historical use of the property or item; ability to regulate access, including the right to admit or exclude others from the place; subjective expectation of privacy; and the objective reasonableness of their subjective expectation.²⁷ In addition to these factors, a Court can also examine whether the search was conducted reasonably.²⁸ In *Mann*, the Supreme Court found that an officer’s safety concerns could not justify searching a pocket for a soft item, later found to be marihuana.²⁹ The search was unlawful as an individual has a

22. U.S. CONST. amend. V.

23. Dwight Newman & Lorelle Binnion, *The Exclusion of Property Rights from the Charter Correcting the Historical Record*, ALTA. L. REV. 543, 544–50 (2015).

24. Canadian Charter of Rights and Freedoms, s 8, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c11 (U.K.).

25. *R. v. Edwards*, [1996] 1 S.C.R. 128, ¶45 (Can.).

26. *Id.*

27. *Id.*

28. *Id.*

29. *R. v. Mann*, 2004 S.C.C. 52 ¶¶ 42, 49–50 (Can.).

reasonable expectation of privacy in his pockets.³⁰ In the second stage, a Court decides whether the state conduct and search were unreasonable and whether the admission of the evidence would put the admission of justice into disrepute.³¹

III. ONTARIO CASE

The case of the *Attorney General of Ontario v. \$10,000 in Canadian Currency (in rem)* is an example of an extractive statecraft.³² In this case, the property owner and his girlfriend were having a public heated argument.³³ When the police stopped to speak to the couple, the owner threatened the police and when arrested the police seized \$10,000 found in his pockets.³⁴

The owner's criminal past supported forfeiture. A police officer provided affidavit evidence, at the forfeiture hearing, that given his illegal drug enforcement experience and the owner's criminal record, he concluded that the seized bundled money was "consistent with money obtained from drug trafficking".³⁵ The owner's dated criminal record included theft, possession of stolen property and drug possession convictions.³⁶ The owner filed supporting bank and employment evidence and claimed his money was not deposited to save it from child-support garnishment.³⁷ The Court did not rely on the state's assertion that the owner was a "well-known drug dealer," however, the Court concluded that the criminal record was relevant to determining the source and purpose of the funds found.³⁸ The Court held that owner did not provide a satisfactory explanation and it concluded that the funds were either proceeds or an instrument of unlawful activity and ordered forfeiture.³⁹ The money was not connected to the owner's assaultive behaviour and the facts did not disclose that any drug paraphernalia was found. In addition to losing the \$10,000 and paying for legal counsel, the owner also had to pay some of the winning party's legal costs.⁴⁰ In this case, a *Charter* application was not made, however a court always has the power to ensure that the state's conduct is *Charter*-compliant.⁴¹

30. *Id.* ¶ 56.

31. *R. v. Grant*, 2009 S.C.C. 32 ¶ 71 (Can.)

32. *\$10,0000*, *supra* note 1.

33. *Id.* ¶ 1.

34. *Id.* ¶ 1-2.

35. *Id.* ¶¶ 4, 14.

36. *Id.* ¶ 18.

37. *Id.* ¶ 30.

38. *Id.* ¶¶ 16, 19-20.

39. *Id.* ¶¶ 30-32.

40. *Id.* ¶¶ 33-34.

41. *Rex v. Tran*, 2001 CanLII 5555 ¶ 26 (Can. Ont.).

CONCLUSION

The \$10,000 case meets the definition of stategraft. The state sought forfeiture through properly enacted legislation.⁴² The owner failed to prove his property's innocence at a significant financial cost. Here, the owner had a dated criminal record, and the funds had no direct connection to unlawful asset-generating activities. This is unlawful extraction, and the stategraft theory gives a framework to address this type of state action that operates to the detriment of vulnerable owners.⁴³ We want to ensure that criminals do not profit from their misdeeds, but this forfeiture did not have a direct connection to illegal activity as required and would seem unfair to the average citizen.

42. Ontario Civil Remedies Act, *supra* note 16.

43. Atuahene & Hodge, *supra* note 11, at 300.