COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Director of Civil Forfeiture v. Lloydsmith,* 2014 BCCA 72

Date: 20140221
Docket: CA040891; CA040896

Civil Forfeiture Action in Rem Against

The Lands and Structures at 33707 6th Avenue, Mission, British Columbia, and having a legal description of Parcel Identifier 011-404-086 East Half Lot 11 District Lot 1 Group 3 New Westminster District Plan 9142 (the "Property") and the fruits and proceeds thereof

Between:

Director of Civil Forfeiture

Appellant
(Plaintiff)

And

The Owners and All Others Interested in the Property,
In Particular David Lloydsmith

Respondents
(Defendants)

Corrected Judgment: Corrections were made in the summary and at paras. [6] and [39] on March 4, 2014.

Before: The Honourable Madam Justice Saunders
The Honourable Madam Justice Neilson
The Honourable Madam Justice Bennett

On appeal from: Supreme Court of British Columbia, dated April 12, 2013
(*Director of Civil Forfeiture v. Lloydsmith*, Vancouver Registry S111483)

Oral Reasons for Judgment

Counsel for the Appellant: A.D. Gay and S.H. Coulson

Counsel for the Respondent, D. Lloydsmith: B.D. Vaze and M.S.A. Fox

Counsel for the Intervenor, Attorney General of British Columbia: B.A. Mackey

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Counsel for the Intervenor, British Columbia Civil Liberties Association	S. Hern
Place and Dates of Hearing:	Vancouver, British Columbia February 17 & 18, 2014
Place and Date of Judgment:	Vancouver, British Columbia January 21, 2014

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Summary:

The appeals are from two procedural determinations in this civil forfeiture case. The first is an order the case be bifurcated to deal with issues of police compliance with the defendant's rights under the Canadian Charter of Rights and Freedoms prior to other issues, and any consequent issue under s. 24 of the Charter, before the trial of the remaining issues, the police actions being the source of evidence relied upon by the Director of Civil Forfeiture to ground the action. The second is a determination that completion of examination of discovery will await completion of the first part of the trial.

Held: Appeal from the bifurcation order dismissed. There is no proper basis upon which to interfere with the judge's exercise of his discretion, and no basis upon which to conclude that his assessment of efficiency is so wrong as to permit this court's intervention. The second appeal, being in the nature of a ruling as to timing of the acquisition of evidence, mid-trial, is quashed for lack of jurisdiction. Any complaint to that determination will be subsumed into the final outcome and may be brought to this court as part of an appeal of a final order.

[1] **SAUNDERS J.A.**: This action depends, in its allegations against Mr. Lloysdsmith, upon information provided by the Royal Canadian Mounted Police to the Director of Civil Forfeiture, based on evidence gathered by its members from Mr. Lloydsmith's residential property. The action is an *in rem* proceeding seeking forfeiture of that residential property under the *Civil Forfeiture Act*, S.B.C. 2005, c. 29. In the course of the proceedings two determinations have been made, committed to paper and entered as orders of the Supreme Court of British Columbia. The Director of Civil Forfeiture appeals, with leave, from both. The first, made September 27, 2012, is in these terms:

> The trial of this matter shall be bifurcated, and the issues of whether the Defendant's *Charter* rights were violated and of whether a remedy should be granted under s. 24 of the *Charter*, shall be heard first, prior to the hearing of any other issues for trial.

[2] The second, made April 12, 2013, in the following terms, has the effect of bifurcating the examination for discovery of Mr. Lloydsmith:

> The Director's application to compel Mr. Lloydsmith to attend a full examination for discovery prior to the hearing on s. 24 of the *Charter* is dismissed.

[3] Pursuant to these determinations, a hearing has been held, evidence has been adduced, and the judge has found that various actions taken by members of the RCMP, violated Mr. Lloydsmith's rights under ss. 8, 9 and 10(b) of the *Canadian Charter of Rights and Freedoms*. Mr. Lloydsmith has been examined for discovery as to the day of the search, but otherwise, as the matter now lies, the next step will be consideration of remedies, if any, under ss. 24(1) and 24(2) of the *Charter*. The effect of the April 12, 2013 determination is to postpone the conclusion of the examination for discovery of Mr. Lloydsmith until after the hearing into the s. 24 issues.

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[4] Leave to appeal was granted in respect to each determination. The reasons for judgment on leave address, mainly, the potential effect of an appeal upon the proceedings in the Supreme Court of British Columbia, and the general advantage that may accrue to the practice from clearing up certain procedural issues.

[5] Consolidating the grounds of appeal somewhat, the Director contends that the judge erred:

1. in bifurcating the trial; and
2. directing that remedies under ss. 24(1) and (2) of the *Charter* should proceed before completion of pre-trial discovery and without regard for the remedy provided by s. 6 of the *Civil Forfeiture Act*.

[6] The Director says that the judge was wrong to say that ss. 24(1) and (2) can be analyzed outside of the context of a full trial and that he was wrong to rely upon the decision of Mr. Justice Schultes in *British Columbia (Director of Civil Forfeiture) v. Huynh*, 2012 BCSC 740.

[7] With respect to all, it seems to me that the procedure followed in this action has become rather muddled. The muddle is demonstrated in the failure to identify the Rule under which the determinations have been made. The first determination is what I will refer to as the bifurcation of the trial order. We are left to guess at the Rule under which it was made. The second determination delays completion of the examination for discovery until the first part of the bifurcated trial is complete. It is

really only the dismissal of an application to compel earlier completion, which if granted, would have been, I think, a direction or a ruling. How the matter came to the trial court matters to us, of course, because our jurisdiction is to hear appeals from orders, and if the order is listed in Rule 2.1 of the *Court of Appeal Rules* as a limited appeal order, leave to appeal is required. But I will return to this topic. First I should describe the case more fully.

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[8] This action was commenced in March 2011. It follows a warrantless search of Mr. Lloydsmith's residential property on October 15, 2007 by an RCMP constable who attended at the property in response to what is referred to as a "static" 911 call, that is, a call in which there is no voice on the line and the dispatcher hears only static. Apparently such calls are a phenomenon that occurs from time to time. The phenomenon is known to police. When the constable arrived at the door he knocked but did not announce police presence. Mr. Lloydsmith answered, stated he did not call 911, and said he was the only person there. Mr. Lloydsmith did not permit the constable to enter. The constable forced his way in, applied force to Mr. Lloydsmith, and arrested him on obstruction. The constable and another police officer went through the residence to determine whether there was anyone present in distress. While doing so they discovered what they characterized as a marihuana grow-operation in the basement. Later that day the constable prepared an information to obtain a search warrant, commonly referred to as an ITO, and received a warrant by telecommunication, commonly termed a telewarrant. The plants discovered were seized and destroyed without analysis that would have confirmed their character as marihuana plants.

[9] No criminal charges in respect to this incident were laid against Mr. Lloydsmith.

[10] After several years the RCMP forwarded information concerning the events of October 15, 2007, to the Director of Civil Forfeiture, and the Director commenced this action. In the claim the Director describes Mr. Lloydsmith as an electrician. The Director pleads that with the knowledge of Mr. Lloydsmith, proceeds from the sale of

controlled substances were used to make material contributions to what is maladroitly termed “equity” in the property, a commercial marihuana growing operation was found on the property, and the property was used for activities in respect to controlled substances contrary to the *Controlled Drugs and Substances Act*, R.S.C. 1996, c. 19. It pleads that this alleged illegal activity was a major source of income for Mr. Lloydsmith. I will pause to note that the Director’s pleading refers to Mr. Lloydsmith by his surname only, a rather old style manner of referring to an offender that the courts have moved away from, and inconsistent with the decorum generally demonstrated in court documents filed in civil proceedings. I would ask counsel for the Director, who I do not think is the author of the pleadings, to carry this remark to his client, and I respectfully suggest that pleadings should be drawn from a perspective of formal respect for any defendant.

[11] Under the heading ‘Legal Basis of the Notice of Civil Claim’ the Director pleads that “equity” was acquired in whole or part by the unauthorized production and trafficking in controlled substances and was acquired in whole or part by the laundering of proceeds of crime.

[12] Mr. Lloydsmith pleads that he has worked as an electrician, earned a “handsome income”, initially acquired the property in 1992 through spending his savings, and acquired complete ownership, which I will take to mean paid off the mortgage, from savings, gifts, inheritances, settlements and sale of various assets. He admits the police discovered elements of a marihuana growing operation but denies a commercial grow-operation and disputes the number of plants. He pleads that the claim has arisen solely as a result of breaches of ss. 7, 8, 9 and 10(b) rights under the *Charter* by the police and he seeks a remedy under both ss. 24(1) and 24(2) of the *Charter.*

[13] This case is one of several, perhaps more than several, now making their way through the Supreme Court of British Columbia. And it is not alone in being a claim of forfeiture against a person who has been neither charged nor convicted of a criminal offence. Accordingly it is a case in which challenges to police compliance

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with the *Charter* must be presented without the assistance of a Legal Aid funded lawyer. Yet the sophistication of the Charter issues makes it desirable that the individual is represented by counsel, which of course is very costly. Having to maintain a costly defence is a risk every person in the community is vulnerable to. There is, however, an extra element in the civil forfeiture cases, and that is the jeopardy faced by a civilian, at risk of losing a great deal and at risk of being labelled for criminal behaviour. This jeopardy arises from evidence gained by police using their special authority but without the case ever having fed into the criminal proceedings stream, with the defendant now caught in a proceeding that requires presentation for cross-examination at an examination for discovery. All of this is allowed by the legislation. Given these very high stakes for the individual and the power difference between the parties, it is not surprising that there has been an assortment of applications seeking to challenge the legitimacy of the evidence gathering actions of the police, seeking to postpone discovery until that legitimacy has been determined, and seeking avenues for just redress where such activities have been found to be in violation of a person's *Charter* rights.

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[14] One of those cases is, *Huynh*, relied upon by the judge in this case. In *Huynh,* Mr. Justice Schultes, as a chambers judge, before trial, considered an application to have the trial of the application for *Charter* remedies heard before other trial issues. Mr. Justice Schultes relied upon Rules 12-5(67), Rule 7-1(22) and Rule 7-2(18), and referred to *D.P. v. Wagg* (2004), 239 D.L.R. (4th) 501 (Ont. C.A.). He concluded that he had authority to order the trial to be bifurcated and the *Charter* issues to be determined before the rest of the trial, provided he was satisfied the requisite degree of efficiency would be advanced by that procedure. He found it was, saying: "I conclude that there is a meaningful possibility that the outcome of the *Charter* applications could resolve this case completely".

[15] A different attempt to use the *Supreme Court Civil Rules* to determine *Charter* issues before the ultimate question was made in *British Columbia (Director of Civil Forfeiture) v. McCluskey*, 2013 BCSC 2376. There the defendants sought to use the summary trial procedure to determine the existence of *Charter* breaches in the

gathering of evidence relied upon by the Director and sought to determine the consequential remedies, in the interests of justice, of dismissal of the claim under 24(1) of the *Charter* for abuse of process, and denial of forfeiture under s. 6 of the *Civil Forfeiture Act*. Mr. Justice Abrioux determined that the case before him was not appropriate for summary determination, but stayed examination for discovery of the defendants pending this appeal.

[16] Yet another approach is demonstrated in *Director of Civil Forfeiture v. Shoquist*, 2011 BCSC 1199, wherein the defendant applied under Rule 9-5, unsuccessfully in the circumstances of that case, to strike a notice of civil claim on the basis that it was an abuse of process.

[17] Another alternative mentioned in our hearing is a free-standing application, before trial, to strike the pleadings on the basis of abuse of process under s. 24(1) of the *Charter*. We have not been referred to any case that discusses this alternative.

[18] I turn now to the two 'orders'. The first is the bifurcation order. It has two components, first splitting the trial into two portions to determine whether Mr. Lloydsmith's *Charter* rights were violated, and the second to determine, if *Charter* rights were violated, whether a remedy should be granted under either s. 24(1) or s. 24(2) of the *Charter.*

[19] I have observed already that it is not apparent from the material which of the *Supreme Court Civil Rules* were relied upon by the judge in his determinations. In *Huynh*, Mr. Justice Schultes was not the trial judge on the case. Yet he referred to Rule 12-5(67). Rule 12-5 applies to evidence and procedure at trial and I have understood it to be the tool of the trial judge. Rule 12-5(67) provides:

> The court may order that one or more questions of fact or law arising in an action be tried and determined before the others.

[20] Rule 5-3(1)(p) also allows for such an order. Rule 5-3 describes the orders that may be made at a case planning conference, that is, in Chambers before the

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trial commences, and includes "authorizing or directing the parties of record to try one or more issues in the action independently of others".

[21] In this case, we are told that the application came before the judge in chambers and that the judge then seized himself of the action, including as to becoming the trial judge. That procedure appears irregular, has resulted in the shortcutting of several steps of the process, and has resulted in confusion such that the parties are not certain, for example, whether what has happened thus far is part of the trial. Untangling this as best I can, it seems to me that the order for bifurcation preceded the trial, that is, it was made during pre-trial proceedings, and the *Charter* breach hearing was part of the trial. While the initial proceedings were not formally designated a case planning conference, and trying not to be too formalistic in what has been a fluid and unstructured procedure, I will take it that the order to bifurcate the trial was made under Rule 5-3(1)(p). Accordingly, the appellant was required to obtain leave, because such an order is, by Rule 2.1 of the *Court of Appeal Rules*, a limited appeal order.

[22] The criteria on bifurcation, also referred to as severance, has been established for some time. They include trial fairness, convenience, efficiency, and the presence or absence of prejudice. I would suggest that the preeminent consideration is the interests of justice.

[23] A decision on bifurcation engages the discretion of the judge in the management of the trial process. In *Logan v. Hong,* 2013 BCCA 249, the deference owed to the trial court was explained this way:

> [9] Whatever may be the source of authority for the making of the order, it is clear it was made in the management by the trial court of its own processes and involves the exercise of discretion. Accordingly, this court must approach the appeal with the requisite deference. It is well known that we may interfere with an order made in the exercise of discretion only if we consider the judge did not give weight to all relevant considerations: *Friends of the Oldman River Society v. Canada (Minister of Transport),* [1992] 1 S.C.R. 3, 88 D.L.R. (4th) 1; *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561, 96 D.L.R. (3d) 14; and *MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] 1 S.C.R. 6. An error of principle, by definition, fits within the test established for interference with such an order.

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[24] The appellant vigorously contends that the judge misapprehended the efficiency component. In making this submission he objects both to the determination at this stage of the issue of *Charter* breaches, and also, consideration of the s. 24 issues.

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[25] In my view, it is for the judge to consider and assess the issue of efficiency, both as to judicial economy and as to the parties' time and effort that will be expended and potentially will be saved by the proposed manner of proceeding. On the materials before us, I cannot say the standard set in *Oldman River* is met. I would not interfere with the judge's assessment of the criterion of efficiency on the record before us; I would not interfere with the order for determination of the issue of *Charter* breaches before the balance of the trial.

[26] Nor, in my view, should we interfere with the aspect of the order permitting consideration of the s. 24 issues at this stage. At the end of the day, it may be established that the procedure adopted was not optimum. However, now, in February 2014, I cannot say this is apparent given the manner in which these *Charter* issues come to court, the nature of the litigation, the high values protected by the Charter, and the broad latitude generally given to the trial court to manage its own processes. It seems to me that we should not interfere with either aspect of the bifurcation order.

[27] At the hearing of the appeal many hypothetical situations were addressed. So I will consider the alternatives that may arise from the bifurcation order:

- at most, the first phase of this case may result in an order dismissing the action, by way of a s. 24(1) remedy. In that case, the final order may be appealed as of right, and all interlocutory matters including rulings and directions leading to that order may be appealed as of right because they are subsumed in the final order;

- alternatively, the judge may decline to dismiss the action but may rule that the evidence is not admissible. Such a ruling, along with whatever other

evidentiary and procedural rulings may be made, will be subsumed into the eventual final order, and again may be considered by this court on appeal; or

- further alternatively, the evidence may be admitted and lesser effect given to the *Charter* breaches identified by the judge. Even in that event, those rulings may be challenged on appeal.

[28] In any event, somewhere in the proceedings the judge will have the opportunity to opine on the interaction between s. 6 of the *Civil Forfeiture Act* and s. 24 of the *Charter*. Whether he does so after stage 1 or stage 2 of the trial, that issue, too, may be raised on an appeal of the final order.

[29] Listing these alternatives demonstrates that the correctness of the bifurcation procedures, if correctness is the right term to use, is not beyond our review once the litigation is concluded. As I have said, whether the contemplated procedure is efficient is an assessment that I would not interfere with at this stage. Notwithstanding the strong urgings of counsel for the Director, I do not consider we should interfere with the bifurcation order and I would dismiss the appeal from it.

[30] The second determination appealed is the dismissal of the Director's application for an order requiring completion of examinations for discovery before determination of the *Charter* issues. The Rule under which the application was made is not apparent on the face of the material, but we know it was made after commencement of the trial, that is, not under Rule 5-3(1) of the *Supreme Court Civil Rules*, and so we do not need to determine the correct approach to that Rule: in referring to matters that are governed by a primary Rule, is Rule 5-3 intended to expand the power of the judge given in the primary rule or is it administrative and, for convenience, a summary of the orders that may be made under the primary Rule? Further, in listing matters that have never before been the subject of orders, such as witness lists, does it intend to clothe those items with the character of an independent order that may be appealed to this Court or do they retain their former character as directions or rulings?

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[31] Because this determination was not made under Rule 5-3, I have looked to the balance of the Rules. I cannot find a Rule that expressly refers to the court ordering the time, or even stage, of an examination for discovery. If granting the application would not have engaged a particular Rule, so too dismissal of the application does not. That this is not an 'order' makes considerable sense when one considers the issue of enforcement of orders. Rather than triggering contempt proceedings for failure to attend an examination for discovery, the ultimate consequence for a defendant failing to attend is striking his or her response under Rule 22-7(5). In my view, the second determination appeal is, in substance, refusal to give a direction sought, or a ruling, and it does not seem to me to fit within the notion of 'order' as to which there may be an appeal to this court. Reducing the determination to writing and filing it as an 'order' does not make the determination an 'order' that may be appealed to this court.

[32] When we heard this appeal we raised with counsel its ripeness for appeal, given that the matters brought to us by the appellant engaged issues of management of the trial process. Our practice on non-appealability of directions and rulings is an expression of this concern. That rulings are not appealable was demonstrated by Chief Justice McEachern in *Rahmatian v. HFH Video Biz, Inc.* (1991), 55 B.C.L.R. (2d) 270. The ruling under consideration was dismissal of a non-suit application. Chief Justice McEachern described the situation before him and referred to s. 6 of the *Court of Appeal Act*. Referring to *New Brunswick Telephone Co. Ltd. v. John Maryon International Ltd.* (1980), 116 D.L.R. (3d) 581, he said:

> It is my judgment that a disposition of a motion for nonsuit made during the course of a trial is not an order although authorized by R. 40(1) on a matter of practice or procedure, nor does it fall within the description of an interlocutory order in any of the subparagraphs of s. 61. It is instead, in my judgment, what is more properly described as a ruling, or a ruling on evidence which is part of the trial process, and it is not appealable until after the trial has been completed.

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[33] Although the ruling in issue in *Rahmatian* is different from the determination before us, it offers guidance. *Rahmatian* was referred to by Madam Justice Levine in *Tylon Steepe Homes Ltd. v. Landon,* 2011 BCCA 162 in determining that decisions of a case management judge that the parties were bound by findings of fact and law in another earlier proceeding and that the principles of estoppel were in play, were not appealable except as part of an appeal from the final judgment. These cases are but two of a line of authorities that affirm the different considerations that apply to our jurisdiction in respect to rulings and directions, than as apply to orders.

[34] Unless the determination was made under any of the Rules listed in 2.1 of the *Court of Appeal Rules* as a limited appeal order, leave to appeal is not required. There is on my examination, no Rule relating to the timing of discoveries listed in our Rule 2.1 and it has never been that such determinations may be brought, mid-proceeding to this court, as of right. I conclude this is because the determination as to timing of the discovery is, at its heart, not an order but rather a direction or ruling made in the management of the civil litigation process. Any complaint concerning it must await completion of the action.

[35] I recognize that this issue was not presented to the chambers judge on the leave application. On examination, however, I am satisfied that the appellate scheme simply does not allow for interference by this court mid-litigation, on issues concerning the timing of the gathering of evidence for trial purposes, at least so long as the *Supreme Court Civil Rules* do not expressly refer to the making of orders in respect to such timing.

[36] Nor in my view does this limit the ability of the Director to prosecute his action or appeal to us. Again, looking at the hypothetical outcomes on the issue of examination for discovery:

- in the event the case proceeds after conclusion of the first stage, the examination sought by the Director will be conducted. At that examination, objections to questions will be taken as considered appropriate, and determinations will be made on the legitimacy of the objections and the

propriety of the questions, all as provided by the *Supreme Court Civil Rules*. Ultimately those determinations may be tested on appeal in the event the final order should be appealed.

- in the event the case does not proceed, the finality of the process will permit an appeal, with a full opportunity to challenge the conduct of the proceeding leading to the final order.

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[37] Notwithstanding the vigorous submissions on behalf of the Director, and indeed the order granting leave to appeal, in my respectful view there is no proper basis for our intervention in either matter brought to us, but for different reasons as I have explained. Further, allowing the case to proceed as now organized will provide an opportunity for the interaction of s. 6 of the *Civil Forfeiture Act* and s. 24 of the *Charter* to be sorted out at the trial level before we address it.

[38] I am mindful that this is a new area of litigation. The procedural questions before the trial court are not straight forward, engaging as they do important *Charter* issues in the context of civil litigation. It may be that there is no monolithic best way to deal with the process. Certainly at this stage, I cannot say the determinations before us demonstrate any error with which we should interfere at this time.

[39] With appreciation to all counsel for their fine submissions, I would dismiss the appeal from the bifurcation order, which is appeal CA040896. On my conclusion appeal CA040891 does not come within our jurisdiction, I would quash that appeal for lack of jurisdiction.

[40] **NEILSON J.A.**: I agree.

[41] **BENNETT J.A.**: I agree.

[42] **SAUNDERS J.A.**: Appeal CA040896 is dismissed. Appeal CA040891 is quashed.

"The Honourable Madam Justice Saunders"

"The Honourable Madam Justice Neilson"

"The Honourable Madam Justice Bennett"

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