Court of Appeal File No.: CA040891 and CA040896
Court of Appeal Registry: Vancouver

COURT OF APPEAL

ON APPEAL FROM DECISIONS BY THE HONOURABLE MR. JUSTICE LEASK, OF THE SUPREME COURT OF BRITISH COLUMBIA, AT VANCOUVER, ON THE 27TH DAY OF SEPTEMBER, 2012 AND THE 2ND DAY OF APRIL, 2013

BETWEEN:

DIRECTOR OF CIVIL FORFEITURE

APPELLANT

AND:

THE OWNERS AND ALL OTHERS INTERESTED IN THE PROPERTY, IN PARTICULAR DAVID LLOYDSMITH

RESPONDENT

BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

INTERVENOR

FACTUM OF THE INTERVENOR

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OPENING STATEMENT

The Director of Civil Forfeiture rightly does not take issue with the applicability of section 24 of the *Charter* to evidence gathered by the police and used in a proceeding brought under the *Civil Forfeiture Act*, S.B.C 2005, c. 29 (*CFA*). This appeal is premised on an acknowledgement that, in appropriate circumstances, the effect of section 24 of the *Charter* may be to exclude unlawfully collected evidence. The Director's concern in this appeal is about when the assessment of section 24 remedies under the *Charter* should occur.

In this case, the Chambers Judge determined that the question of whether evidence should be excluded under section 24 should be heard and decided as a preliminary stage in the hearing. That was a procedural decision which was entirely within his discretion and promotes a just, speedy and inexpensive resolution to a case which perhaps should not have been commenced at all by the Director considering the circumstances giving rise to the evidence.

Because the considerations to be made in determining whether a remedy under section 24 should be granted are different from those under the "interests of justice" test in section 6 of the *CFA*, addressing the section 24 remedies as a preliminary issue was open to the Chambers Judge. As the assessment of the section 24 remedies has not yet been made, the merits of the resolution of that issue are a question for another day.

In this submission, the BCCLA highlights the importance of ensuring section 24 in its practical application remains operative in protecting civil liberties and maintaining the reputation of the justice system. Forcing judges in civil forfeiture cases to consider section 24 remedies only at the end of a proceeding, with the analysis intermingled with the collateral and irrelevant considerations under section 6 of the *CFA*, has the potential to weaken section 24's vital purpose and role. This is particularly the case if as a result of the cost and complexities of the civil process, the Director is able to extract settlements part-way through the process based on defendants' decisions as to the costs and net benefits of carrying on with a case even through the proceeding is founded on evidence derived from the violation of fundamental rights and freedoms.

CHRONOLOGY OF EVENTS

The BCCLA relies on the chronologies of the appellant and the respondent.

PART 1 - STATEMENT OF FACTS

1. The BCCLA relies on the facts as set out by the respondent.

PART 2 - QUESTIONS ON APPEAL

2. The question in issue that the BCCLA will address is whether the Chambers Judge erred in exercising his discretion to consider as a preliminary issue whether a remedy should be granted under section 24 of the *Charter* to address the alleged violations by the police in the collection of the evidence on which the civil forfeiture action is brought.

PART 3 - ARGUMENT

A. The Director is a part of the Administration of Criminal Justice

3. The Director's role and purpose is to contribute to the ongoing governmental efforts to prevent and reduce criminal activity. The Director's office has an increasingly important role in that regard.

4. The Director describes himself as a "statutory actor"[1] armed with special powers given to him by the provincial legislature to:

- Suppress crime by removing the working capital and tools of criminal enterprises.
- Attack the economic incentive to engage in unlawful activity.
- Allow for the recovery of the proceeds of unlawful activity.
- Disrupt organized crime.[2]

5. This description is consistent with the purposes the Supreme Court of Canada identified in Ontario's *Civil Remedies Act, 2001*, S.O. 2001, c. 28, in *Chatterjee v.*

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[1] J. Douglas Eastwood & Robert G. Kroeker, "Civil Forfeiture in British Columbia: A Primer" Civil Law for Criminal Lawyers (Continuing Legal Education of British Columbia, February 2012) at 1 [Kroeker CLE]

[2] Civil Forfeiture Office, Civil Asset Forfeiture Overview (British Columbia: Ministry of Public Safety and Solicitor General, February 2009) online: <http://www.fmi.ca/media/old/Rob_Kroeker_Civil_Forfeiture_Act_03.pdf> [Director's Powerpoint].

Ontario (Attorney General), [2009] 2 S.C.R. 624. Justice Binnie, writing for the Court stated that the legislation was enacted "to deter crime and to compensate its victims….its dominant purpose is to make crime in general unprofitable, to capture resources tainted by crime so as to make them unavailable to fund future crime and to help compensate private individuals and public institutions for the costs of past crime".[3] *Chatterjee* upheld Ontario's jurisdiction to have its civil forfeiture office stand shoulder to shoulder with other provincial and federal agencies fighting crime and its ill effects.

6. In addition to the various police services and the Ministry of Justice, other participants in the effort to combat crime in British Columbia can include the BC Securities Commission, Canada Revenue Agency, Canada Border Services Agency, and the Competition Bureau.

7. The Director's powers include the ability to enter into information sharing agreements with police agencies to obtain information collected by the police using their special authority and legal status. Presumably the sharing of information is reciprocal.[4]

8. The Director also shares information with other provinces to have the benefit of information derived from their police activities.[5]

9. The Director's proceedings are initiated as a result of being provided information from the RCMP or municipal police. The Director does not conduct his own investigations to find targets for forfeiture proceedings. While the civil proceedings are styled "*in rem*", the investigative work concerns individuals and it is the individual owner who becomes the defendant in the forfeiture proceeding.

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[3] *Chatterjee*, cited to SCR at 629 – 630

[4] The information sharing agreements do not appear to have been made public.

[5] Ministry of Public Safety and Solicitor General, *Provinces band together to strengthen civil forfeiture* (British Columbia: May 2011). News release announcing the sharing agreement between British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, New Brunswick and Nova Scotia.

10. In return for the assistance of the police, under his powers of distribution of the forfeited assets, the Director can use monies derived from forfeitures to support police programs.

11. In some cases, says the Director, within the forfeiture proceedings, "the discovery of additional proceeds and instruments result in significant increases in jeopardy beyond that originally faced by the defendant."[6]

12. While the proceedings initiated by the Director are civil, they are based on evidence collected in the criminal law process and as noted, their purpose is to further objectives related to the criminal law objectives of combatting and reducing crime. Indeed, the Director has referred to the program as "another tool or option" to criminal forfeiture.[7] In short, while framed as civil procedure, the Director's activities are nevertheless part of the administration of criminal law and justice in British Columbia.[8]

13. The stature and significance of the Director among his crime fighting colleagues is growing. The program only began in 2006 and the value of property seized by the Director has reached over $32 million with over 200 cases concluded, most without a trial.[9] There is no reason to expect the significance of this program will not continue to increase. That has been the experience in the United States which has a longer history of civil forfeiture. A recent article in the New Yorker reported that proceeds from forfeiture in the US soared from $27 million in 1985 to $556 million in 1993, and that in 2012, forfeitures amounted to nearly $4.2 billion.[10]

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6 Kroeker CLE, supra note 1 at 3.1.6

7 Director's Powerpoint , *supra* note 2 at 10

8 Hansard Extracts, pages 3-7, remarks of the Honourable J. van Dongen (former Solicitor General and Minister of Public Safety)

9 Hansard Extracts, page 9, remarks of the Honourable S. Anton (Minister of Justice)

10 Stillman, Sarah. "Taken", The New Yorker, August 12, 2013, page 8 of the extracted article.

B. Section 24 protects the reputation of the administration of justice

14. The section 24(2) remedy of excluding unlawfully collected evidence is to maintain the reputation of the administration of justice. As explained in *R. v. Grant*, [2009] 2 S.C.R 353 at paras 67-70, the focus is on the long term, systemic concern for maintaining the integrity of, and public confidence in, the justice system. The section 24(2) remedy is also prospective in that it starts from the proposition that where *Charter* breaches have occurred, they have damaged the administration of justice, and the court needs to ensure that evidence obtained from those breaches is not used in a way that further damages the justice system.

15. The *Grant* test is threefold: a court must assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard for (1) the seriousness of the *Charter* infringing conduct, (2) the impact of the breach on the *Charter* protected interests of the person whose rights have been infringed, and (3) society's interest in an adjudication of the case on the merits.

16. The remedies under section 24 are not confined to the context of criminal charges, but can be applied in any instance where *Charter* rights, such as the right to be secure against unreasonable search and seizure, are violated by a state actor. This is clear from the language of section 24 which contains no words suggesting it is limited to the criminal context.[11]

C. As the Director acknowledges, the *Charter* applies to evidence collection in furtherance of provincial forfeiture proceedings

17. In civil forfeiture proceedings like the case at bar, the Director relies on the police using their police powers, which are paid for with public funds, to conduct the

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[11] The application of section 24(2) does, of course, more commonly arise in criminal investigations than anywhere else. The manner in which civil forfeiture proceedings are founded on criminal investigations conducted by the police is a unique aspect of the statutory scheme. Other public agencies which from time to time engage in quasi-criminal or related matters, such as the Securities Commissions or the Canada Revenue Agency, normally obtain evidence from their own investigators.

investigations which collect the evidence that form the basis of the Director's proceedings. Absent those investigations, the Director would have no evidence with which to commence forfeiture proceedings. When the police, pursuant to the information sharing agreements with the Director, take the work product of their criminal investigations and forward it to the Director, a continuum of conduct in furtherance of the administration of justice is established beginning with the police investigation and ending with the resolution of the forfeiture proceeding.[12] In such a circumstance, *Charter* rights of privacy and protection from unreasonable searches and seizures remain engaged despite the shift in purpose, and section 24 remedies are potentially available to defendants.[13]

18. The Director rightly acknowledges the *Charter*'s application to forfeiture proceedings,[14] and the BCCLA will not repeat the arguments of the respondent at paragraphs 36-39 of his factum in which he cites a number of examples in the case law where the *Charter* has been applied in civil forfeiture proceedings.

19. While the "*in rem*", civil posture of the proceeding may be sufficient to allow for provincial jurisdiction in this aspect of the effort to curtail crime (per *Chatterjee, supra*), it does not circumvent the *Charter*'s application or its oversight of the administration of justice when the proceedings are derivative of a targeted police investigation against one or more individuals.[15]

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[12] This relationship distinguishes this case from *Canada (Deputy Minister of National Revenue, Customs, Excise and Taxation) v. Millar*, 2007 BCCA 401, relied on by the appellant. In *Millar*, the CRA was just an opportunistic creditor making a claim against monies that had been paid into court by police following an interpleader application. There was no nexus between CRA's outstanding judgment for tax arrears and the conduct of the police in seizing the funds pursuant to an unrelated investigation.

[13] As was the case in *R. v. Law* [2002], 1 S.C.R 227, where a safe recovered by police in a theft investigation was subsequently searched and the contents used to prosecute a tax violation.

[14] It is a premise of his argument – e.g. paras 13, 27, 28, 44, 46, 48, 51, 55, 60, 69, 74, 75, etc.

[15] While it is true that in a civil forfeiture case, the "target" transitions from an individual being investigated to an asset to be seized, the individual owner of the asset is a defendant in the proceeding and when a person has their house or vehicle seized in forfeiture proceedings, the stigma of criminality for the owner is present whether the proceedings are styled as criminal or civil. Their neighbours and friends will not draw a distinction where the common foundation of the proceedings is that the government alleges the assets were obtained through criminal activity.

20. Indeed, the applicability of the *Charter* and its remedies within civil proceedings was one of the bases on which Justice Kloegman in *British Columbia (Director of Civil Forfeiture) v. Nguyen*, 2013 BCSC 1610 (citing *British Columbia (Director of Civil Forfeiture) v. Huynh,* 2012 BCSC 740) cited as supporting the constitutionality of the legislation.

21. The applicability of section 24 remedies in the civil forfeiture context is similar to the approach taken in the context of tax prosecutions. In *O'Neill Motors Ltd. v. Canada*, [1998] 4 F.C. 180 (FCA), tax assessments were vacated under section 24(1) as a result of violations in the collection of evidence which led to the tax assessments at issue. There was no suggestion by the Federal Court of Appeal that since the focus of the proceedings was money owing to the government, the *Charter* was ineffective to address, as a preliminary issue, the allegation that the evidentiary basis for the assessments was the product of unlawful investigative conduct.

22. It is also appropriate that there be consistency in judicial oversight of evidence collected for the provincial forfeiture regime and evidence collected in furtherance of a forfeiture proceeding under the *Criminal Code*. In the latter proceedings, *voir dires* are held to determine the admissibility of evidence where a *Charter* infringement is alleged: see *R. v. Struss*, 2008 BCSC 1674, and the cases cited therein at paras 23-25. Certainly there are differences between the two types of proceedings, but from the perspective of preserving confidence in, and respect for, the administration of justice, there is no basis to distinguish between the two as they are both "tools" in the fight against crime.

23. Indeed it would be systemically and structurally dangerous to foster a forfeiture regime which relies on police investigations, but insulates those investigations from any consequences for abusive or unlawful police conduct when the evidence gathered is used in civil forfeiture cases. The reputation of the justice system requires that there be no vaccuum of judicial oversight and no "consolation prize" of forfeiture for authorities who engage in abusive or unlawful investigation conduct.

D. The factors relating to the interests of justice test are different, so a preliminary consideration is appropriate

24. The factors relevant to the respective tests under section 24 of the *Charter* and section 6 of the *CFA* have been addressed in the factum of the respondent at paragraphs 49-52, and will not be duplicated here. As seen in *British Columbia (Director of Civil Forfeiture) v. Wolff*, 2012 BCCA 473, the factors relevant to the section 6 interests of justice test are different from those to be considered in the application of section 24 of the *Charter*. The analysis in section 6 is centred on the hardship and personal circumstances of the defendant in relation to the asset at issue. In section 24, the focus is on the investigative conduct and the potential injury to the reputation of the administration of justice. The purposes of the two tests are distinct and no benefit is achieved by conflating them or considering them together. Moreover, it would not be prudent to, as the Director suggests, consider *Charter* remedies only after a consideration of the section 6 test in the *CFA*. *Charter* remedies are not remedies of last resort. To the contrary, the administration of justice benefits when *Charter* violations are identified and addressed.[16]

E. A preliminary determination of section 24 remedies will often be appropriate

25. If the exclusion of evidence (or a stay of proceedings) by way of section 24 will bring an early end to civil forfeiture proceedings, it is an issue that should be available to a defendant at a preliminary stage in the process. The discretion of the Chambers Judge to structure the adjudicaton of the case in that manner should be respected. He made no error in principle or law, and did not misconceive the facts. Deference should therefore be accorded.[17]

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[16] The appellant cites *R. v. Nasogaluak*, [2010] 1 S.C.R. 206 for the proposition that statutory remedies should be considered prior to *Charter* remedies. That case does not support such a proposition and is easily distinguished from the case at bar. *Nasogaluak* involved a question of whether section 24(1) could be employed to reduce a sentence resulting from a criminal conviction. Naturally, that question had to be answered at the end of the proceeding because the Court first had to know what the sentence was before deciding whether it could be reduced.

[17] The test for review of a discretionary order was recently recited in *Duckett v. McKinnon*, 2013 BCCA 468 at para 2.

26. Since there is no information or evidence relevant to the section 24 issues that could arise from the discovery process or trial, the Chambers Judge must have decided that addressing the section 24 issues as a preliminary matter was a just, speedy and inexpensive way to proceed, proportionate to the amount involved, the importance of the issues in dispute and the complexity of the proceeding (which are the object of the Supreme Court Civil Rules as set out in Rule 1-3). Civil procedure permits, and indeed encourages, procedural flexibility to fairly and expeditiously adjudicate the issues in each case.

27. The Director's objection to such a procedure raises a question as to why it is so important to him to complete discoveries and conflate the section 24 analysis with the test under section 6 of the *CFA*. One theory would be that the Director wants to obtain as much evidence as possible from defendants under the discovery procedures in order to identify other potential targets for forfeiture. That may be the case, but a review of the Director's February 2012 CLE paper is potentially more instructive as to the Director's motivations in seeking to have consideration of *Charter* violations pushed to the end of a case. He wrote:

> Since its inception in 2006…more than 300 actions have been commenced with approximately 200 brought to a conclusion thus far. The CFO has experienced only one adverse trial outcome throughout this experience and that matter will be proceeding to appeal.
>
> Unlike criminal procedure, disclosure, production of records, and discovery obligations fall equally on the defence and plaintiff under the Supreme Court Rules. Defendants and the plaintiff engaged in a civil forfeiture action will be required to disclose the existence of and provide access to all relevant materials…
>
> …Early settlement has often proven to be the most advantageous defence strategy. [18]

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[18] Kroeker CLE, *supra* note 1 at 3.1.6

28. Settlement of a civil case is normally linked to the risk that each party identifies in each other's cases during the discovery phase. Settlements also typically result from a pragmatic cost and net benefit analysis as to whether it is economically viable to pursue the litigation, or whether the cost of litigating is equal to or exceeds the best case scenario for an outcome after legal fees and other costs are accounted for. Unless the asset at issue has a particularly large value, the cost of civil litigation for defendants will often, perhaps routinely, threaten to exceed the value of the asset for which forfeiture is sought.

29. As a result, the great benefit to the Director in having section 24 remedies addressed at the end of a forfeiture proceeding is that he will be well-positioned to leverage settlements from defendants so that stage is never reached. This will not be an acceptable result for the reputation of the administration of justice - civil forfeitures and forfeiture settlements must not become a consolation prize for criminal investigations that are failed or aborted because they are marred by serious *Charter* infringements. With the growing significance of forfeiture proceedings among the crime fighting tools available to authorities, allowing police and governments to benefit from unlawful investigative conduct is incompatible with the importance of judicial oversight of evidence collection activities. Considering at a preliminary stage allegations of *Charter* violations and whether evidence should be excluded as a result, is a practical and appropriate way of ensuring the reputation of the administration of justice is preserved within these unique proceedings. The Chambers Judge's order was sensible and just, and it protects civil liberties in a pragmatic and effective way that is consistent with the objects of the *Charter*.

PART 4 - ORDER SOUGHT

30. The BCCLA submits the appeal should be dismissed for the reasons noted above. The BCCLA seeks no order for costs and asks that none be ordered against it.

31. The BCCLA asks for leave to make oral submissions no longer than 30 minutes in the hearing of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED:

November 12, 2013

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Counsel for the Intervenor

PART 5 - LIST OF AUTHORITIES

CASE LAW **PAGES**

STATUTES

SECONDARY