# EDITORIAL

BY KENNETH A. PRICE
BARRISTER & SOLICITOR

Ken Price has practiced in a variety of areas for almost forty years. For thirty of those he has practiced tort law. He is a past president of this organization, and is a founding member of TLABC. He has worked for years providing counsel to several social and legal agencies, and has been a regular contributor to TLABC and CLE legal education programs. He has also worked to keep lawyers vigilant in their duty to represent citizens against oppression by the state.

Civil asset forfeiture has now become a widely used practice in many jurisdictions. It allows law enforcement officials to seize property that they suspect is connected to criminal activity. The legal theory behind the concept is that property itself can be guilty of a crime if it was used to commit that crime. The theory was used centuries ago to justify the confiscation of pirate ships. Today, in many of the United States, it is not uncommon to see cases commenced on the basis of police charging real or personal property directly, without any criminal charges necessarily being filed against a person related to the property. Court proceedings styles of cause often refer to "U.S. v Ferrari," or "U.S. v $80,000."

The use of civil forfeiture legislation in British Columbia varies not so much in the application of the legal theory as it does in the disposition of the assets recovered through seizure. In this Province, proceeds from the sale of assets under the law go into general revenue for the Province. This is in stark contrast to the many regimes in the United States where the police are permitted to not only recommend forfeiture action against property, but also to seize the sale proceeds of those assets for their own budgetary uses. In other words, small town police forces in Louisiana and Texas, for example, are able to initiate forfeiture action against a luxury vehicle or a piece of real property, sell the assets, and pocket the money. In some instances, it has been discovered that local police and/or prosecutors' offices have set up accounts for seized money, and used it for "continuing education" gatherings at ski or beach resorts. The money is frequently used to buy equipment or vehicles to augment limited financial resources from government. The common term for this practice is, "policing for profit," and it can result in some incredible machinations.

Louisiana state and local police developed a reputation for routinely pulling over cars travelling through the state with Texas license plates and going on fishing expeditions to see of there were any signs of those vehicles ever carrying any kind of drugs. In one instance, they got lucky when they stopped a luxury Mercedes. Inside the car, they found a small cache of cocaine, SEE PAGE 12

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FROM PAGE 8, EDITORIAL

and upon further investigation, they found a suitcase containing over $300,000 in cash. As a bonus, police also discovered that the man driving the car had a $35,000 Rolex watch. The driver of the car was summarily arrested and taken to the local police lockup. When giving him the opportunity to call his lawyer, police discovered that the man's attorney was a formidable criminal defence lawyer practising in the southern states, and well known to police and local state prosecutors alike.

After speaking with his client, the lawyer called the officer in charge and expressed an interest in making some accommodation to facilitate his client's instructions to try to make a deal. Obviously looking at the large amount of the assets potentially coming to the police coffers through civil forfeiture, and taking into account the reputation of the lawyer he was dealing with, the police chief and prosecutor accepted the accused's proposal: The Louisiana authorities would summarily take forfeiture of the cash by consent, and the accused would be sent on his way keeping the car and his beloved Rolex.

As amusing as this story may be, it is a stark example of the potential for arbitrary and discretionary application of the law of civil forfeiture. Especially if there is a financial incentive for authorities to seize assets under the law, citizens can be faced with a number of grossly unfair results as a consequence of the discretionary application of civil forfeiture laws.

One of the most perplexing issues in the application of these laws is the fact that fighting the forfeiture is not practical simply because the value of the assets seized will be eaten up by legal fees spent in trying to recover the assets.

More importantly, however, is the overriding issue of proportionality. In other words, how does the system make certain that the punishment fits the crime when it comes to forfeiture of assets?

An ongoing saga that has this year reached the Supreme Court of the United States is the interesting case of Timbs v Indiana. The facts are simple, yet familiar. Timbs received a life insurance payout of $73,000 following the death of his father in 2012. He then made a series of stupid decisions. First he blew $42,000 on a Land Rover. Then he started dealing in heroin, and made a pair of two-ounce sales worth $385 to an undercover police officer. Timbs was charged and authorities soon seized his Land Rover under civil forfeiture.

But Timbs did not roll over. He hired a lawyer and sought to have his asset returned. He argued that the federal constitution says that "excessive fines" may not be "imposed", and that the value of the SUV was worth more than four times the maximum fine of $10,000 applicable to the charge under Indiana law.

The Indiana state court concluded that the state's seizure of Mr. Timb's car was indeed disproportionate. On appeal, the Indiana High Court reversed that decision on legal grounds, finding that the state is not obliged to impose the federal constitution's strictures on itself, and rejecting the lower court's consideration of the federal law of excessive fines.

Earlier this year, the matter went to the Supreme Court of the United States on the limited issue of whether or not the states are bound by the U.S. Constitution's 14th amendment clause incorporating the Excessive Fines clause. The Court gave short shrift to the State's argument on implied state incorporation of the constitutional clause in question, and sent the matter back to the Indiana Court of Appeal for hearing on the ultimate issue of whether or not the penalty imposed on Timbs was "grossly disproportionate." Justice Ruth Bader Ginsberg wrote the unanimous opinion of the court, definitively ruling that the Excessive Fines clause is incorporated against the states and therefore Timbs has a right to raise that argument.

What is most interesting about the Supreme Court's decision on this Reference is contained in the extensive comments in obiter on the issue of how to determine what "grossly disproportionate" means and the scope of what the Excessive Fines clause protects. When counsel for the state was asked by the court whether the state law could seize a Bugatti based on the driver going five miles an hour over the speed limit, he replied "yes." Clearly, as the court expressed, having concluded that the U.S. Constitution applies to the States in this regard, it is inevitable that the issue of "gross disproportionality" must come before the Supreme Court directly, rather than an adjunct question, as it has so far in these proceedings.

Those interested in the issue are hopeful, as apparently were the Supreme Court Justices, that the Indiana case will make it back to the high court once the Indiana Court of Appeal has ruled on the merits, as it is now obliged to do. In the meantime, we can continue to ponder the perplexing issue of what "proportionality" really means in the context of civil forfeiture and excessive fines.

In our Province, it appears that lawmakers, on the urging of lobbyists from ICBC, police forces, and organisations like MADD, are bound and determined to keep escalating penalties for various driving offences. At what point do those fines become excessive and out of proportion to the gravity of the offences to which they are applied? When does regulatory or administrative discretion go over the edge into unlawfulness?

The bar on extortionate fees and fines has its roots in the 1689 Bill of Rights and the Magna Carta. In my opinion, we are at the point where we are again suffering the consequences of a practice which the people have been vigilant against for centuries: extortion by the state, whether it be excessive taxes, fines, or forfeitures.

We can even start small. For example, when does a parking fine of $75.00 become grossly disproportionate to the offence of over-holding a parking meter for a few minutes, thereby depriving the city coffers of another loonie?