

# Non-Conviction Based Forfeiture in Canada: The Example of Three Outlaw Motorcycle Gang Clubhouses



## Article

Jeffrey Simser \*

### ABSTRACT

A 2023 non-conviction based (NCB) forfeiture order was recently issued against three clubhouses in Canada. Each served as the chapter headquarters for an outlaw motorcycle gang. Clubhouses form the base of operations for their organized criminal activities. The protracted litigation started in 2007, and a Canadian appellate court found in February 2023 that the clubhouses were forfeitable as instruments, as they supported the organized criminal activities of outlaw motorcycle gangs. The court overturned a trial ruling that part of the NCB law was unconstitutional. The court also held that each clubhouse served as a "safe house" for the respective gang, namely as a place where business could be conducted away from the prying eyes of the police. The clubhouses were also intelligence hubs, where members could discuss their criminal business, their rivals, and the techniques used by police to interdict them. Lastly, the court found that each clubhouse operated as a "planted flag" marking the territorial jurisdiction of the outlaw motorcycle gang, announcing to both customers and rivals that this was its territory. Leave to appeal this ruling from Canada's highest court was denied, so this final judgment will have an important impact on organized crime cases moving forward, giving law enforcement an NCB option to apply. This article summarizes the cases and examines the type of evidence used in court to tackle organized crime. It concludes with the analysis of a similar case in New Zealand.

### AUTHOR

Jeffrey Simser

Barrister and Solicitor in Toronto, Canada

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# I. How Does Non-Conviction Based Forfeiture Work in Canada?

Non-conviction based (NCB) forfeiture, called civil forfeiture in Canada, is a remedial statutory device designed to recover the proceeds and instruments (property used to facilitate crime) of unlawful activity. Canada first adopted NCB forfeiture in 2001, and there are now nine jurisdictions in Canada that have such laws: the constitutional division of powers assigns civil law authority to subnational jurisdictions. Canada adopted the American *in rem* approach, meaning that proceedings are brought before civil court against the object of forfeiture, not against the person associated with the property. As a result, Canadian court cases may have unusual names like *Ontario (Attorney General) v. \$232,405 in Canadian Currency*.<sup>1</sup> NCB cases operate independently of criminal law cases, which are brought against individuals; the criminal law matches a prohibition with an appropriate penalty to enable a criminal charge to be brought against an individual. Canada has conviction-based forfeiture provisions in its criminal law.

In 2009, Canada's highest court ruled that the Canadian NCB laws were constitutional, finding their dominant purpose a civil one: making crime unprofitable by capturing the fruits of crime and making resources unavailable to fund future crime.<sup>2</sup> This ruling addressed a proceeds case. In an NCB case, property with an unlawful provenance is a proceed. Illicit narcotics are exchanged for cash on the street, and that cash is a proceed. NCB cases are brought before a civil court, where the judge is asked to inquire into the title. If the title was generated through crime, the court is empowered by statute to extinguish that title. In the common law world, property law despises a void. NCB law prevents a void by allowing the court to forfeit the property to the state, where it can be made available for, amongst other things, victim compensation. Instruments can also be forfeited, although the court has a slightly different ground for their forfeiture. An instrument is a piece of property that makes the labour of crime possible. The court must examine the use of the property: if this property is not forfeited, will it be used again? As a safeguard, NCB statutes confer on the court a jurisdiction to refuse to issue an order that would clearly not be in the interest of justice. If the state makes out all technical elements required for a case, the court can still refuse or limit forfeiture if the outcome would be manifestly harsh or inequitable. For example, a very valuable property could be implicated in a minor crime and the court could refuse to issue an NCB forfeiture order.<sup>3</sup> In a recent outlaw motorcycle gang case, the appellate court in British Columbia examined the constitutionality of Canada's NCB instrument provisions.<sup>4</sup>

# II. Outlaw Motorcycle Gangs and Organized Crime

In 2007, a case was brought against a clubhouse in Nanaimo, British Columbia, which belonged to the Hells Angels' Motorcycle Club (HAMC), a notorious outlaw motorcycle gang. Two other HAMC clubhouses, in Vancouver and Kelowna, were later added to the proceedings. In British Columbia, NCB cases are initiated by the director of civil forfeiture (hereinafter: "the Director"). At trial in the above-mentioned case, the director adduced evidence about the HAMC. At the time of trial, there were 463 HAMC chapters with roughly 6000 members in 56 countries. Canada has 34 active chapters. HAMC chapters must comply with international membership rules (as well as Canadian and local rules), pay dues, participate in "motorcycle runs," and organize shifts to ensure that the clubhouse buildings are always occupied. Chapters have weekly member-only meetings and have relative independence within the broader HAMC world. Promotion to "full member" must be approved by all members of the chapter. Undesirables, including "snitches, junkies, cops or ex-cops" are prohibited. Anyone who has joined or chosen to work with any law enforcement agency is ineligible for membership. At regional, national, and international meetings, members discuss organized crime proceed-

ings and the activities of rival outlaw motorcycle gang clubs. Members also exchange information about the existence and investigation of potential “snitches” and contribute to defence funds for members facing criminal charges.<sup>5</sup>

Those who have a passing familiarity with organized crime might find the HAMC operating model strange. Organized criminals aspire to blend in, driving modest vehicles (so as not to attract “heat” from law enforcement) and presenting as respectable members of their community. Outlaw motorcycle gangs run on the “power of the patch” and use their well-known propensity for violence to intimidate and control local criminal markets. Clubs have a “no burn” rule for drug transactions, meaning that if they agree to sell you narcotics, they will honour the transaction. Outlaw motorcycle gangs want a reputation of reliability. Reliability builds sales volume, giving the organization the wherewithal to source wholesale narcotics offshore. Locally, the HAMC controls the market within its territory. Violence ensures that non-affiliated drug dealers will either pay a tax or source their drugs with the local chapter. The HAMC members wear a “death head” patch on the back of their jackets; only members are allowed to wield that patch, which represents and projects the power of the club.<sup>6</sup> There is one other marked physical declaration: the presence of an outlaw motorcycle gang clubhouse.<sup>7</sup>

Clubhouses are central to the outlaw motorcycle gang business model. The three clubhouses in the aforementioned Canadian NCB case were two-story fortified buildings on fenced and gated property. The fences ensure privacy: people on the street, including police, cannot see what is going on in the compound. The front doors are made of metal and open outwards; they are designed to prevent forced entry. Where there are windows, they are made of bulletproof glass. Cameras and a security system monitor the property. Inside the club, a member-only section for secret meetings is set off from the main entertainment area. The buildings include kitchens, bars, recreational areas, storage areas, bedrooms, and a gym.

The evidence adduced in court showed that these clubhouses served three operational objectives for the outlaw motorcycle gang. First, they operate as safe houses. This allows members to plan crimes, including drug trafficking. Clubhouses allow for weapons storage. Members can collectively muster at the clubhouse to travel and commit crime. Disputes within the gang can be resolved privately in the clubhouse. Second, the clubhouses are intelligence hubs. Members can network and develop criminal enterprise opportunities. Donations are solicited to fund criminal defences for members facing prosecution. Information can be stored and disseminated about fellow members, rivals, “snitches,” and undercover police officers. Police methods and criminal countermeasure strategies can be safely discussed in the clubhouse. Third, the clubhouse represents a “planted flag” that marks the outlaw motorcycle gang’s territory. The building serves as a reminder (and warning) to rivals that this is HAMC turf.

### III. Extended NCB Litigation

The litigation in this case was extensive and long. In 2007, a freezing order (called an interim preservation order by the statute) was obtained for the first clubhouse. Over time, some assets were released (e.g. motorcycles) and others were added (two more clubhouses). The pre-trial proceedings were described by the assigned trial judge as a “procedural quagmire,” and most steps were heavily contested. Throughout a protracted pre-trial process, the lawyers for the outlaw motorcycle gang challenged the director’s evidence and use of experts as well contesting numerous points of law. Finally, after eleven years of litigation, the matter went to trial. Two years later, in 2020, the trial judge issued a massive 327-page judgment and ordered the clubhouses returned to the outlaw motorcycle gang. The principal gravamen for the trial judge was that NCB forfeiture for instruments was an impermissibly ersatz form of criminal law. According to the trial judge, the statute called on the Director to prove the propensity to commit crimes. The trial judge found that the effect of the NCB instruments provision was to suppress, criminalize, and punish offenders, a matter

reserved for criminal law and criminal standards of proof (beyond a reasonable doubt, in Canada, as opposed to the civil standard of balance of probabilities). The trial judge's findings on evidence and the constitutionality of the instrument's provisions was firmly overturned in 2023 by the Court of Appeal. That court ruled that the purpose of NCB forfeiture for an instrument was to disable the property and deter future unlawful activities by removing it from a criminal. The Court of Appeal found that this was a constitutionally valid exercise of the civil law.

The Court of Appeal also overturned the evidentiary findings of the trial judge, criticizing his refusal to admit certain evidence and his application of an improperly elevated standard of proof. The court drew attention to several facts: The clubhouses were a safe space in which outlaw motorcycle gangs could plan future crimes, often using erasable whiteboards to discuss activities silently, without the risk of being overheard or detected by police. Members of the gang could share criminal disclosure packages to understand how the police operate and then develop strategies to evade future detection. The clubhouses stored information on agents and informants, again with a view towards evading future investigations. The buildings were outfitted with measures to prevent surveillance or monitoring by police; the clubs had a penchant for secrecy and a preoccupation with "rats and snitches;" many members of the club had been implicated in past crimes and had engaged others to commit crimes and acts of violence. Finally, the clubhouses reinforced the presence of the outlaw motorcycle gang in the territory, a presence backed up by propensity to engage in violence against anyone who dared to cross it. Against this factual background, the Court of Appeal issued orders of forfeiture against the three clubhouses.

## IV. What's Next?

This case, launched in 2007, was one of the first British Columbia civil forfeiture cases to tackle organized crime. Every step of the case was fiercely contested. The voluminous 2020 decision of the trial judge was worrying on numerous fronts. Had that decision stood, the use of NCB forfeiture in Canada for organized crime cases would have been curtailed. The trial judge rejected expert evidence from an experienced organized crime investigator and then found there was insufficient evidence to support forfeiture. In its 2023 decision, the Court of Appeal overturned these findings and clarified the law. Leave to appeal this decision was denied by the Supreme Court of Canada on October 12, 2023.<sup>8</sup> Of related interest, the Supreme Court of Canada ruled in 2009 that civil forfeiture was constitutional, but that case involved proceeds not instruments.<sup>9</sup>

Those interested in outlaw motorcycle gang clubhouses and NCB forfeiture might also wish to read a New Zealand decision: *Commissioner of Police v. Richardson*.<sup>10</sup> In this decision, an outlaw motorcycle gang called the "Head Hunters" faced an NCB forfeiture proceeding in respect of its clubhouse near Christchurch. In New Zealand, NCB proceedings are brought by the police, who in this instance tendered evidence that the Head Hunters had engaged in illegal gaming and in the sale of methamphetamine. Not only did the gang sell drugs, but, like their Canadian counterparts, it also "taxed" other drug dealers who operated in its territory. Unlike the Canadian litigation, however, the police were able to adduce sufficient evidence for the court, tracing the proceeds of crime to renovations of the clubhouse; these findings supported a right of NCB forfeiture of the clubhouse as a proceed. For law enforcement, a "proceeds" theory, as used in New Zealand, appears to be a less complicated pathway to an NCB forfeiture based on an instruments theory.

1. 2022 ONSC 7353. ↵

2. *Chatterjee v. Ontario (Attorney General)*, 2009 SCC 19. ↵

3. J. Simser, *Civil Asset Forfeiture in Canada* (Canada Law Book 2011 – present, loose-leaf, updated twice annually). ↵

4. *British Columbia (Director of Civil Forfeiture) v. Angel Acres Recreation and Festival Property Ltd.*, 2023 BCCA 70. ↵

5. *British Columbia (Director of Civil Forfeiture) v. Angel Acres Recreation and Festival Property Ltd.*, 2020 BCSC 880. ↵

6. See, for example, P. Edwards and L. Najera, *The Wolfpack* (Toronto: Penguin, 2022); J. Sher and W. Marsden, *The Road to Hell* (Toronto: Penguin, 2004).<sup>42</sup>
7. In *R. v. Lindsay*, 2009 ONCA 532, the court found that the HAMC relied on its “patch” and reputation for violence to collect debts as part of an extortion scheme; the court ruled that the HAMC was a criminal organization.<sup>43</sup>
8. Angel Acres Recreation and Festival Property Ltd. and All Others Interested in the Property, et al. v. Director of Civil Forfeiture, et al., 2023 BCCA 70. Leave to appeal denied, October 12, 2023, 40688, SCC.<sup>44</sup>
9. *Chatterjee v. Ontario (Attorney General)*, 2009 SCC 19.<sup>45</sup>
10. 2022 NZHC 3184.<sup>46</sup>

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## \* Author statement

Barrister and Solicitor in Toronto, Canada

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