Chatterjee v. Ontario (Attorney General): Provincial Law on Proceeds of Crime (2009)

In April 2009, the Supreme Court of Canada released a judgment dealing with federalism and the division of powers.[1]The Court had to decide whether Ontario legislation dealing with the proceeds of crime was valid under the *Constitution Act, 1867*.

Mr. Chatterjee was arrested in Ontario for breaching his bail conditions. The officer who arrested him searched his car and found $29,020 in cash, an exhaust fan, a light ballast and a light socket – all of which smelled of marijuana.[2]The police seized the property. Though Chatterjee was never charged with any offence related to this search, the Ontario government applied to the courts to permanently seize the cash as proceeds of unlawful activity and to confiscate the items as instruments of unlawful activity.[3]This procedure is called forfeiture.

The government's application was based on an Ontario law[4] that allows the province to forfeit property that is located in Ontario if it is proved to be the "proceeds" or "instruments" of unlawful activity.[5] "Unlawful activity" covers anything that is an offence under Ontario law, federal law, or the law of another province or territory – or even an offence in a foreign jurisdiction, as long as it would be an offence if it had occurred in Ontario.[6] The funds from these forfeitures are deposited into an account.[7]Money from that account is then used to cover the costs of administering the forfeiture program, and the remaining funds are used to assist victims of unlawful activity, prevent unlawful activity, and compensate municipal and public bodies that are affected by unlawful activity.[8]

Chatterjee responded to the forfeiture application by arguing that the province did not have the power to enact the law. His point was that the law provides for the forfeiture of proceeds of *federal* criminal offences and the federal Parliament, not the provinces, has jurisdiction to make criminal law.[9]

Under Canadian federalism, the provinces and the federal Parliament each have different powers to enact laws. The 1867 Constitution lists the different powers that each level of government possesses. The federal Parliament, for example, may make laws relating to criminal law and procedure, banking, currency, and the military.[10] The provinces, on the other hand, may make laws on such subjects as property and civil rights, the administration of justice, and matters of a merely local and private nature.[11]

In its decision, the Supreme Court reviewed its approach to division of powers cases and then applied those principles to the Ontario law to determine that it was constitutionally valid.

General Approach to Division of Powers Cases

Division of powers cases are decided in a two-step process. First, courts determine the "pith and substance" of the challenged law.[12] This involves determining the essence of "what the law does and how does it do it?"[13] Courts consider this by looking at both the purpose of the law and its effects. In order to identify the*purpose* of the law, the courts look at the statute itself as well other sources of information.[14]This examination usually involves looking at the "purpose clause" of the statute, though courts are not bound to accept such a clause as expressing a law's purpose.[15] Other information surrounding the passage of the law, such the Hansard record of debates, may also be looked at.[16]Courts determine the *effects* of a law by looking at how the legislation actually affects those who are subject to its terms.[17] To assess a law's effects, courts look at the legislation itself and consider the actual or predicted effect of the law in operation. Combining these assessments of both purpose and effects of the law, the courts then determine the essential character (or "pith and substance") of the law.

In the second step, courts classify the law's essential character according to the "classes of subjects" listed in the Constitution, to decide whether the law falls within the powers of the legislature that enacted it.[18]In classifying the Ontario proceeds-of-crime law, it was important that the provinces have the power to enact laws concerning "property and civil rights in the province," whereas the federal government has the power to enact laws concerning the criminal law.[19]

In the past, the Supreme Court took the approach that the powers of the provinces and the federal government were firmly separated and a provincial law could not encroach upon an area assigned to the federal government. That is no longer the case. The modern approach is one of "co-operative federalism," which recognizes that overlaps between provincial and federal power are inevitable.[20] Now, courts identify the "dominant feature" of the legislation.[21]Provided that feature falls within the powers of the government that enacted it, "incidental" intrusions into the fields assigned to the other level of government are considered acceptable.[22]

The Ontario Law

The Supreme Court applied these principles to the Ontario law and decided that it is a valid provincial law. The Court looked at the purpose clause of the law and the record of legislative debates before its enactment, and concluded that its purpose is to use the proceeds of crime to compensate victims and the public for

the costs associated with criminal activity.[23] In terms of effects, the law allows to the province to seize property that is tainted by crime.[24] It does not single out offences in any one jurisdiction. The actions that "taint" the property could be prohibited under a provincial law or a federal law, or they could be conduct that occurred outside of Canada.[25]

The Court concluded that the law focuses on property and the effects of crime, rather than adding additional penalties to federal crimes.[26]The law is essentially concerned with giving the province the authority to seize property tainted by crime, reduce the profits associated with crime, and use the proceeds to compensate victims and address the effects that crime has upon society.[27]

Looking at the powers that the Constitution gives to the two levels of government, the Court concluded that the proceeds-of-crime law has both provincial and federal aspects. It falls under the provincial power over "property and civil rights" and "matters of a merely local and private nature."[28] As well, it has a federal aspect as it touches upon criminal law.[29]The Court stated that the criminal law aspect is acceptable because the law is primarily concerned with property and the effects of crime.[30] The only potential problem would be if the provincial law conflicted with the federal forfeiture laws.

Potential Conflict with Federal Forfeiture Provisions

The Court said that provinces are permitted to deter crime and deal with its financial consequences as long as they are acting within their provincial powers and the provincial laws do not interfere with the proper functioning of federal criminal law.[31]In the past, for example, the Supreme Court accepted that provinces could suspend driver's licenses after a criminal conviction for impaired driving (a federal offence).[32]

The only potential problem with the law would be if it interfered with the forfeiture provisions in the *Criminal Code*.[33] If the Ontario law interfered with the operation of the federal law, the doctrine of paramountcy would render the Ontario law inoperative to the extent that it interferes. The Court acknowledged that the Ontario law has a lower standard of proof than the federal law: proof on a balance of probabilities rather than proof beyond a reasonable doubt.[34]According to the Court, however, this only poses a problem in situations where the federal government has sought forfeiture in the criminal process and it was refused.[35] Even in those cases, the Court did not see a conflict because existing legal principles would prevent the sentencing issue from being re-litigated.[36] If a circumstance arose where the two laws conflicted, the Court stated that the doctrine of paramountcy ensures that the federal law would prevail.[37]

Since the Ontario law falls within the provincial law-making powers and there was no necessary interference with the federal forfeiture law, the Court concluded that it is a valid law.[38]

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[1] *Chatterjee v. Ontario (Attorney General)*, 2009 SCC 19.
[2] *Ibid*. at para. 5.
[3] *Ibid*. at paras. 6-7.
[4] *Remedies for Organized Crime and Other Unlawful Activities Act, 2001*, S.O. 2001, c. 28. ("*Civil Remedies Act*")
[5] *Ibid*. , ss. 3, 8.
[6] *Ibid*., s. 2.
[7] *Ibid*., s. 6.
[8] *Ibid*. s. 15.
[9] *Supra* note 1 at para. 7.
[10] *Constitution Act, 1867*, s. 91.
[11] *Ibid*., s. 92.
[12] *Supra* note 1 at para. 16.
[13] *Ibid*.
[14] *Ibid*.
[15] *Ibid*. at para. 17.
[16] *Ibid*. at para. 16.
[17] *Ibid*. at para. 19.
[18] *Ibid*. at para. 24.
[19] *Constitution Act, 1867*, ss. 91(27), 92(13).
[20] *Supra* note 1 at para. 32.
[21] *Ibid*. at para. 29.
[22] *Ibid*.
[23] *Ibid*. at para. 19.
[24] *Ibid*. at para. 20.
[25] *Ibid*.
[26] *Ibid*.
[27] *Ibid*. at para. 23.
[28] *Ibid*. at para. 25, citing *Constitution Act, 1867*, ss. 92(13), 92(16).
[29] *Ibid*. at paras. 31-39.
[30] *Ibid*.
[31] *Ibid*. at para. 40.
[32] *Ibid*. citing *Provincial Secretary of Prince Edward Island v. Egan*, [1941] S.C.R. 396; *Ross v. Registrar of Motor Vehicles*, [1975] 1 S.C.R. 5.

[33] *Criminal Code*, R.S.C. 1985, c. C-46, Part XII.2, s. 462.37(1).
[34] *Supra* note 1 at para. 49.
[35] *Ibid.*
[36] *Ibid.* at para. 51.
[37] *Ibid.* at para. 52.
[38] *Ibid.* at para. 53.