Court File No.: CV-16-11424-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

EMMANUEL VILLAGE RESIDENCE INC.

Applicant

- and -

ATTORNEY GENERAL OF ONTARIO

Applicant

- and -

1250 WEBER STREET EAST, KITCHENER, ONTARIO OR THE PROCEEDS OF THE SALE THEREOF (IN REM)

Respondent

BOOK OF AUTHORITIES
(Motion Returnable September 6, 2016)

September 1, 2016

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TAB 1

2013 ONSC 4756
Ontario Superior Court of Justice

Comstock Canada Ltd., Re

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In Bankruptcy and Insolvency

In the Matter of the Notice of Intention to Make a Proposal of Comstock Canada Ltd.

In the Matter of the Notice of Intention to Make a Proposal of CCL Realty Inc.

In the Matter of the Notice of Intention to Make a Proposal of CCL Equities Inc.

Morawetz J.

Heard: July 9, 2013
Judgment: July 9, 2013 [*]
Docket: CV-13-10181-00CL, 32-1763935, 32-1763929, 32-1764011

Counsel: A. MacFarlane, F. Lamie, A. McFarlane for Applicants, Comstock Canada Ltd., CCL Realty Inc., and CCL Equities Inc.
H. Chaiton for Bank of Montreal
R.B. Schwill for PricewaterhouseCoopers Inc.
B. Harrison for Board of Directors
K. Plunkett for TESC Inc.
J. Milton for Rio Tinto Alcan Inc.

Subject: Insolvency

MOTION by group of companies for order continuing its restructuring proceedings, and related relief.

***Morawetz J.*:**

1 This motion was brought by Comstock Canada Ltd. ("Comstock"), CCL Realty Inc. ("CCL Realty") and CCL Equities Inc. ("CCL Equities", and together with Comstock and CCL Realty, the "Comstock Group") for an order, *inter alia*:

(a) continuing Comstock Group's restructuring proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA"), effective as of July 9, 2013;

(b) granting an initial order (the "Initial Order") under the CCAA in respect of the Comstock Group;

(c) declaring that, upon the continuance under the CCAA, the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA") proposal provisions shall have no further application;

(d) approving the cost reimbursement agreement entered into by Comstock and Rio Tinto Alcan Inc. ("Rio Tinto");

(e) approving the Commitment Letter (defined below) and the granting of the DIP Lender's Charge (defined below) and corresponding priority in favour of Bank of Montreal ("BMO"); and

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(f) discharging PricewaterhouseCoopers Inc. ("PwC") in its capacity as interim receiver (in such capacity, the "Interim Receiver") of Comstock.

2 At the conclusion of argument, the motion was granted, with reasons to follow. These are those reasons.

Background

3 Established in 1904, Comstock is one of Canada's largest multi-disciplined contractors, currently employing over 1,000 unionized and non-unionized tradespeople and 80 salaried employees across Canada. For over 100 years, Comstock has provided a broad capability in the completion of large-scale electrical and mechanical contracts to the planning, directing and execution of multi-trade, multi-million dollar commercial, industrial, institutional, automotive, nuclear, oil and gas, overhead and underground, and structural steel assignments. Recent projects include work for Enbridge Pipelines Incorporated, Shell Canada Limited, Petro Canada, Imperial Oil, Ontario Power Generation, Bruce Nuclear Power, Ford Motor Company, Chrysler Canada Inc., Winnipeg Airport Authority Inc. and Cadillac Fairview Corporation. In 2012, Comstock provided services to 130 customers and had several recurring customers.

4 Comstock experienced financial challenges necessitating a restructuring of the company. While Comstock continues to enjoy a strong market reputation, Comstock's business has experienced liquidity challenges, cost overruns and litigation costs that have imperilled the Comstock Group's business.

5 Comstock's counsel submits that any serious disruption to Comstock's ability to provide core services would imperil the viability of various projects and have negative effects cascading throughout the trades, subtrades and local economies of these projects. As a result, Comstock's senior management believes that it is imperative to restructure the Comstock Group as soon as reasonably possible with a focus on avoiding disruption to Comstock's operations.

6 The Comstock Group seeks the Initial Order, at this time, to protect its business and preserve its value while it seeks to complete its restructuring.

7 Comstock is a privately-held corporation incorporated pursuant to the *Business Corporations Act (Ontario)*, R.S.O. 1990, c. B.16 ("OBCA"), with headquarters located in Burlington, Ontario and a western office located in Edmonton, Alberta. Comstock maintains additional regional facilities in Ontario, Manitoba, Alberta and British Columbia.

8 Comstock and CCL Realty, a real estate holding company which holds all of the Comstock Group's real property, are the direct and wholly-owned subsidiaries of CCL Equities — a holding company incorporated pursuant to the OBCA with headquarters located in Burlington, Ontario.

9 In 2011, a management buyout was executed in respect of Comstock. Prior to this time, Comstock was a wholly-owned subsidiary of a U.S. publicly-traded company.

Comstock Debt and Lender Security

10 Pursuant to a credit agreement dated July 29, 2011 (the "Credit Agreement") among Comstock, as borrower, CCL Equities Inc., CCL Realty Inc., 3072454 Nova Scotia Company, as guarantors (collectively, the "Guarantors") and BMO, as lender, BMO made available to Comstock a credit facility up to a maximum aggregate amount of $29,200,000 (the "Credit Facility" or the "Loan").

11 Comstock's indebtedness under the Credit Agreement is secured by a general security agreement in favour of BMO; an assignment of insurance policies of Comstock and the Guarantors; an assignment, postponement, and subordination of shareholder loans; guarantees from each of the Guarantors; and mortgages over all of the real property owned by Comstock and CCL Realty (collectively, the "Lender's Security").

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12 A number of entities, including CBSC Capital Inc., Transportation Lease Systems Inc., ATCO Structures and Logistics Ltd., Leavitt Machinery General Partnership, Altruck International Truck Centres, Integrated Distribution Systems LP o/a Wajax Equipment, RCAP Leasing Inc., Horizon North Camp & Catering Inc., also have registered a security interest in respect of certain of Comstock's equipment and vehicles.

13 According to Comstock's trade accounts payable records, Comstock owed approximately $47 million of unsecured trade debt to approximately 830 vendors as of June 27, 2013.

14 As of July 9, 2013, Comstock is not in arrears in respect of payroll. Payroll obligations of the previous week had been funded through an Interim Receiver's Borrowing Charge, which was subject of an endorsement reported at *Comstock Canada Ltd., Re*, 2013 ONSC 4700 (Ont. S.C.J.).

15 Comstock had payroll of $1.5 million due on Thursday, July 11, 2013, pertaining to the contracted project in Kitimat, British Columbia. The mechanics enabling this payroll to be met were authorized by the Initial Order.

Comstock's Financial Position

16 Copies of the consolidated and unaudited balance sheet and income statement of the Comstock Group as at December 31, 2012, and all other audited and unaudited financial statements prepared in the year prior to 2013 (collectively, the "Financial Statements"), are attached to the confidential supplement (the "Confidential Supplement") to the Report of PwC in its capacity as proposal trustee and prospective CCAA monitor of the Comstock Group.

17 As at December 31, 2012, the Comstock Group had assets with book value of approximately $112 million, with corresponding liabilities of $103.4 million.

18 Comstock has initiated several ongoing litigation claims against various entities, with a total claim face amount in excess of $120 million. Comstock has been named as defendant in litigation claims, with a face amount in excess of $110 million.

19 The Comstock Group previously enjoyed financial prosperity due to sustained contracts throughout Canada in respect of various significant engagements. However, counsel advises that Comstock's recent declining economic fortunes have resulted in increasingly severe financial losses, liquidity challenges, cost overruns and litigation costs imperilling the Comstock Group's business.

20 On June 27, 2013, counsel advises that Chrysler Canada locked out Comstock from the performance of its contract at facilities in Ontario and, on July 2, 2013, threatened to terminate all existing contracts and purchase orders with Comstock. On July 3, 2013, Chrysler Canada issued a formal notice of contract termination to Comstock.

21 On July 5, 2013, Travellers Insurance Company of Canada provided Comstock with notices of termination, to be effective in 30 days, in respect of certain contracts.

22 During the week of July 1, 2013, TLS Fleet Management notified Comstock that no further purchases would be authorized in respect of vehicle leases, service and maintenance, and management fees, unless Comstock paid outstanding amounts and provided a security deposit.

23 Certain entities have registered lien claims against Comstock in respect of labour and material allegedly supplied in relation to Enbridge Pipelines (Athabasca) Inc. in Calgary.

Restructuring and Refinancing Efforts

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24 In February 2013, the Comstock Group engaged Deloitte & Touche Corporate Finance Canada Inc. ("Deloitte") to conduct a market solicitation process with a view to attracting equity investors and/or purchasers of Comstock. Under this market solicitation process, the Comstock Group did not receive any letters of intention.

25 Comstock's Counsel advised that the Comstock Group's management believes that, in view of cost overruns and the Comstock Group's liabilities, a number of potential purchasers would not submit letters of intention absent the protections afforded by a restructuring vehicle such as the CCAA or BIA.

Filing of Notices of Intention to Make a Proposal

26 Comstock's counsel advised that in response to Chrysler Canada's lockout and, as a result of unsuccessful negotiations with a potential bridge financer, Comstock's Board of Directors determined that the Comstock Group had no other readily available options but to file Notices of Intention to Make a Proposal (the "NOI") pursuant to section 50.4(1) of the BIA on June 28, 2013 (the "NOI Proceedings") in order to preserve the *status quo* and prepare for a CCAA restructuring.

27 On July 3, 2013, I issued an order appointing PwC as Interim Receiver for the limited and specific purpose of ensuring Comstock's payroll was funded by July 4, 2013 and granting the Interim Receiver a priority charge, including in priority to construction lien and trust claimants, pursuant to the Interim Receiver's Borrowing Charge under the order.

Anticipated Restructuring

28 Comstock anticipates conducting a sales and investor solicitation process (the "SISP") to be administered by the monitor. Comstock and the monitor have advised that they will report back to court once the SISP has been fully developed.

29 In order to avoid disruption to the ongoing operations of one of Comstock's major customers, Rio Tinto, and to minimize enhanced safety risks that would be incurred in the event of such a disruption, Rio Tinto agreed to a cost reimbursement agreement with Comstock in order to ensure that the project continues in an uninterrupted manner. In addition, Rio Tinto and BMO agreed to a cost sharing mechanic which would see Rio Tinto cover portions of the costs for overhead, infrastructure and administrative costs from which they believe they will benefit in relation to the Rio Tinto contracts and their related projects. The material terms of the cost reimbursement agreement are set out at paragraph 61 of Jeffrey Birkbeck's affidavit.

30 The Comstock Group has secured a commitment for Debtor-In-Possession ("DIP") financing ("DIP Financing") from BMO (in such capacity, the "DIP Lender") in the amount of $7,800,000 under the terms of a DIP Commitment Letter dated July 9, 2013 (the "DIP Loan"), pursuant to which the DIP Financing will provide the Comstock Group with sufficient liquidity to implement its initial restructuring initiatives pursuant to the CCAA and to continue with its core profitable projects during its restructuring.

31 The DIP Financing conditions include a priority charge in favour of BMO in its capacity as DIP Lender, in priority to all other charges save and except the administration charge, and in priority to all present construction lien and trust claims, save and except in relation to those construction liens and trust claims arising in respect of the specific contracts and projects to which the DIP Loan is advanced following the date of such contract-specific and project-specific advances.

32 The proposed DIP Financing contemplates that the DIP Lender will be granted a court-ordered priority charge (the "DIP Lender's Charge"), which is intended to rank in priority to all other charges save and except the administrative charge and will not apply to any holdbacks owing in respect of the Rio Tinto Kitimat, British Columbia project.

33 Comstock's counsel advises that the DIP Financing is essential to the Comstock Group's restructuring and the maintenance of a substantial portion of the Comstock Group's large-scale construction project.

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34 The Comstock Group's counsel submits that the Comstock Group will not be able to obtain alternative financing and maintain its operations without DIP Financing and, as such, submits that court approval of the DIP Financing, including the DIP Credit Agreement and the DIP Lender's Charge, is necessary and in the best interests of the Comstock Group and its stakeholders.

35 The 13-week cash flow forecast that was filed projects that, subject to obtaining DIP Financing, Comstock Group will have sufficient cash to fund its projected operating costs during this period. In the absence of the liquidity provided by the proposed DIP Financing, counsel submits that the Comstock Group would be unable to meet its obligations as they come due or continue as a going concern and, accordingly, is insolvent.

Continuation Under the CCAA

36 Continuations of BIA Part III proposal proceedings under the CCAA are governed by section 11.6(a) of the CCAA which provides:

> 11.6 Notwithstanding the Bankruptcy and Insolvency Act,
>
> > (a) proceedings commenced under Part III of the Bankruptcy and Insolvency Act may be taken up and continued under this Act only if a proposal within the meaning of the Bankruptcy and Insolvency Act has not been filed under that Part.

37 Comstock, CCL Realty and CCL Equities have not filed a proposal under the BIA. I am satisfied that each member of the Comstock Group has satisfied the statutory condition prescribed by section 11.6(a) of the CCAA.

38 I am also satisfied that the evidence filed by the Comstock Group supports a finding that continuation under the CCAA to permit stabilization of Comstock's projects and to enable a going concern sale of Comstock's business and assets is consistent with the purposes of the CCAA. Counsel submits, and I accept, that such stability and continuation of contracts afforded by a continuation under the CCAA would set the conditions for maximizing recovery for the senior secured creditor, preserve employment for many of the 1,000 independent contractors, and maintain the local economies that are highly integrated into the projects which Comstock services. Further, avoidance of the social and economic losses which would result from the liquidation and the maximization of value would be best achieved outside of bankruptcy.

39 I am also satisfied that continuation under the CCAA is consistent with the jurisprudence on this issue. In arriving at this conclusion, I have considered the following cases: *Hemosol Corp., Re* (2007), 34 B.L.R. (4th) 113, 36 C.B.R. (5th) 286 (Ont. S.C.J. [Commercial List]); *Clothing for Modern Times Ltd., Re*, 2011 ONSC 7522 (Ont. S.C.J. [Commercial List]) ; *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.); *Stelco Inc., Re* (2004), 6 C.B.R. (5th) 316 (Ont. S.C.J. [Commercial List]); and *Nortel Networks Corp., Re* (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List]).

40 Comstock Group has also complied with section 10.2 of the CCAA insofar as the required cash flow statements have been filed.

41 I am satisfied the record establishes that each entity within the Comstock Group is a "company" within the meaning of the CCAA, and that each entity of the Comstock Group is a debtor company within the meaning of the definition of "debtor company" as they are each insolvent and have each committed an act of bankruptcy in filing their respective NOIs.

42 I am also satisfied that the Comstock Group meets the traditional test for insolvency (BIA, section 2) and the expanded test for insolvency based on a looming liquidity condition (see *Stelco Inc., Re* (2004), 48 C.B.R. (4th) 299 (Ont. S.C.J. [Commercial List]); leave to appeal to C.A. refused, [2004] O.J. No. 1903 (Ont. C.A.); leave to appeal to SCC refused, [2004] S.C.C.A. No. 336 (S.C.C.) [*Stelco*]). In arriving at this conclusion in respect of the expanded test for insolvency, I have taken into account that there has been a decline in Comstock's financial performance due to cost overruns and litigation claims; Comstock Group has been unable to meet its covenants under the Credit Agreement

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and is in default under the Credit Facility; Comstock Group was not able to obtain additional or alternative financing outside of a court-ordered or statutory mandated process; there is no reasonable expectation that Comstock Group, in the near term, will be able to generate sufficient cash flow to support its existing debt obligations; and the cash flow forecast indicates that without additional funding, the Comstock Group will exhaust its available cash resources and will, thus, be unable to meet its obligations as they become due.

43 I am satisfied that it is both necessary and appropriate to grant relief to Comstock under the CCAA. A stay of proceedings is appropriate in order to preserve the *status quo* and enable the Comstock Group to pursue and implement a rationalization of its business.

44 The Comstock Group's counsel submits that certain suppliers to the Comstock Group are critical to its operations and that they must be paid in the ordinary course in order to avoid disruption to its operations during the CCAA proceedings. Failure to pay these suppliers would likely result in them discontinuing critical ongoing services, which could ultimately put customer, supplier or Comstock's own personnel at risk on the job site. Accordingly, Comstock seeks authorization in the Initial Order to pay obligations owing to its suppliers, regardless of whether such obligations arise before or after the commencement of the CCAA proceedings, if in the opinion of Comstock and with the consent of the monitor, the supplier is critical to the business and ongoing operations.

45 I am satisfied that this request is appropriate in the circumstances and it is to be included in the Initial Order.

Priority Charges

46 Comstock Group seeks approval of certain court-ordered charges over its assets relating to its administrative costs, interim financing and the indemnification of its sole director and officer. The Initial Order contemplates that the Administration Charge, the DIP Charge, and the Director's Charge will rank in priority to all other present and future security interests, trusts, liens, construction liens, trust claims, charges and encumbrances, claims of secured creditors, statutory or otherwise, in favour of any person.

47 The Administration Charge is contemplated to be in the amount of $1 million. The authority to grant such a charge is contained in section 11.52 of the CCAA. The list of factors to consider in approving an administration charge include:

(a) the size and complexity of the business being restructured;

(b) the proposed role of the beneficiaries of the charge;

(c) whether there is unwarranted duplication of roles;

(d) whether the quantum of the proposed charge appears to be fair and reasonable;

(e) the position of the secured creditors likely to be affected by the charge; and

(f) the position of the monitor.

See *Timminco Ltd., Re*, 2012 ONSC 106 (Ont. S.C.J. [Commercial List]).

48 Having reviewed the record and considered the foregoing, I am satisfied that the Administration Charge, with the requested priority ranking, is warranted and necessary and the same is granted in the amount of $1 million.

49 Section 11.52(1) of the CCAA provides that the court may make such an order on notice to the secured creditors who are likely to be affected by the security. Notification of this motion has not been provided to all secured creditors and, accordingly, this issue is to be revisited on the comeback hearing.

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50 Comstock Group also seeks approval of the DIP Commitment Letter providing the DIP Loan of up to $7,800,000 to be secured by a charge over the assets of the Comstock Group. The DIP Lender's Charge is to be subordinate in priority to the Administration Charge.

51 The authority to grant a DIP financing charge is contained in section 11.2 of the CCAA. The factors to be considered are set out in section 11.2(4) the CCAA.

52 Counsel submits that the following factors support the granting of the DIP Lender's Charge, many of which incorporate the considerations enumerated in section 11.2(4):

> (a) the cash flow forecast indicates Comstock will require additional borrowing;
>
> (b) Comstock cannot obtain alternative new financing without new liquidity and a reduction of its significant indebtedness;
>
> (c) the proposed DIP Lenders have indicated that they will not provide the DIP Loan if the DIP Lender's Charge is not approved;
>
> (d) the DIP Loan is essential to the initiation of the restructuring;
>
> (e) the Comstock business is intended to continue to operate on a going concern basis during the CCAA proceedings under the direction of management with the assistance of advisors and the monitor;
>
> (f) the DIP Credit Agreement and the DIP Lender's Charge are necessary and in the best interests of the Comstock Group and its stakeholders; and
>
> (g) the proposed monitor is supportive of the DIP Loan and the DIP Lender's Charge.

53 I am satisfied, having considered the foregoing factors, that the granting of a super-priority for DIP Financing is both necessary and appropriate in these circumstances.

54 It is also necessary to consider the specific request for the creation of a super-priority in respect of a DIP Charge over construction lien claimants and various trust claimants. This issue was addressed at paragraphs 120-138 of the Comstock factum which reads:

> 120. Granting the Initial Order substantially in the form sought is consistent with the purpose of the CCAA, the leading jurisprudence with respect to priority, and is fair and reasonable to all affected parties under these exigent and urgent circumstances. Over 1,000 jobs are at stake, the progress of major infrastructure projects with national importance is in the balance, the safety of workers is in jeopardy, and the relevant local economies are relying upon the proper application of the CCAA's overriding purpose to effect a constructive solution in order to achieve a position way forward for all stakeholders.
>
> 121. In the event the DIP Charge, and the proposed priority thereof, is not authorized by this Honourable Court in the urgent and precarious circumstances confronting the Comstock Group and its stakeholders, the overriding purpose of the CCAA would be frustrated. The CCAA must always be read in light of the CCAA's overriding purpose — the provision of a constructive solution for all stakeholders and the avoidance of the devastating effects of bankruptcy or creditor initiated termination of business operations.
>
> 122. In the recent Supreme Court decision *Sun Indalex Finance, LLC v. United Steelworkers*, Chief Justice McLachlin addressed the overarching purpose of the CCAA as being the provision of a constructive solution for all stakeholders and the avoidance of the devastating effects of bankruptcy or creditor initiated termination of business operations:

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> [I]t is important to remember that the purpose of CCAA proceedings is not to disadvantage creditors but rather to try to provide a constructive solution for all stakeholders when a company has become insolvent. As my colleague, Deschamps J. observed in *Century Services*, at para. 15:
>
> > ...the purpose of the CCAA... is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets.
>
> In the same decision, at para. 59, Deschamps J. also quoted with approval the following passage from the reasons of Doherty J.A. in *Elan Corp. v. Comiskey* (1990), 41 O.A.C. 282, at para. 57 (dissenting):
>
> > The legislation is remedial in the sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.
> >
> > [Emphasis added]

Sun Indalex Finance, LLC v. United Steelworkers ("*Indalex*"*)* 2013 SCC 7at para. 205.

123. Parliament has granted the Court powers under the CCAA to preserve the *status quo* in order to enable a company to restructure its affairs and to permit time for a plan of compromise to be prepared, filed, and considered by creditors. Section 11.2 of the CCAA establishes the provision of a super priority for DIP financing as a mechanism for accomplishing this goal.

124. The Ontario Legislature has created a statutory trust as a mechanism for accomplishing purpose of the *Construction Lien Act* (the "CLA"). In *Baltimore Aircoil of Canada Inc. v. ESD Industries Inc.*, Justice Wilkins summarized the purpose and intent of the trust provisions of the CLA:

> [31] The Construction Lien Act is a specific piece of legislation designed to remedy and rectify problems in the construction industry in Ontario. Section 8 creates trusts in respect of moneys in the hands of described persons under subsections 8(1)(a) and (b).
>
> . . .
>
> [36] The purpose and intent of the trust provisions of the Act is to impose the provisions of a trust on money owing or received, on account of a contract or sub-contract, which is for the benefit of the sub-contractors or other tradespeople who supplied services and materials to a job site. The legislation is clearly remedial in its effect. The legislation is clearly intended to rectify a circumstance in which persons who provide material and services to a job site, might find that money which was due to them in payment, has been used for other purposes.

Baltimore Aircoil of Canada Inc. v. ESD Industries Inc. 2002 CanLII 49492 (ONSC) at paras. 31, 36.

125. The Supreme Court of Canada's 2013 decision in *Indalex* is instructive when the Court is faced with a request for the creation of a super priority in respect of a DIP charge in favour of a DIP lender over a deemed trust.

126. In *Indalex*, the Supreme Court dealt with whether the priority established under s. 11.2 of the CCAA had priority over a deemed trust established provincially under s. 57(3) of the *Pension Benefits Act* RSO 1990, c. P-8. The Court unanimously agreed with the reasons of Deschamps J., who reasoned that:

> "[58] In the instant case, the CCAA judge, in authorizing the DIP charge,... did consider factors that were relevant to the remedial objective of the CCAA and found that Indalex had in fact demonstrated that the

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CCAA's purpose would be frustrated without the DIP charge. It will be helpful to quote the reasons he gave on April 17, 2009 in authorizing the DIP charge ((2009), 52 C.B.R. (5th) 61):

(a) the Applicants are in need of the additional financing in order to support operations during the period of a going concern restructuring:

(b) there is a benefit to the breathing space that would be afforded by the DIP Financing that will permit the Applicants to identify a going concern solution;

(c) there is no other alternative available to the Applicants for a going concern solution;

. . .

(f) the benefit to stakeholders and creditors of the DIP Financing outweighs any potential prejudice to unsecured creditors that may arise as a result of the granting of super-priority secured financing against the assets of the Applicants;

. . .

(h) the balancing of the prejudice weighs in favour of the approval of the DIP Financing.

[59] Given that there was no alternative for a going-concern solution, it is difficult to accept the Court of Appeal's sweeping intimation that the DIP lenders would have accepted that their claim ranked below claims resulting from the deemed trust. There is no evidence in the record that gives credence to this suggestion. Not only is it contradicted by the CCAA judge's findings of fact, but case after case has shown that "the priming of the DIP facility is a key aspect of the debtor's ability to attempt a workout" (J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at p. 97). The harsh reality is that lending is governed by the commercial imperatives of the lenders, not by the interests of the plan members or the policy considerations that lead provincial governments to legislate in favour of pension fund beneficiaries. The reasons given by Morawetz J. in response to the first attempt of the Executive Plan's members to reserve the rights on June 12, 2009, are instructive. He indicated that any uncertainty as to whether the lenders would withhold advances or whether they would have priority if advances were made did "not represent a positive development". He found that, in the absence of any alternative, the relief sought was "necessary and appropriate". 2009 CanLII 37906 (ON SC), (2009 CanLII 37906, at paras. 7 and 8).

[60] In this case, compliance with the provincial law necessarily entails defiance of the order made under federal law. On the one hand, s. 30(7) of the PPSA required a part of the proceeds from the sale related to assets described in the provincial statute to be paid to the plan's administrator before other secured creditors were paid. On the other hand, the Amended Initial Order provided that the DIP charge ranked in priority to "all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise" (para. 45). Granting priority to the DIP lenders subordinates the claims of other stakeholders, including the Plan Members. This court-ordered priority based on the CCAA has the same effect as a statutory priority. The federal and provincial laws are inconsistent, as they give rise to different, and conflicting, orders of priority. As a result of the application of the doctrine of federal paramountcy, the DIP charge supersedes the deemed trust.

Indalex, at paras. 58-60, concurred with by McLachlin, C.J. at para. 242 and Lebel J. at para. 265.

127. The Supreme Court's approach in *Indalex* is both the correct resolution of the priority issue on the grounds of paramountcy in circumstances where, but for the granting of priority over a statutory deemed trust in favour of the DIP lender, the DIP financing would not be advanced and the distressed company and its stakeholders would see the immediate halt to the restructuring. It is also the practical approach and manifestation of the CCAA's overriding purpose placed into reality.

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128. The current case before the Court is analogous to *Indalex* in many respects:

(a) Comstock is in need of the additional financing in order to support operations during the period of a going concern restructuring;

(b) No creditor will advance funds to Comstock without the priming of the DIP facility;

(c) there is a benefit to the breathing space that would be afforded by the DIP facility that will permit Comstock to identify a going concern solution;

(d) there is no other alternative available to Comstock for a going concern solution;

(e) the benefit to stakeholders and creditors of the DIP facility outweighs any potential prejudice to unsecured creditors, secured creditors, and potential trust beneficiaries that may arise as a result of the granting of super-priority secured financing against the assets of the Comstock Group;

(f) the balancing of the prejudice weighs in favour of the approval of the DIP Financing;

(g) a deemed trust arises as a result of a provincial statute; and

(h) the federal and provincial laws are inconsistent as they give rise to different, and conflicting, priority.

129. The failure to continue Comstock as a going concern will result in substantial costs to all parties contracting with Comstock. The transition alone will require parties to, *inter alia*: (a) re-bid on proposals; (b) negotiate new union agreements; (c) endure significant business interruption and resumption costs; (d) risk the viability of projects; (e) significantly disrupt local economies and those connected to them; and (f) place the safety at workers at risk.

130. This case is also similar to *Indalex*, as there has not been the opportunity to provide notice to all affected parties. Comstock proposes that substituted service is a reasonable solution to the problem of providing notice in time-constrained circumstances.

131. In *Royal Oaks Mines Inc. Re*, Justice Blair, as he then was, cautioned against the priming of DIP financing where there had not been notice to affected parties. However, Justice Blair allowed that a super priority could be granted as a means to effect "what is reasonably necessary to meet the debtor company's urgent needs over the sorting-out period".

Royal Oak Mines Inc., Re 1999 CanLII 14840 at para. 24.

132. In urgent CCAA filings where time compression and logistical constraints result in the limited or non-notification of certain secured creditors on the initial CCAA application, the desire to balance a distressed company's requirement to obtain vital and time-sensitive financing with the protection of other creditors' rights is put to the test. The customary comeback provisions in the Initial order is an appropriate protection afforded to such secured creditors in circumstances where delay of Court intervention would result in the imminent (or in the case of Comstock, immediate) expiry of the company's enterprise.

133. In such circumstances, it is open to secured creditors to seek to review such Court ordering of priorities and parties enjoying such priority in view of their advancement of funds pursuant to such Court-ordered charges may have to ensure such a review and further justify the continued operation of such priority later in the restructuring proceeding. This is a fair and practical result in urgent circumstances. Credit and priority should be given, at least initially, in such exigent circumstances to the "man in the arena" in the commercial conception of the Rooseveltian ethos — the DIP lender who advances funds in the face of limited notice to interested parties with a view to preventing the otherwise certain peril of a company in distress.

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> 134. The inherent tension that arises between the prescribed notice requirements and the rush to the Court house steps in pan-Canadian CCAA applications is further ameliorated in situations where the secured creditors not receiving notice would not likely be affected when considered against the backdrop of the practical realities of restructuring scenarios and the alternatives to permitting the priming charge in favour of a DIP lender. In the current proceeding, the entities who have registered security interests in the Comstock Group appear to be equipment and vehicle lessors. In a shut-down scenario, their interests would be not likely be [sic] affected differently given that the receivables in such a case would not likely be collected to satisfy such interests.
>
> 135. Given the existent circumstances confronting Comstock and its stakeholders, and the large number of affected parties, it is necessary that the DIP loan be given the priority sought in order to allow Comstock to meet its urgent needs during the sorting out period.
>
> 136. The Proposal Trustee is of the view that the anticipated DIP Facility represents the only alternative available to the Comstock Group to ensure the continuation of operations. Furthermore, the Proposal Trustee is of the view that the costs associated with the DIP Facility, interest expense, permitted fees and expenses, and facility fees are commercially reasonable.
>
> 137. The Proposal Trustee is supportive of the Comstock Group's efforts to obtain the DIP financing so as to avoid liquidation and provide time to attempt to implement a restructuring and going concern sale. Without access to financing under the DIP Facility, the Comstock Group will face an immediate liquidity crisis and would have to cease operations.
>
> 138. The purpose of the CCAA, the application of paramountcy in relation to the taking of priority of DIP facilities over provincial deemed trusts, and the commercial realities of this case all militate in favour of the proposed priority of the DIP Loan as set out in the proposal Initial Order.

55 This reasoning is applicable in this case and supports the conclusion that the DIP Charge is to have priority over construction lien claims and various trust claims. I accept the statements made at paragraph 128 of counsel's factum set out above. In my view, the Comstock Group is unlikely to survive without DIP Financing supported by the super priority DIP Charge, which is granted.

56 Comstock Group also seeks a charge in the amount of $4.6 million over the assets of the Applicants (the "Director's Charge") to indemnify the sole director of the Comstock Group in respect of liabilities he may incur in his capacity as a director and officer of the Comstock Group. The Director's Charge is to be subordinate to the Administration Charge and the DIP Lender's Charge.

57 The authority to grant such a charge is set out in section 11.51 of the CCAA.

58 I am satisfied that granting the Director's Charge, with the requested priority ranking, is warranted and necessary in the circumstances and is granted in the amount of $4.6 million. Again, I note that section 11.51 requires notice to secured creditors who are likely to be affected by the security or charge. Not all secured creditors have been notified and, accordingly, this issue is to be revisited at the comeback hearing.

Substituted Service

59 Counsel advises that, in view of the extensive number of potentially interested parties, including contractors, subcontractors and tradespeople, the Comstock Group is of the view that notice of the effect of the proposed DIP Charge on one occasion in the The Globe and Mail (National Edition) and the Daily Commercial News, Ontario's only daily construction news newspaper, in a court-approved form, is reasonably likely to bring this application to the attention of contractors and subcontractors that may be affected. I accept this argument and authorize substituted service in the suggested manner.

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Sealing of Documents

60 Comstock's counsel requested that the Confidential Supplement be sealed in order to protect against the disclosure of sensitive and confidential financial information to third parties, the disclosure of which, it is submitted, could adversely affect the Comstock Group and its stakeholders. The "Confidential Supplement — Financial Statements" is documented as Exhibit J to the affidavit of Mr. Birkbeck sworn on July 9, 2013; paragraph 26 of the Birkbeck Affidavit refers to Financial Statements that will be provided to the court at the return of the motion, and paragraph 43 of the Birkbeck Affidavit requests that Confidential Exhibit "J" be sealed from the public record in its entirety.

61 In my view, having considered section 137(2) of the *Courts of Justice Act*, R.S.O. 1990, c. C-43 and the governing jurisprudence in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 (S.C.C.) [*Sierra Club*], I am satisfied that the sealing order should be granted and the confidential material is to be sealed.

Discharge of the Interim Receiver

62 On July 4, 2013, Comstock required $1.5 million in order to meet its payroll and independent contractor obligations. On July 3, 2013, Comstock brought a motion seeking an order authorizing BMO to make an immediate advance on a priority basis in order to permit Comstock to fund its payroll and independent contractor obligations. The motion was granted and on July 3, 2013, an order was issued appointing PwC as Interim Receiver for the limited and specific purpose of ensuring Comstock's payroll was funded by July 4, 2013 and granting the Interim Receiver a priority charge, including in priority to construction lien and trust claimants, pursuant to the Interim Receiver's Borrowing Charge under the order.

63 The Interim Receiver has now discharged its duties in connection with its limited purpose appointment and I am satisfied that it is appropriate and reasonable for the interim receivership proceedings to be terminated and to discharge the Interim Receiver. In making this order, I recognize that the contemplated DIP financing will be used, in part, to repay the Interim Receiver's borrowings to BMO, leaving no further purpose for the interim receivership proceedings. The fees and disbursements of the Interim Receiver and its counsel can roll over in to the Administration Charge and be approved as part of the monitor's fee approvals inside the CCAA proceedings.

Disposition

64 In the result, the motion is granted. Two orders have been signed; namely, the Initial Order under the CCAA, which recognizes a continuation of the restructuring proceedings under the CCAA, and an order discharging PwC in its capacity as Interim Receiver of Comstock.

65 A comeback hearing, as provided for in paragraph 61 of the Initial Order, is scheduled for Friday, July 19, 2013.

Motion granted.

Footnotes

* A corrigendum issued by the court on July 23, 2013 has been incorporated herein.

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TAB 2

2014 ONSC 514
Ontario Superior Court of Justice

Colossus Minerals Inc., Re

2014 CarswellOnt 1517, 2014 ONSC 514, 14 C.B.R. (6th) 261, 237 A.C.W.S. (3d) 584

In the Matter of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, As Amended

In the Matter of the Notice of Intention of Colossus Minerals Inc., of the City of Toronto in the Province of Ontario

H.J. Wilton-Siegel J.

Heard: January 16, 2014
Judgment: February 7, 2014
Docket: CV-14-10401-00CL

Counsel: S. Brotman, D. Chochla for Applicant, Colossus Minerals Inc.
L. Rogers, A. Shalviri for DIP Agent, Sandstorm Gold Inc.
H. Chaiton for Proposal Trustee
S. Zweig for Ad Hoc Group of Noteholders and Certain Lenders

Subject: Insolvency

APPLICATION by debtor for various orders under *Bankruptcy and insolvency.*

***H.J. Wilton-Siegel J.*:**

1 The applicant, Colossus Minerals Inc. (the "applicant" or "Colossus"), seeks an order granting various relief under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "BIA"). The principal secured creditors of Colossus were served and no objections were received regarding the relief sought. In view of the liquidity position of Colossus, the applicant was heard on an urgent basis and an order was issued on January 16, 2014 granting the relief sought. This endorsement sets out the Court's reasons for granting the order.

Background

2 The applicant filed a notice of intention to make a proposal under s. 50.4(1) of the BIA on January 13, 2014. Duff & Phelps Canada Restructuring Inc. (the "Proposal Trustee") has been named the Proposal Trustee in these proceedings. The Proposal Trustee has filed its first report dated January 14, 2014 addressing this application, among other things. The main asset of Colossus is a 75% interest in a gold and platinum project in Brazil (the "Project"), which is held by a subsidiary. The Project is nearly complete. However, there is a serious water control issue that urgently requires additional de-watering facilities to preserve the applicant's interest in the Project. As none of the applicant's mining interests, including the Project, are producing, it has no revenue and has been accumulating losses. To date, the applicant has been unable to obtain the financing necessary to fund its cash flow requirements through to the commencement of production and it has exhausted its liquidity.

DIP Loan and DIP Charge

3 The applicant seeks approval of a Debtor-in-Possession Loan (the "DIP Loan") and DIP Charge dated January 13, 2014 with Sandstorm Gold Inc. ("Sandstorm") and certain holders of the applicant's outstanding gold-linked notes (the "Notes") in an amount up to $4 million, subject to a first-ranking charge on the property of Colossus, being the

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DIP Charge. The Court has the authority under section 50.6(1) of the BIA to authorize the DIP Loan and DIP Charge, subject to a consideration of the factors under section 50.6(5). In this regard, the following matters are relevant.

4 First, the DIP Loan is to last during the currency of the sale and investor solicitation process ("SISP") discussed below and the applicant has sought an extension of the stay of proceedings under the BIA until March 7, 2014. The applicant's cash flow statements show that the DIP Loan is necessary and sufficient to fund the applicant's cash requirements until that time.

5 Second, current management will continue to operate Colossus during the stay period to assist in the SISP. Because Sandstorm has significant rights under a product purchase agreement pertaining to the Project and the Notes represent the applicant's largest debt obligation, the DIP Loan reflects the confidence of significant creditors in the applicant and its management.

6 Third, the terms of the DIP Loan are consistent with the terms of DIP financing facilities in similar proceedings.

7 Fourth, Colossus is facing an imminent liquidity crisis. It will need to cease operations if it does not receive funding. In such circumstances, there will be little likelihood of a viable proposal.

8 Fifth, the DIP Loan is required to permit the SISP to proceed, which is necessary for any assessment of the options of a sale and a proposal under the BIA. It will also fund the care and maintenance of the Project without which the asset will deteriorate thereby seriously jeopardizing the applicant's ability to make a proposal. This latter consideration also justifies the necessary adverse effect on creditors' positions. The DIP Charge will, however, be subordinate to the secured interests of Dell Financial Services Canada Limited Partnership ("Dell") and GE VFS Canada Limited Partnership ("GE") who have received notice of this application and have not objected.

9 Lastly, the Proposal Trustee has recommended that the Court approve the relief sought and supports the DIP Loan and DIP Charge.

10 For the foregoing reasons, I am satisfied that the Court should authorize the DIP Loan and the DIP Charge pursuant to s. 50.6(1) of the BIA.

Administration Charge

11 Colossus seeks approval of a first-priority administration charge in the maximum amount of $300,000 to secure the fees and disbursements of the Proposal Trustee, the counsel to the Proposal Trustee, and the counsel to the applicant in respect of these BIA proceedings.

12 Section 64.2 of the BIA provides jurisdiction to grant a super-priority for such purposes. The Court is satisfied that such a charge is appropriate for the following reasons.

13 First, the proposed services are essential both to a successful proceeding under the BIA as well as for the conduct of the SISP.

14 Second, the quantum of the proposed charge is appropriate given the complexity of the applicant's business and of the SISP, both of which will require the supervision of the Proposal Trustee.

15 Third, the proposed charge will be subordinate to the secured interests of GE and Dell.

Directors' and Officers' Charge

16 Colossus seeks approval of an indemnity and priority charge to indemnify its directors and officers for obligations and liabilities they may incur in such capacities from and after the filing of the Notice of Intention (the "D&O Charge").

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It is proposed that the D&O Charge be in the amount of $200,000 and rank after the Administration Charge and prior to the DIP Charge.

17 The Court has authority to grant such a charge under s. 64.1 of the BIA. I am satisfied that it is appropriate to grant such relief in the present circumstances for the following reasons.

18 First, the Court has been advised that the existing directors' and officers' insurance policies contain certain limits and exclusions that create uncertainty as to coverage of all potential claims. The order sought provides that the benefit of the D&O Charge will be available only to the extent that the directors and officers do not have coverage under such insurance or such coverage is insufficient to pay the amounts indemnified.

19 Second, the applicant's remaining directors and officers have advised that they are unwilling to continue their services and involvement with the applicant without the protection of the D&O Charge.

20 Third, the continued involvement of the remaining directors and officers is critical to a successful SISP or any proposal under the BIA.

21 Fourth, the Proposal Trustee has stated that the D&O Charge is reasonable and supports the D&O Charge.

The SISP

22 The Court has the authority to approve any proposed sale under s. 65.13(1) of the BIA subject to consideration of the factors in s. 65.13(4). At this time, Colossus seeks approval of its proposed sales process, being the SISP. In this regard, the following considerations are relevant.

23 First, the SISP is necessary to permit the applicant to determine whether a sale transaction is available that would be more advantageous to the applicant and its stakeholders than a proposal under the BIA. It is also a condition of the DIP Loan. In these circumstances, a sales process is not only reasonable but also necessary.

24 Second, it is not possible at this time to assess whether a sale under the SISP would be more beneficial to the creditors than a sale under a bankruptcy. However, the conduct of the SISP will allow that assessment without any obligation on the part of the applicant to accept any offer under the SISP.

25 Third, the Court retains the authority to approve any sale under s. 65.13 of the BIA.

26 Lastly, the Proposal Trustee supports the proposed SISP.

27 Accordingly, I am satisfied that the SISP should be approved at this time.

Engagement Letter with the Financial Advisor

28 The applicant seeks approval of an engagement letter dated November 27, 2013 with Dundee Securities Limited ("Dundee") (the "Engagement Letter"). Dundee was engaged at that time by the special committee of the board of directors of the applicant as its financial advisor for the purpose of identifying financing and/or merger and acquisition opportunities available to the applicant. It is proposed that Dundee will continue to be engaged pursuant to the Engagement Letter to run the SISP together with the applicant under the supervision of the Proposal Trustee.

29 Under the Engagement Letter, Dundee will receive certain compensation including a success fee. The Engagement Letter also provides that amounts payable thereunder are claims that cannot be compromised in any proposal under the BIA or any plan of arrangement under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA").

30 Courts have approved success fees in the context of restructurings under the CCAA. The reasoning in such cases is equally applicable in respect of restructurings conducted by means of proposal proceedings under the BIA. As the

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applicant notes, a success fee is both appropriate and necessary where the debtor lacks the financial resources to pay advisory fees on any other basis.

31 For the following reasons, I am satisfied that the Engagement Letter, including the success fee arrangement, should be approved by the Court and that the applicant should be authorized to continue to engage Dundee as its financial advisor in respect of the SISP.

32 Dundee has considerable industry experience as well as familiarity with Colossus, based on its involvement with the company prior to the filing of the Notice of Intention.

33 As mentioned, the SISP is necessary to permit an assessment of the best option for stakeholders.

34 In addition, the success fee is necessary to incentivize Dundee but is reasonable in the circumstances and consistent with success fees in similar circumstances.

35 Importantly, the success fee is only payable in the event of a successful outcome of the SISP.

36 Lastly, the Proposal Trustee supports the Engagement Letter, including the success fee arrangement.

Extension of the Stay

37 The applicant seeks an extension for the time to file a proposal under the BIA from the thirty-day period provided for in s. 50.4(8). The applicant seeks an extension to March 7, 2014 to permit it to pursue the SISP and assess whether a sale or a proposal under the BIA would be most beneficial to the applicant's stakeholders.

38 The Court has authority to grant such relief under section 50.4(9) of the BIA. I am satisfied that such relief is appropriate in the present circumstances for the following reasons.

39 First, the applicant is acting in good faith and with due diligence, with a view to maximizing value for the stakeholders, in seeking authorization for the SISP.

40 Second, the applicant requires additional time to determine whether it could make a viable proposal to stakeholders. The extension of the stay will increase the likelihood of a feasible sale transaction or a proposal.

41 Third, there is no material prejudice likely to result to creditors from the extension of the stay itself. Any adverse effect flowing from the DIP Loan and DIP Charge has been addressed above.

42 Fourth, the applicant's cash flows indicate that it will be able to meet its financial obligations, including care and maintenance of the Project, during the extended period with the inclusion of the proceeds of the DIP Loan.

43 Lastly, the Proposal Trustee supports the requested relief.

Application granted.

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TAB 3

2009 SCC 19
Supreme Court of Canada

Ontario (Attorney General) v. Chatterjee

2009 CarswellOnt 1949, 2009 CarswellOnt 1950, 2009 SCC 19, [2009] 1 S.C.R. 624, [2009] S.C.J. No. 19, 177 A.C.W.S. (3d) 106, 242 C.C.C. (3d) 129, 249 O.A.C. 355, 304 D.L.R. (4th) 513, 387 N.R. 206, 65 C.R. (6th) 1, 82 W.C.B. (2d) 719, 97 O.R. (3d) 399 (note), J.E. 2009-760

Robin Chatterjee, Appellant v. Attorney General of Ontario, Respondent and Attorney General of Canada, Attorney General of Quebec, Attorney General of Nova Scotia, Attorney General of Manitoba, Attorney General of British Columbia, Attorney General of Saskatchewan, Attorney General of Alberta, Attorney General of Newfoundland and Labrador, Criminal Lawyers' Association (Ontario), Canadian Civil Liberties Association and British Columbia Civil Liberties Assosiation, Interveners

McLachlin C.J.C., Binnie, LeBel, Deschamps, Fish, Abella, Rothstein JJ.

Heard: November 12, 2008
Judgment: April 17, 2009
Docket: 32204

Proceedings: affirming *Ontario (Attorney General) v. Chatterjee* (2007), 221 C.C.C. (3d) 350, 282 D.L.R. (4th) 298, 225 O.A.C. 40, 86 O.R. (3d) 168, 2007 ONCA 406, 2007 CarswellOnt 3290, 156 C.R.R. (3d) 94 (Ont. C.A.)**Proceedings: affirming *Ontario (Attorney General) v. Chatterjee* (2006), 2006 CarswellOnt 3395 (Ont. S.C.J.)**

Counsel: Richard Macklin, James F. Diamond, for Appellant
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Jean-Vincent Lacroix, for Intervener, Attorney General of Quebec
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Michael Conner, for Intervener, Attorney General of Manitoba
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Bradley E. Berg, Allison A. Thornton, for Intervener, Canadian Civil Liberties Association
David G. Butcher, Anthony D. Price, for Intervener, British Columbia Civil Liberties Association

Subject: Constitutional; Civil Practice and Procedure; Criminal; Human Rights

Annotation

The forfeiture of assets connected to criminal activity sits astride the boundaries of federal jurisdiction over the criminal law and provincial jurisdiction over property and civil rights. The Supreme Court must be correct that a provincial law cannot be considered invalid merely because its purpose is to deter crime; many provincial social welfare programs would count crime reduction among their goals. Yet there are surely limits on what means the province can employ to achieve that end.

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Some of the opposition to forfeiture laws, whether federal or provincial, is premised on the potential for disproportionality. In some cities, loss of a house used for criminal activity can amount to a million-dollar "fine" in addition to the formal sentence. Yet the Supreme Court makes clear that such an order should not be understood as part of the sentence, meaning that the application of section 12 of the *Charter* is uncertain. To date, such laws have not provided a major source of provincial revenue, and they bring with them the administrative burden of disposing of the property.

The other main objection to such laws is that the provincial version relies on a civil standard of proof rather than the proof beyond a reasonable doubt required by the *Criminal Code*. *Toronto (City) v. C.U.P.E., Local 79* (2003), 17 C.R. (6th) 276 (S.C.C.), on which the Court relies, is not directly comparable. There, the litigant tried to reopen findings of guilt made according to the criminal standard at a subsequent arbitration where the standard of proof was lower, and was ultimately precluded from doing so. Here, the situation is akin to a civil litigant proceeding with litigation in the face of a criminal acquittal of the defendant, a practice that is generally permitted given the different purpose of the two proceedings. The Supreme Court is content to allow instances of collateral attack and *res judicata* to be dealt with individually. In one Ontario case, the court refused to permit a second attempt at forfeiture in the provincial context: *Ontario (Attorney General) v. Cole-Watson* (Ont. S.C.J.). It remains to be seen whether other courts will follow suit where a second attempt at forfeiture is made.

Janine Benedet

Faculty of Law, University of British Columbia

APPEAL from judgment reported at *Ontario (Attorney General) v. Chatterjee* (2007), 221 C.C.C. (3d) 350, 282 D.L.R. (4th) 298, 225 O.A.C. 40, 86 O.R. (3d) 168, 2007 ONCA 406, 2007 CarswellOnt 3290, 156 C.R.R. (3d) 94 (Ont. C.A.).

POURVOI à l'encontre d'un jugement publié à *Ontario (Attorney General) v. Chatterjee* (2007), 221 C.C.C. (3d) 350, 282 D.L.R. (4th) 298, 225 O.A.C. 40, 86 O.R. (3d) 168, 2007 ONCA 406, 2007 CarswellOnt 3290, 156 C.R.R. (3d) 94 (Ont. C.A.).

***Binnie J.*:**

1 The question raised on this appeal is whether the Ontario *Remedies for Organized Crime and Other Unlawful Activities Act, 2001*, S.O. 2001, c. 28 (otherwise known as *Civil Remedies Act, 2001* or *CRA*), which authorizes the forfeiture of proceeds of unlawful activity, is *ultra vires* Ontario because it encroaches on the federal criminal law power. In my view, the *CRA* is valid provincial legislation.

2 The argument that the *CRA* is *ultra vires* is based in this case on an exaggerated view of the immunity of federal jurisdiction in relation to matters that may, in another aspect, be the subject of provincial legislation. Resort to a federalist concept of proliferating jurisdictional enclaves (or "interjurisdictional immunities") was discouraged by this Court's decisions in *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3 (S.C.C.), and *Burrardview Neighbourhood Assn. v. Vancouver (City)*, 2007 SCC 23, [2007] 2 S.C.R. 86 (S.C.C.), and should not now be given a new lease on life. As stated in *Canadian Western Bank*, "a court should favour, where possible, the ordinary operation of statutes enacted by *both* levels of government" (para. 37; emphasis in original).

3 The present appeal provides an opportunity to apply the principles of federalism affirmed in those recent cases. The *CRA* was enacted to deter crime and to compensate its victims. The former purpose is broad enough that both the federal government (in relation to criminal law) and the provincial governments (in relation to property and civil rights) can validly pursue it. The latter purpose falls squarely within provincial competence. Crime imposes substantial costs on provincial treasuries. Those costs impact many provincial interests, including health, policing resources, community

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stability and family welfare. It would be out of step with modern realities to conclude that a province must shoulder the costs to the community of criminal behaviour but cannot use deterrence to suppress it.

4 Moreover, the *CRA* method of attack on crime is to authorize *in rem* forfeiture of its proceeds and differs from both the traditional criminal law which ordinarily couples a prohibition with a penalty (see *Reference re Firearms Act (Canada)*, 2000 SCC 31, [2000] 1 S.C.R. 783 (S.C.C.)) and criminal procedure which in general refers to the means by which an allegation of a particular criminal offence is proven against a particular offender. The appellant's answer, however, is that the effect of the *CRA in rem* remedy just adds to the penalties available in the criminal process, and as such the *CRA* invalidly interferes with the sentencing regime established by Parliament. It is true that forfeiture may have *de facto* punitive effects in some cases, but 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. These are valid provincial objects. There is no operational conflict between the forfeiture provisions of the *Criminal Code*, R.S.C. 1985, c. C-46, and the *CRA*. It cannot reasonably be said that the *CRA* amounts to colourable criminal legislation. Accordingly, I would dismiss the appeal.

I. Facts

5 The appellant was stopped by York Regional Police on March 27, 2003, because his car had no front licence plate. A computer search showed the police that he was in breach of his recognizance, which required him to reside in Ottawa, some 400 kilometres away. When the appellant acknowledged that he was then living in Thornhill, just north of Toronto, the officers arrested him and, incidental to the arrest, searched his car. They discovered $29,020 in cash, as well as an exhaust fan, a light ballast and a light socket. According to police, all of these items smelled of marijuana, although no marijuana was found.

6 The appellant was never charged with any offence in relation to the money, items, or any drug related activity. However, on May 13, 2003, the Attorney General of Ontario brought an interlocutory motion under ss. 4 and 9 of the *CRA* to preserve the seized money and equipment. A preservation order was granted.

7 On May 16, 2003, the Attorney General brought an application under ss. 3 and 8 of the *CRA* for forfeiture of the seized money as proceeds of unlawful activity and of the items as instruments of unlawful activity. In response, the appellant challenged the *CRA's* constitutionality: that challenge eventually led to this appeal.

II. Relevant Statutory Provisions

8 *Remedies for Organized Crime and Other Unlawful Activities Act, 2001*, S.O. 2001, c. 28

PART I PURPOSE

PURPOSE

1. The purpose of this Act is to provide civil remedies that will assist in,

(a) compensating persons who suffer pecuniary or non-pecuniary losses as a result of unlawful activities;

(b) preventing persons who engage in unlawful activities and others from keeping property that was acquired as a result of unlawful activities;

(c) preventing property, including vehicles as defined in Part III. 1, from being used to engage in certain unlawful activities; and [added S.O. 2007, c. 13, s. 26] and

(d) preventing injury to the public that may result from conspiracies to engage in unlawful activities.

Definitions

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2. In this Part,

. . . . .

"legitimate owner" means, with respect to property that is proceeds of unlawful activity, a person who did not, directly or indirectly, acquire the property as a result of unlawful activity committed by the person, and who,

(a) was the rightful owner of the property before the unlawful activity occurred and was deprived of possession or control of the property by means of the unlawful activity,

(b) acquired the property for fair value after the unlawful activity occurred and did not know and could not reasonably have known at the time of the acquisition that the property was proceeds of unlawful activity, or

(c) acquired the property from a person mentioned in clause (a) or (b);

"proceeds of unlawful activity" means property acquired, directly or indirectly, in whole or in part, as a result of unlawful activity, whether the property was acquired before or after this Act came into force, but does not include proceeds of a contract for recounting crime within the meaning of the *Prohibiting Profiting from Recounting Crimes Act, 2002*;

"property" means real or personal property, and includes any interest in property;

"unlawful activity" means an act or omission that,

(a) is an offence under an Act of Canada, Ontario or another province or territory of Canada, or

(b) is an offence under an Act of a jurisdiction outside Canada, if a similar act or omission would be an offence under an Act of Canada or Ontario if it were committed in Ontario,

whether the act or omission occurred before or after this Part came into force.

Forfeiture order

3. (1) In a proceeding commenced by the Attorney General, the Superior Court of Justice shall, subject to subsection (3) and except where it would clearly not be in the interests of justice, make an order forfeiting property that is in Ontario to the Crown in right of Ontario if the court finds that the property is proceeds of unlawful activity.

. . . . .

Legitimate owners

(3) If the court finds that property is proceeds of unlawful activity and a party to the proceeding proves that he, she or it is a legitimate owner of the property, the court, except where it would clearly not be in the interests of justice, shall make such order as it considers necessary to protect the legitimate owner's interest in the property.

. . . . .

Special purpose account

6. . . .

Payments out of account for Crown's costs

(3) Subject to the regulations made under this Act and after making the payments, if any, out of the account under subsection (2.1), [regarding payments for the Crown's costs], the Minister of Finance may make payments out of the account described in subsection (1) for the following purposes:

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1. To compensate persons who suffered pecuniary or non-pecuniary losses, including losses recoverable under Part V of the *Family Law Act*, as a result of the unlawful activity.

2. To assist victims of unlawful activities or to prevent unlawful activities that result in victimization.

3. To compensate the Crown in right of Ontario for pecuniary losses suffered as a result of the unlawful activity, other than the costs described in subsection (2.1), but including costs incurred in remedying the effects of the unlawful activity.

4. To compensate a municipal corporation or a public body that belongs to a class prescribed by the regulations made under this Act for pecuniary losses that were suffered as a result of the unlawful activity and that are costs incurred in remedying the effects of the unlawful activity.

5. If, according to the criteria prescribed by the regulations made under this Act, the amount of money in the account is more than is required for the purposes referred to in paragraphs 1 to 4, such other purposes as are prescribed by the regulations.

Criminal Code, R.S.C. 1985, c. C-46

Forfeiture of Proceeds of Crime

462.37 (1) [**Order of forfeiture of property on conviction**] Subject to this section and sections 462.39 to 462.41, where an offender is convicted, or discharged under section 730, of a designated offence and the court imposing sentence on the offender, on application of the Attorney General, is satisfied, on a balance of probabilities, that any property is proceeds of crime and that the designated offence was committed in relation to that property, the court shall order that the property be forfeited to Her Majesty to be disposed of as the Attorney General directs or otherwise dealt with in accordance with the law.

(2) [**Proceeds of crime derived from other offences**] Where the evidence does not establish to the satisfaction of the court that the designated offence of which the offender is convicted, or discharged under section 730, was committed in relation to property in respect of which an order of forfeiture would otherwise be made under subsection (1) but the court is satisfied, beyond a reasonable doubt, that that property is proceeds of crime, the court may make an order of forfeiture under subsection (1) in relation to that property.

. . . . .

(2.1) [**Property outside Canada**] An order may be issued under this section in respect of property situated outside Canada, with any modifications that the circumstances require.

Constitution Act, 1867

91.... [T]he exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

. . . . .

27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

. . . . .

13. Property and Civil Rights in the Province.

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14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.

15. The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.

16. Generally all Matters of a merely local or private Nature in the Province.

III. Judicial History

A. Superior Court of Justice (2005), 138 C.R.R. (2d) 1 (Ont. S.C.J.)

9 The application judge declined to permit the appellant to challenge Part III of the *CRA* dealing with *instruments* of crime because, although some of the seized items were alleged to be instruments of crime, Mr. Chatterjee disclaimed ownership of them. Loukidelis J. also rejected a challenge under the *Canadian Charter of Rights and Freedoms.* Neither issue is pursued in this Court.

10 Loukidelis J. concluded that the *CRA* had two purposes, namely, compensating the victims of unlawful activities and suppressing the conditions that lead to unlawful activities by removing incentives. The *in rem* nature of *CRA* proceedings distinguished them from criminal proceedings. The *CRA* does not *create* any criminal prohibitions, it simply refers to prohibitions created by other legislation. Further, he rejected the argument of a conflict between the *CRA* and the *Criminal Code* forfeiture provisions. The latter require a conviction and are part of the sentencing process. In his view, it would be *ultra vires* the federal Parliament to enact a forfeiture regime *not* tied to conviction and sentencing. Accordingly, the *CRA* relates almost entirely to property and civil rights in the province. To the extent that any of the impugned provisions fall outside the heading of property and civil rights, they fall under the administration of justice in the province, or are matters of local or private concern. The *CRA*, in his view, was accordingly *intra vires* and valid.

B. Court of Appeal (Labrosse, Sharpe and Rouleau JJ.A.), 2007 ONCA 406, 86 O.R. (3d) 168 (Ont. C.A.)

11 In joint reasons the court upheld the judgment below including the exercise of the applications judge's discretion not to deal with Part III of the *CRA* ("instruments of crime"). The court noted that civil forfeiture schemes appear in several Canadian provinces as well as foreign states. Such schemes often co-exist with conviction-based forfeiture regimes within the criminal law. *CRA* proceedings do not involve an allegation that a named individual has committed an offence. The *CRA* does not define or create any offence. It is not tied to the identification, charging, prosecution, conviction, or punishment of an offender. It does not seek to impose a penalty, fine, or other punishment, and does not provide for imprisonment.

12 In the court's view, the pith and substance of the *CRA* is to require the disgorgement of financial gains from unlawful activity, to compensate victims, and to suppress conditions leading to unlawful activity by removing financial incentives. The *CRA* therefore falls within the province's power to legislate in relation to property and civil rights in the province and matters of a merely local or private nature in the province. Provincial civil remedies for criminal offences do not conflict with the *Criminal Code*, because Parliament expressly preserved such remedies in s. 11 of the *Criminal Code*. Further, suppression of conditions likely to favour the commission of crimes falls within provincial competence.

13 The subject of forfeiture of the proceeds of crime has both a federal criminal aspect and a provincial aspect. The *CRA* approaches that subject from an area of valid provincial competence — disgorgement of wrongful gains, compensation and crime suppression. The *CRA* is valid provincial legislation. The appeal was therefore dismissed.

IV. Issue

14 The Chief Justice stated the following constitutional question:

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> Are ss. 1 to 6 and ss. 16 to 17 of the *Remedies for Organized Crime and Other Unlawful Activities Act, 2001*, S.O. 2001, c. 28, *ultra vires* the Province of Ontario on the ground that they relate to a subject matter which is within the exclusive jurisdiction of the Parliament of Canada under s. 91(27) of the *Constitution Act, 1867*?

On the hearing of the appeal the appellant narrowed his challenge to argue that the *CRA* is *ultra vires* to the extent it provides for forfeiture of the proceeds of *federal offences* because to that extent the *CRA* is in pith and substance criminal law.

V. Analysis

15 Crime imposes significant costs at every level of government: federal, provincial and municipal. Impaired driving is a *Criminal Code* offence but carnage on the roads touches numerous matters within provincial jurisdiction including health, highways, automobile insurance and property damage. The cost associated with drug abuse is another example. Each level of government bears a portion of the costs of criminality and each level of government therefore has an interest in its suppression. The appellant's argument is, however, that the *CRA* adopts a method of fighting crime and compensating its victims that is not constitutionally permissible in relation to federal offences. The forfeiture of property tainted by crime in relation to *federal* offences, he says, "encroaches directly on the federal government's exclusive jurisdiction over criminal law and is *ultra vires*" (A.F., at para. 4). It is apparent that provincial objectives *can* become so entangled in the enforcement of criminal law as to be declared *ultra vires*. In *Starr v. Ontario (Commissioner of Inquiry)*, [1990] 1 S.C.R. 1366 (S.C.C.) (*The Patti Stair Inquiry*), for example, it was held that provincial terms of reference for a judicial inquiry into a provincial fundraising scandal were *ultra vires* as constituting a substitute police investigation and preliminary inquiry in which the targets were made compellable witnesses. See also *Scowby v. Saskatchewan (Board of Inquiry)*, [1986] 2 S.C.R. 226 (S.C.C.). The appellant's contention that the *CRA* is an invalid attempt to increase the penalty for federal offences therefore requires careful scrutiny.

A. Determination of the Pith and Substance

16 The first step in a constitutional challenge is to determine "the matter" (to track the language of the *Constitution Act, 1867*) in relation to which the impugned law is enacted. What is the essence of what the law does and how does it do it? "[T]wo aspects of the law must be examined: the purpose of the enacting body, and the legal effect of the law" (*Reference re Firearms Act (Canada)*, at para. 16). This exercise is traditionally known as determining the law's "pith and substance". It may include not only the impugned Act but also external material surrounding its passage, including Hansard. In principle this assessment should be made without regard to the head(s) of legislative competence, which are to be looked at only once the "pith and substance" of the impugned law is determined. Unless the two steps are kept distinct there is a danger that the whole exercise will become blurred and overly oriented towards results.

17 As its name suggests, the *Civil Remedies Act, 2001*, enacts civil remedies in relation to property tainted by crime. Its purpose, as stated in s. 1

> The purpose of this Act is to provide civil remedies that will assist in,
>
> (a) compensating persons who suffer pecuniary or non-pecuniary losses as a result of unlawful activities;
>
> (b) preventing persons who engage in unlawful activities and others from keeping property that was acquired as a result of unlawful activities;
>
> (c) preventing property, including vehicles as defined in Part III. 1, from being used to engage in certain unlawful activities [added in 2007, c. 13, s.26] and
>
> (d) preventing injury to the public that may result from conspiracies to engage in unlawful activities.
>
> [Emphasis added.]

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While the Court is not bound by a purpose clause when considering the constitutional validity of an enactment, a statement of legislative intent is often a useful tool, particularly where it is apparent, as in this case, that the machinery created by the *CRA* corresponds to what is required to achieve the stated purposes. Purposes (a) and (b) contemplate the re-distribution of property tainted by crime. (Purpose (c) relates to the instruments of crime and is not before us.) Purpose (d) is directed to the prevention of crime-related injuries. It is suggested that the reference to "conspiracies" in (d) indicates a focus on combatting organized crime, and the appellant cites some extracts from Hansard to that effect. This, he says, entangles the *CRA* in criminal law. However, the province has good reason to deter organized crime, provided it stays within areas of provincial competence. There is nothing in the provisions of the *CRA* that are before us on this appeal that go beyond the redistribution of property tainted by crime, including federal crimes of all descriptions.

18 The internal evidence of purpose thus suggests a credible intent to recover from the proceeds of crime found in Ontario the costs to victims and to the public of criminality that would otherwise fall on the provincial treasury. Forfeiture is the transfer of property from the owner to the Crown. Forfeiture does not result in the conviction of anybody for any offence. On its face, therefore, the *CRA* targets property rights.

19 In terms of the *effects* of the *CRA*, the Court in determining its pith and substance will look at "how the legislation as a whole affects the rights and liabilities of those subject to its terms" (*R. v. Morgentaler*, [1993] 3 S.C.R. 463 (S.C.C.), at p. 482). When appropriate, as well, a reviewing court will look beyond the legal effect — beyond the statute's "four corners" — to examine "the actual or predicted practical effect of the legislation in operation" (*Morgentaler*, at p. 483). The record shows that as of August 2007 approximately $3.6 million in property has been ordered forfeited under the *CRA* of which approximately $1 million had been paid out to direct victims, $900,000 had been paid in grants to various bodies on victims' issues, including the Peel Police Internet Child Exploitation Unit, leaving $1.7 million in special *CRA* accounts. Forfeited property included approximately $500,000 in property involved in marijuana grow operations, a Hamilton crack house (the ownership of which was then transferred to the City), vehicles involved in street racing contrary to the *Highway Traffic Act*, R.S.O.1990, c. H.8, and approximately $1 million in cash involved in fraud or money laundering: *Civil Forfeiture in Ontario 2007 — An Update on the Civil Remedies Act, 2001* (2007).

20 Criminal "taint" of property has many sources. Section 2 of the *CRA* defines unlawful activity as "an act or omission that is an offence under an Act of Canada, an Act of Ontario or another province or territory". The definition also extends to offences in jurisdictions outside Canada provided the conduct there would be an offence if committed in Ontario. It is significant that the *CRA* throws its "crime" net so widely. There is no singling out of offences in any particular jurisdiction, including federal offences in Canada. This suggests the province was concerned with the deleterious *effects* of crime in general rather than attempting in a colourable way to tack a penalty onto the federal criminal sentencing process.

21 Proceeds of crime are defined as "property acquired, directly or indirectly, in whole or in part, as a result of unlawful activity" (s. 2(c)). The forfeiture proceedings are initiated by an application or action under the ordinary civil rules of the province. Proceedings are taken *in rem* against the property itself and can be initiated without joining the owners or possessors as defendants (who of course may be added as parties at a later date — see now ss. 15.5 and 15.6). The Attorney General as applicant is not required to prove any particular offence against any particular offender. Initially these proceedings were styled *Attorney General of Ontario v. $29,020 in Canada Currency, Exhaust Fan, Light Ballast, Light Socket (in rem) and Robin Chatterjee*, but Mr. Chatterjee was before the Court as a property claimant, not as an accused.

22 The rest of the statutory machinery may be briefly described. Forfeiture "shall" be ordered unless it is not in the interest of justice to do so or a legitimate owner comes forward (s. 3(3)). Legitimate owners may bring any claims to the property within a 15-year limitation period (s. 3(5)). The proceeds of the forfeiture are deposited into a separate provincial revenue account (s. 6(1)), out of which a court may order Crown's costs to be paid (s. 6(2.1)). The money left in the account may be directed to compensate persons who have suffered losses as a result of the unlawful activity, victims of general unlawful activity, the Crown in right of Ontario, municipal corporations or other public bodies *in*

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respect of their losses flowing from the unlawful activity or (if there is money left over) for such other purpose as may be prescribed by regulation (s. 6(3)).

23 In essence, therefore, the *CRA* creates a property-based authority to seize money and other things shown on a balance of probabilities to be tainted by crime and thereafter to allocate the proceeds to compensating victims of and remedying the societal effects of criminality. The practical (and intended) effect is also to take the profit out of crime and to deter its present and would-be perpetrators.

B. Assignment to Heads of Legislative Power

24 Once the "pith and substance" is ascertained, it is necessary to classify that essential character of the law by reference to the provincial and federal "classes of subject" listed in ss. 91 and 92 (or, in an appropriate case, ss. 93, 94A and 95) to determine if the law comes within the jurisdiction of the enacting legislature. Clearly the *CRA* relates to property but, of course, much of the *Criminal Code* is dedicated to offences involving property. To characterize a provincial law as being in pith and substance related to property is therefore just a starting point. A good deal of overlap in measures taken to suppress crime is inevitable:

> Moreover, while, as subject matter of legislation, the criminal law is entrusted to the Dominion Parliament, responsibility for the administration of justice and, broadly speaking, for the policing of the country, the execution of the criminal law, the suppression of crime and disorder, has from the beginning of Confederation been recognized as the responsibility of the provinces ....
>
> [Emphasis added.]
>
> (*Reference re Adoption Act (Ontario)*, [1938] S.C.R. 398 (S.C.C.), at p. 403 (*per* Duff C.J.). See also *Di Iorio v. Montreal Jail* (1976), [1978] 1 S.C.R. 152 (S.C.C.), at pp. 207 and 213 (*per* Dickson J.).)

C. The Provincial Aspect

25 As stated, the *CRA* fits neatly into the provincial competence in relation to Property and Civil Rights in the Province (*Constitution Act, 1867*, s. 92(13)) or Matters of a merely local or private Nature in the Province (s. 92(16)). The Attorneys General rely on *Martineau c. Ministre du Revenu national*, 2004 SCC 81, [2004] 3 S.C.R. 737 (S.C.C.), for the proposition that "civil mechanisms include the seizure as forfeit of goods and conveyances" (para. 27).

26 Our jurisprudence offers many examples of the interplay between provincial legislative jurisdiction over property and civil rights and federal legislative jurisdiction over criminal law and procedure. In *Bedard v. Dawson*, [1923] S.C.R. 681 (S.C.C.), for example, the Court upheld the validity of a provincial law that authorized a judge to close a "disorderly hous[e]" for up to one year. The Court held that the law was directed to the enjoyment of property rights not criminal law. Duff J. (later C.J.C.) held that "[t]he legislation impugned seems to be aimed at suppressing conditions calculated to favour the development of crime rather than at the punishment of crime" (p. 684). Idington J., in words relevant to the disposition of the present appeal, said that:

> As to the argument addressed to us that the local legislatures cannot legislate to prevent crime, I cannot assent thereto for in a very wide sense it is the duty of the legislature to do the utmost it can within its power to anticipate and remove, so far as practicable, whatever is likely to tend to produce crime;... [Emphasis added; p. 684.]

27 In *Switzman v. Elbling*, [1957] S.C.R. 285 (S.C.C.), this Court struck down a Quebec law providing for the closure of houses in which socialism or bolshevism were said to be propagated (known popularly as the "Padlock law"). Kerwin C.J. and Nolan and Cartwright JJ. distinguished *Bedard*. Unlike in *Bedard*, the impugned statute in *Switzman* was only superficially concerned with the control and enjoyment of property; in their view its dominant purpose was to criminalize and punish the propagation of communism. By contrast, the *CRA* does not define a new offence or clearly take aim at any particular category of criminal conduct. (Rand and Abbott JJ. held in *Switzman* that the Padlock Act's dominant

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purpose was to suppress the dissemination of political views, an issue which, however important, has no role in the *CRA vires* debate.)

28 In *Canada (Attorney General) v. Dupond*, [1978] 2 S.C.R. 770 (S.C.C.), the Court upheld a municipal ordinance regulating public demonstrations with a view to the prevention of "conditions conducive to breaches of the peace and detrimental to the administration of justice" (p. 791). The Court held the municipal law to be in relation to "Matters of a merely local or private Nature" under s. 92(16) and stated at p. 792 that "[i]t is now well established that the suppression of conditions likely to favour the commission of crimes falls within provincial competence", citing *Bedard* and *Di Iorio v. Montreal Jail*. The Attorney General of Ontario also argues that the *CRA* in a sense operates as a substitute for civil litigation by victims against criminal offenders, a notoriously difficult and costly exercise.

29 The question, however, is at what point does a provincial measure designed to "suppress" crime become itself "criminal law"? There will often be a degree of overlap between measures enacted pursuant to the provincial power (property and civil rights) and measures taken pursuant to the federal power (criminal law and procedure). In such cases it is necessary for the Court to identify the "dominant feature" of an impugned measure. If, as is argued by the Attorneys General here, the dominant feature of the *CRA* is property and civil rights, it will not be invalidated because of an "incidental" intrusion into the field of criminal law.

30 For the reasons that follow I agree that the *CRA* was enacted "in relation to" property and civil rights and may incidentally "affect" criminal law and procedure without doing violence to the division of powers. As noted by Dickson C.J. in *City National Leasing Ltd. v. General Motors of Canada Ltd.*, [1989] 1 S.C.R. 641 (S.C.C.), at p. 670, "[b]oth provincial and federal governments have equal ability to legislate in ways that may incidentally affect the other government's sphere of power".

D. The Federal Aspect

31 The appellant's argument is that the *CRA*, properly analyzed, is in pith and substance an enactment in relation to the criminal law. It imposes an additional penal regime in relation to federal offences that supplements, and may on occasion, conflict with the federal forfeiture provisions of Part XII.2 of the *Criminal Code*. The first argument leads to a conclusion that the *CRA* is *ultra vires*. The second argument would lead to the conclusion that the *CRA* is rendered inoperative in relation to federal offences only by reason of operational conflict which must be resolved in favour of the federal law by virtue of the doctrine of paramountcy.

32 The appellant argues that *Bedard* must be read in light of the Court's later decisions in *R. v. Industrial Acceptance Corp.*, [1953] 2 S.C.R. 273 (S.C.C.), and *Johnson v. Alberta (Attorney General)*, [1954] S.C.R. 127 (S.C.C.). In the *Industrial Acceptance* case the Court upheld the federal forfeiture provisions contained in the *Opium and Narcotic Drug Act, 1929*, S.C. 1929, c. 49, on the ground that it "provides for the forfeiture of property used in the commission of a criminal offence and is, therefore, legislation in relation to criminal law" (p. 275). This decision is of limited interest in the present appeal as no one contests the validity of the federal law. Co-operative federalism recognizes that overlaps between provincial and federal laws are inevitable.

> Matters, however, which in one aspect and for one purpose fall within the jurisdiction of a province over the subjects designated by one or more of the heads of s. 92, may in another aspect and for another purpose, be proper subjects of legislation under s. 91, and in particular under head 27.
>
> (*Proprietary Articles Trade Assn. v. Canada (Attorney General)*, [1929] S.C.R. 409 (S.C.C.), at p. 413)

The mere existence of a valid federal law bearing some similarities to the challenged provincial law does not, without more, demonstrate the invalidity of the latter.

33 *Johnson*, on the other hand, did involve an attack on the *vires* of a provincial statute on the basis that it trenched on the federal criminal law power. In that case, the Court (in a 4-3 split) declared invalid the Alberta *Slot Machine Act*,

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R.S.A. 1942, c. 333, which had laid down that "[n]o slot machine shall be capable of ownership, nor shall the same be subject of property rights within the Province". The Alberta definition of a slot machine included devices which, under the *Criminal Code*, were deemed to be the means for playing a game of chance. The police were authorized to cause a summons to be issued to the occupant to appear before a justice of the peace to show cause (if possible) why the machine should not be considered a slot machine. Failing to do so resulted in the forfeiture of the slot machine to the provincial Crown.

34 *Johnson* is distinguishable on a number of grounds. The deciding vote was cast by Rand J., whose main reason for striking down the legislation was that it conflicted with the gaming house provisions in the *Criminal Code*. In the alternative, the provisions — though dealing on their face with property in the province — were in reality directed against gambling, a "public or community evil" (p. 137) and as such must perforce be criminal law.

35 As to the main argument, Rand J. wrote that the field of slot machines was "already occupied by the *Criminal Code*" (p. 135). "An additional process of forfeiture by the province," he continued, "would both duplicate the sanctions of the Code and introduce an interference with the administration of its provisions" (p. 138). Rand J.'s "occupying the field" reasoning has been rendered obsolete by subsequent case law which makes it clear that a federal law touching on a "matter" does not in general create a negative inference ousting the operation of a provincial law otherwise valid in relation to provincial objects. On the (contrary, s. 11 of the *Criminal Code* provides that "[n]o civil remedy for an act or omission is suspended or affected by reason that the act or omission is a criminal offence."

36 If the dominant purpose of the provincial enactment is in relation to provincial objects, the law will be valid, and if the enactments of both levels of government can generally function without operational conflict they will be permitted to do so. In factual situations where operational conflict does occur, the conflict will be resolved by the restrained view of federal paramountcy established by *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161 (S.C.C.), where it was said at p. 191:

> In principle, there would seem to be no good reasons to speak of paramountcy and preclusion except where there is actual conflict in operation as where one enactment says "yes" and the other says "no"; "the same citizens are being told to do inconsistent things"; compliance with one is defiance of the other.

See also *Rio Hotel Ltd. v. New Brunswick (Liquor Licensing Board)*, [1987] 2 S.C.R. 59 (S.C.C.); *M & D Farm Ltd. v. Manitoba Agricultural Credit Corp.*, [1999] 2 S.C.R. 961 (S.C.C.), at paras. 40-41; *Burrardview Neighbourhood Assn. v. Vancouver (City)*, 2007 SCC 23, [2007] 2 S.C.R. 86 (S.C.C.), at paras. 75-77. To the extent Rand J. considered dominant the criminal law aspect of the Alberta *Slot Machine Act*, it should be remembered that the person suffering forfeiture — the keeper of the slot machine — had also committed the gaming house offence. This "match" helped the Court conclude in *Johnson* that the provincial forfeiture, in pith and substance, was punishment for a crime. The same is not true of *CRA* forfeiture.

37 The other judges in the *Johnson* majority agreed that the forfeiture was designed to supplement punishment, and that this made it criminal law in pith and substance. They also felt that legislation in relation to gaming was classic criminal law, because of the relation to public morality. The three dissenting judges would have upheld the provincial law, citing *Bedard*.

38 The appellant and the interveners supporting him invoke *Industrial Acceptance* and *Johnson* as authorities for the proposition that "[f]orfeiture, in the context of property tainted by crime; is punishment" (A.F., at para. 44) but, in my view, neither case read in light of our subsequent jurisprudence supports such a broad proposition.

39 Indeed *R. v. Zelensky*, [1978] 2 S.C.R. 940 (S.C.C.), shows that it is the federal provisions purporting to attach property consequences to the sentencing process, not the provincial forfeiture provisions, that push the boundary of legislative competence. The Manitoba Court of Appeal in *Zelensky* had invalidated what was then s. 653 of the *Criminal Code* on the basis that compensation orders constituted an "unwarranted invasion of provincial jurisdiction", and did

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"not become valid because of the objective in preventing a criminal from profiting from his crime" (p. 960 S.C.R.). On appeal to this Court, however, Laskin C.J. was prepared to uphold the validity of the *Criminal Code* compensation provisions because he considered them to be part of the sentencing process:

> I wish to dwell further on the course of proceedings in this case in order to provide some guidance to trial judges on the proper application of s. 653 and in order to make clear that s. 653 is not to be used *in terrorem* as a substitute for or a reinforcement for civil proceedings. Its validity is based, as I have already said, on its association with the sentencing process, and its administration in particular cases must be limited by that consideration.
>
> [Emphasis added; p. 962.]

Pigeon J., writing for three judges in dissent, would have struck down the *Criminal Code* provisions on the basis that a "compensation order is nothing but a civil judgment" (p. 984). There is nothing in the judgment to deny that a forfeiture measure which is independent of the sentencing process would be squarely within the provincial competence.

E. Overlapping Effects

40 The Constitution permits a province to enact measures to deter criminality and to deal with its financial consequences so long as those measures are taken in relation to a head of provincial competence and do not compromise the proper functioning of the *Criminal Code* including the sentencing provisions. In *Prince Edward Island (Provincial Secretary) v. Egan*, [1941] S.C.R. 396 (S.C.C.), it was held that a province could validly impose automatic suspension of a provincial driver's licence after conviction for impaired driving under the *Criminal Code*. In *Ross v. Ontario (Registrar of Motor Vehicles)* (1973), [1975] 1 S.C.R. 5 (S.C.C.), the Court upheld the automatic provincial licence suspension following a conviction for impaired driving even though the sentencing judge in the criminal case had purported to allow Ross to continue to drive on an intermittent basis. There is no general bar to a province's enacting civil consequences to criminal acts provided the province does so for its own purposes in relation to provincial heads of legislative power.

41 In *Egan* and *Ross*, the provincial laws were clearly aimed at deterring impaired driving, notwithstanding its status as a federal offence, and with good reason. Drunk drivers create public safety hazards on provincial highways and their accidents impose costs by way of examples on the provincial health system and provincial police and highway services. Similarly, the fact the *CRA* aims to deter *federal* offences as well as provincial offences and indeed offences committed outside Canada, is not fatal to its validity. On the contrary, its very generality shows that the province is concerned about the *effects* of crime as a generic source of social ill and provincial expense, and not with supplementing federal criminal law as part of the sentencing process.

F. Interference With the Criminal Code Forfeiture Provisions

42 The argument arises in this case, as it did in *Johnson*, that the provisions of the provincial Act should be set aside as they "introduce an interference with the administration of [the *Criminal Code* forfeiture] provisions" (p. 138). If such operational interference were demonstrated, of course, or if it were shown that the *CRA* frustrated the federal purpose underlying the forfeiture provisions of the *Criminal Code*, the doctrine of federal paramountcy would render inoperative the *CRA* to the extent of the conflict or interference (*Canadian Western Bank*, at paras. 98-102).

43 Consideration must therefore be given to Part XII.2 of the *Criminal Code* which in s. 462.37(1) provides as follows:

> ... Where an offender is convicted,... of a designated offence and the court imposing sentence on the offender, on application of the Attorney General, is satisfied, on a balance of probabilities, that any property is proceeds of crime and that the designated offence was committed in relation to that property, the court shall order that the property be forfeited to Her Majesty to be disposed of as the Attorney General directs or otherwise dealt with in accordance with the law.

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44 The *Criminal Code* also provided that if the court is satisfied *beyond a reasonable doubt* that the property in question represents the proceeds of crime, the court may order forfeiture even without a showing that the offence was committed in relation to that property (s. 462.37(2)).

45 Parliament's legislative authority to bring about property consequences that are *not* directly connected with the offence for which an accused is being sentenced is not before the Court. I do not suggest any infirmity with any aspect of *Criminal Code* forfeiture. I say only that we have heard no argument on these provisions.

46 On the other hand, we have had the benefit of ample argument on the *vires* of the *CRA* and it is clear that its provisions are not part of any "sentencing process". The *CRA* does not require an allegation or proof that a particular person committed a particular crime. For example, a drug dealer might, in a fit of conscience, gift the proceeds of a drug sale to a charity. Under the *CRA*, the money would constitute the proceeds of unlawful activity, and the charity would not be a "legitimate owner" within the scope of s. 2 because the charity would have acquired the property *after* the unlawful activity occurred and would not have given "fair value" for it. The money would, thus, be subject to forfeiture. In the present case, the *CRA* judge could have accepted wholeheartedly the appellant's claim that he was entirely innocent of any involvement with marijuana cultivation, yet still ordered forfeiture.

47 Even when the owner has gained the property by means of crime, the *CRA* forfeiture proceeding does not require, and may not involve, identifying the owner with a particular offence. This would be the case, for example, if cash were seized from a gang safe house. In such a case, the Attorney General may be able to show on a balance of probabilities that money constituted the proceeds of crime *in general* without identifying any particular crime or criminal.

G. Interference in the Sentencing Process

48 Nevertheless the appellant argues that the *CRA* does in some situations couple a *de facto* penalty to *Criminal Code* prohibition. Often, he says, the owner of the forfeited property will indeed be the person suspected (even if not convicted) of committing the crime which taints the property. Nevertheless, as pointed out in *Martineau*, it may not be punishment to deprive a person of illegally obtained property — "[i]f the offender were not the actual owner of the seized property, he or she would not, in principle, be punished by the forfeiture thereof" (para. 36).

49 The concern has been that the federal forfeiture provisions will be displaced by the *CRA* with its lower threshold of proof: see M. Gallant, "Ontario (Attorney General) v. $29,020 in Canadian Currency: A Comment on Proceeds of Crime and Provincial Forfeiture Laws" (2006), 52 *Crim. L.Q.* 64, at p. 83. This may be true, but where no forfeiture is sought in the sentencing process, I see no reason why the Attorney General cannot make an application under the *CRA*. Where forfeiture is sought and refused in the criminal process, a different issue arises.

50 The appellant points to *Ontario (Attorney General) v. Cole-Watson*, [2007] O.J. No. 1742 (Ont. S.C.J.), where an accused who had $20,000 in cash in his possession when arrested was acquitted of knowing possession of the proceeds of crime (s. 354). During sentencing on other offences, the trial judge made an order under s. 490 of the *Criminal Code* that the money be returned to the mother of the accused for whom the accused claimed he had received the money for deposit. The Crown declined to return the money or appeal the order, and instead brought a *CRA* application for forfeiture of the money as criminal proceeds. The *CRA* court considered the Attorney General's claim to be a collateral attack on the criminal court judge's order and dismissed the *CRA* application.

51 I believe the various doctrines of *res judicata*, issue estoppel and abuse of process are adequate to prevent the prosecution from re-litigating the sentencing issue. Detailed consideration must await a case where the clash of remedies is truly in issue. Reference may be made, however, to *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77 (S.C.C.). In that case, in the context of civil proceedings launched in the wake of a criminal conviction, the Court said that it is an abuse of process "where the litigation before the court is found to be in essence an attempt to relitigate a claim which the [criminal] court has already determined" (para. 37).

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52 Accordingly, procedural options are available where a *CRA* judge considers that the conduct of the Attorney General is abusive of the processes of the Court. Furthermore, if in particular circumstances a conflict arises with the *CRA* to the extent that dual compliance is impossible, then the doctrine of paramountcy would render the *CRA* inoperable to the extent of the conflict.

VI. Disposition

53 In summary, the *CRA* is valid provincial legislation. It does not "introduce an interference with the administration of [the *Criminal Code]* provisions" within the scope of the mischief identified by Rand J. in *Johnson*. Given the flexibility of the remedies potentially available where *CRA* proceedings are initiated by the Crown after an unsuccessful claim for forfeiture under s. 462.37, I conclude that there is no necessary operational conflict between the *Criminal Code* and the *CRA* such as to invalidate the latter.

54 In my opinion the *CRA* is valid. I would dismiss the appeal. The application judge found that this was a test case and that, as a result, there should be no order as to costs. The Court of Appeal agreed. We are of a similar view and make no order as to costs.

55 The constitutional question should be answered as follows:

> Are ss. 1 to 6 and ss. 16 to 17 of the *Remedies for Organized Crime and Other Unlawful Activities Act, 2001*, S.O. 2001, c. 28, *ultra vires* the Province of Ontario on the ground that they relate to a subject matter which is within the exclusive jurisdiction of the Parliament of Canada under s. 91(27) of the *Constitution Act, 1867*?
>
> Answer: No.

Appeal dismissed.

Pourvoi rejeté.

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TAB 4

2011 ONCA 363
Ontario Court of Appeal

Ontario (Attorney General) v. McDougall

2011 CarswellOnt 3107, 2011 ONCA 363, [2011] O.J. No. 2122, 202 A.C.W.S. (3d) 505, 269 C.C.C. (3d) 159, 279 O.A.C. 268, 333 D.L.R. (4th) 326, 95 W.C.B. (2d) 520

Attorney General of Ontario, Applicant (Appellant) and 8477 Darlington Crescent, Windsor, 10824 Atwater Crescent, Windsor, $29,000 in Canadian Currency (in rem), Van-Xinh Do and Tuoi Le Thi Tran, Respondents (Respondents in Appeal)

Attorney General of Ontario, Applicant (Respondent) and 1140 Aubin Road, Windsor and 3142 Halpin Road, Windsor (in rem) and Elwin James McDougall, Respondent (Appellant)

Attorney General of Ontario, Applicant (Respondent) and 8477 Darlington Crescent, Windsor, 10824 Atwater Crescent, Windsor, $29,000 in Canadian Currency (in rem), Van-Xinh Do and Tuoi Le Thi Tran, Respondents (Appellants)

David Watt J.A., Doherty J.A., Gloria Epstein J.A.

Heard: Novemebr 16, 2010
Judgment: May 10, 2011
Docket: CA C49874, C49934

Proceedings: affirming *Ontario (Attorney General) v. McDougall* (2008), 2008 CarswellOnt 7790 (Ont. S.C.J.)

Counsel: Robin K. Basu, Leslie Zamojc, for Appellant, Attorney General of Ontario
Kenneth W. Golish, for Respondents, McDougall, Do, Tran

Subject: Criminal; Constitutional

APPEALS by applicant and respondents from judgment reported at *Ontario (Attorney General) v. McDougall* (2008), 2008 CarswellOnt 7790 (Ont. S.C.J.).

***Doherty J.A.*:**

I

Overview

1 In November 2005, the Attorney General of Ontario ("AG") commenced an application under the *Civil Remedies Act, 2001*, S.O. 2001, c. 28 ("*CRA*") seeking the forfeiture of two residences in Windsor, Ontario, one located at 8477 Darlington Crescent ("Darlington property") and the other at 10824 Atwater Crescent ("Atwater property"). Both residences had been searched in August 2004 and the police had found large, sophisticated marijuana growing operations. Mr. Van-Xinh Do ("Do") owned the Darlington property at the time of the search. He also rented the Arlington property from his former girlfriend, Ms. Tuoi Le Thi Tran ("Tran"). Do and Tran were named as respondents on the AG's forfeiture application. [1]

2 In October 2006, the AG commenced a second application under the *CRA* seeking the forfeiture of two more properties in Windsor, Ontario, one located at 1140 Aubin Road ("Aubin property") and the other at 3142 Halpin Road ("Halpin property"). The police had searched those properties in December 2004 and found substantial marijuana

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growing operations. At the time of the search, Elwin McDougall ("McDougall") owned both properties. He was the respondent on this forfeiture application.

3 The two applications were eventually heard together on March 17, 2008.[2] On December 10, 2008, the application judge released reasons ordering the Darlington, Aubin and Halpin properties forfeited to the Crown in Right of Ontario. She declined to order the forfeiture of the Atwater property.

4 The proceedings before the application judge have generated four appeals:

• the AG appeals from the order refusing to forfeit the Atwater property to the Crown in Right of Ontario (C49874);

• Tran, who successfully opposed the application for an order forfeiting the Atwater property, appeals the application judge's refusal to grant her costs on the application (C49874);

• Do appeals from the order forfeiting the Darlington property (C49934); and

• McDougall appeals the order forfeiting the Aubin and Halpin properties (C49934).

5 I will address the appeals brought by McDougall and Do first. I would dismiss those appeals and affirm the orders directing the forfeiture of the Darlington, Halpin and Aubin properties.

6 I will next consider the AG's appeal. I would dismiss that appeal and affirm the order refusing forfeiture of the Atwater property.

7 Lastly, I will address Tran's appeal from the application judge's refusal to order the AG pay costs on the application. I would dismiss that appeal.

II

The Civil Remedies Act

8 These forfeiture applications were brought under ss. 3 and 8 of the *CRA*. That *Act* identifies two kinds of property that can be the subject of forfeiture orders. Under s. 3 the court may order the forfeiture of property acquired by unlawful activity and under s. 8 the court may order the forfeiture of property used to engage in unlawful activity. The former, described as the "proceeds of unlawful activity" in the *CRA*, is dealt with in Part II of the *Act* (ss. 2-6). The latter, referred to as the "instruments of unlawful activity" in the *CRA*, is dealt with in Part III (ss. 7-11). Property may fall under either, both, or neither definition.

9 The forfeiture provisions in Parts II and III closely parallel each other. I will review the operation of those provisions as necessary to understand the issues raised on these appeals. My review is not an attempt to provide a comprehensive description of the *CRA*. The relevant provisions are attached as an appendix to these reasons.

10 The *CRA* creates a civil forfeiture scheme and is not part of the criminal process. Its purposes are expressly set out in s. 1 and include the compensation of victims and the deterrence of crime. Binnie J. in *Ontario (Attorney General) v. Chatterjee*, [2009] 1 S.C.R. 624 (S.C.C.) said, at para. 4:

> Moreover, the *CRA* method of attack on crime is to authorize *in rem* forfeiture of its proceeds... It is true that forfeiture may have de facto punitive effects in some cases, but 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.

11 The nature of the proceedings contemplated by the *CRA* was described in *Chatterjee*, at para. 23:

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> In essence, therefore, the CRA creates a property-based authority to seize money and other things shown on a balance of probabilities to be tainted by crime and thereafter to allocate the proceeds to compensating victims of and remedying the societal effects of criminality. The practical (and intended) effect is also to take the profit out of crime and to deter its present and would-be perpetrators.

12 Section 3 of the *CRA* provides for a forfeiture order in respect of property that is "proceeds of unlawful activity". That phrase is defined in s. 2. Under that definition, and having regard to the definition of "property" in s. 2, any direct or indirect interest in property, real or personal, acquired by unlawful activity will constitute the "proceeds of unlawful activity". The definition is clearly a broad one and does not require that the person acquiring the property interest be involved in or even aware of the unlawful activity tainting that property interest: see *Chatterjee* at para. 46.

13 If the AG demonstrates that the property falls within the meaning of the "proceeds of unlawful activity", the court must make a forfeiture order under s. 3, subject to two exceptions. The first exception is found in s. 3(3) and applies where the party seeking to avoid forfeiture "proves" that he or she is a "legitimate owner". If the party is successful, the court must make an order that protects the legitimate owner's interest in the property, unless the AG demonstrates that such a protection order would "clearly not be in the interests of justice".

14 The phrase "legitimate owner" is also defined in s. 2. It can refer to a person who was the rightful owner of the property before the unlawful activity (subsection (a)), or to a person who acquired the property for fair value after the unlawful activity occurred (subsection (b)). In either case there are additional criteria that must be met for a person to qualify as a "legitimate owner". The definition of "legitimate owner" is a narrow one.

15 Tran was the rightful owner of the Atwater property at the time of the unlawful activity relied on by the AG. She claimed that she fell within the "legitimate owner" exception on the forfeiture application relating to the Atwater property. I will deal with this exception in more detail when I come to the AG's appeal from the refusal to order the forfeiture of the Atwater property.

16 The second exception to a forfeiture order is found in s. 3(1) itself. That section provides that the court may decline to order forfeiture where it would "clearly not be in the interests of justice". This language gives the court the discretion to refuse forfeiture even where the AG has established that the property is the "proceeds of unlawful activity" and the respondent on the application has failed to bring him or herself within the "legitimate owner" exception.

17 The application judge relied on this discretion as an alternative ground for refusing to order the forfeiture of the Atwater property. Therefore, the meaning of the phrase "clearly not in the interests of justice" is also an issue on the Crown's appeal relating to the Atwater property.

18 Section 8 of the *CRA* is the forfeiture provision in Part III of the *Act* that parallels s. 3 in Part II. Section 8 applies to property that falls within the definition of "instrument of unlawful activity" as defined in s. 7. Like s. 3, s. 8 requires that a forfeiture order be made if the property falls within the relevant definition, unless the party opposing forfeiture can demonstrate that he or she is a "responsible owner" or that it would "clearly not be in the interests of justice" to order forfeiture. "Responsible owner" is defined in s. 7.

19 For reasons I will explain below, these appeals can be determined without regard to the provisions in Part III of the *CRA*. I propose to follow that course and need not describe those provisions any further.

III

The Appeal Brought by Do and McDougall

20 These appeals involve the Darlington property owned by Do, and the Aubin and Halpin properties owned by McDougall. A brief history of each property is necessary before turning to the issues raised by the appeals.

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(a) The Darlington property

21 Do purchased the Darlington property in February 2000 for $77,000. He secured a mortgage from the TD Bank in the amount of $57,000. He made monthly payments on that mortgage of $463.66. Do is still the registered owner of the property.

22 In August 2004, the police executed a search warrant at the Darlington property and discovered a large commercial marijuana growing operation. The marijuana found in the residence had a value of slightly under $500,000. In November 2006, Do pled guilty to charges of producing marijuana and possessing marijuana for the purpose of trafficking.

23 In his affidavit filed on the forfeiture application, Do indicated that in 2004 he leased the Darlington property to someone he had met at the casino in Windsor. He knew the person would be using it to grow marijuana, but Do needed the rent money to pay large gambling debts. Do claimed to have a job but did not produce any documents or provide any information referable to his income or the payments made on the mortgage on the Darlington property. The application judge ultimately concluded at para. 60:

> Do asserted that he has maintained regular employment. However, records indicate that, since 2002, Do has lost approximately $600,000 at Casino Windsor alone. Given the nature of his expenses and given the size of the marijuana cultivation operation, it is more likely than not that Do was receiving income from the sale of marijuana. It is also more likely than not that he used his income to finance the downpayment and mortgage payments on the house.

(b) The Aubin property

24 McDougall purchased the Aubin property in May 1997 for $143,500. He placed a mortgage on the property in 1999 in the amount of $108,500. McDougall owned the Aubin property until sometime after these proceedings were commenced. The property was sold and did not generate funds beyond those owing to the mortgagee.

25 The Aubin property has a long history as a marijuana grow-op. In March 2001, the police executed a search warrant and found a large-scale marijuana growing operation involving some 382 plants. McDougall subsequently pled guilty to production of a controlled substance.

26 In December 2004, the police executed another search warrant on the Aubin property. Once again, they found a significant marijuana growing operation, although it was smaller than the previous one. At the time of the raid, two other people were living in the residence. One paid rent to McDougall. The drugs seized on this search were valued at approximately $90,000.

27 McDougall pled guilty to cultivating the marijuana found in the 2004 search. He explained that he and the two people living in the residence were involved in the cultivation and that one third of the plants belonged to him. He denied that he was intending to sell any of the product from his plants.

28 McDougall claimed to be self-employed. He refused to answer questions concerning the source of the funds used to purchase the property and pay the mortgage. He also refused to provide other documentation relevant to his income, including his income tax statements. McDougall agreed that at least one of his tenants at the Aubin property, and a co-venturer in the marijuana grow-op, paid him rent on a monthly basis.

29 The trial judge, at para. 39, made the following findings of fact:

> I find that the Crown has established, on the balance of probabilities, that 1140 Aubin Road is proceeds of unlawful activity. McDougall purchased 1140 Aubin Road in 1997 for $143,500. He stated that he was self-employed at the time in the clean-up and disposal business. However, he refused to disclose the source of the downpayment used to purchase the property. McDougall also refused to provide any bank statements or income tax statements with

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respect to his business, known as AMD Recycle. A mortgage was registered on title on June 29, 1999 in favour of the National Bank of Canada in the amount of $108,500. There is no evidence to indicate that the mortgage has been discharged.

(c) The Halpin property

30 McDougall purchased the Halpin property in January 2004 for $140,000. There was a mortgage in the amount of $102,500. In December 2004, the police executed a search warrant on the Halpin property. They found a marijuana grow-op. The street value of the drugs found on site was about $37,000.

31 McDougall leased the Halpin property to a man named Hamilton who was charged in connection with the grow-op. Hamilton paid rent of $650.00 a month. McDougall knew there was a marijuana grow-op at the Halpin property and he knew that the rent was in all likelihood coming from the proceeds of that operation.

32 The Halpin property was sold in May 2008. After payment of the amount owing to the mortgagee, a small amount remained. It is being held in trust by a law firm pending the outcome of these proceedings.

33 The trial judge made the following findings in respect of Halpin Road:

> McDougall purchased the 3142 Halpin Road property in 2004 for $140,000.00. He took out a mortgage for $102,500.00 from the Home Trust Company. McDougall refused to provide any bank statements, income tax filings, or other financial documentation disclosing the source of funds used for the downpayment and for the mortgage payments on the property. Absent evidence to the contrary, it is more likely than not that McDougall used rent proceeds from Hamilton to make payments on the property. McDougall was aware that Hamilton was growing marijuana, and had to know that the rent money was likely derived from this activity.

(d) Issues raised by Do and McDougall

34 Do and McDougall challenge the trial judge's finding that the three properties were the proceeds of unlawful activity and the trial judge's finding that the properties were also instruments of unlawful activity. On the first finding, forfeiture was ordered under s. 3 of the *CRA*, and on the second finding, forfeiture was ordered under s. 8. If either is sustained, the forfeiture orders should be upheld, subject to the other arguments advanced on behalf of Do and McDougall.

35 For reasons I will develop, I would hold that the application judge did not err in finding that each of the three properties fell within the definition of the "proceeds of unlawful activity". As forfeiture is justified under s. 3, it is unnecessary to the determination of this appeal to decide whether the properties also fell within the definition of "instrument of unlawful activity" and could be forfeited under s. 8. It is not only unnecessary to decide that question, but also inappropriate to do so. Unlike the forfeiture power in s. 3 of the *CRA*, the constitutionality of the forfeiture power in s. 8 has not been definitively decided. By agreement, the parties did not litigate the constitutionality of s. 8 before the application judge. To address the merits of the grounds of appeal relating to the forfeiture power under s. 8, this court would be required to consider the constitutional arguments that were not vetted before the application judge. That would not be a prudent course.

36 I will not address the grounds of appeal relating to Part III of the *CRA*, in particular, the argument directed at the proper interpretation of s. 7(2) of the *CRA*. Those arguments have no relevance to the correctness of the forfeiture orders made under s. 3.

37 Counsel for Do and McDougall raise four issues arising out of the forfeiture order made under s. 3:

> i. Did the application judge err in holding that the AG had established that the properties were the "proceeds of unlawful activity"?

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ii. Did the application judge err in holding that the AG was required to establish that the properties were the proceeds of unlawful activity on the balance of probabilities, rather than beyond a reasonable doubt?

iii. Did the application judge err in law in placing the onus on Do and McDougall to demonstrate that they fell within the "legitimate owner" exception to forfeiture?

iv. Did the application judge err in failing to hold that the AG was estopped from making a forfeiture application under the *CRA* by virtue of the federal Crown's failure to seek a forfeiture order in the criminal proceedings?

a) Did the application judge err in holding that the AG had established that the properties were the "proceeds of unlawful activity"?

38 Counsel submits that the application judge improperly drew adverse inferences against Do and McDougall from their failure to answer questions or produce documentation relevant to their sources of income and the sources of the money used to fund the purchases of the properties and the payments on the mortgages on the properties. Counsel contends that without this improper inference, the evidence could not reasonably support the finding that the properties were the "proceeds of unlawful activity".

39 Clearly, if money acquired through the sale of drugs was used to purchase any of these properties, that property is the "proceeds of unlawful activity". Counsel also accepts that if drug money is used to pay down a mortgage, the interest acquired in the property is the "proceeds of unlawful activity" under the definition in s. 2 of the *CRA*.

40 I agree that payments on the mortgage constitute the acquisition of an interest in the property. Under s. 6 of the *Land Registration Reform Act*, R.S.O. 1990, c. L.4, a mortgage ("charge") does not, unlike the common law, operate as a transfer of the legal estate in the land. The charge does, however, give the mortgagee equitable rights in the property that remain in place until the obligation secured by the charge is discharged.

41 Although the mortgagee maintains an equitable interest until the obligation is discharged, payments on the mortgage affect the respective rights of the mortgagor and mortgagee. If a mortgagor has made significant payments against the mortgage, the defaulting mortgagor may receive relief from forfeiture and be allowed to redeem the property. Payments on the mortgage can be seen as enhancing the mortgagor's equity and diminishing the mortgagee's equitable interest: see *355498 B.C. Ltd. v. Namu Properties Ltd.* (1999), 171 D.L.R. (4th) 513 (B.C. C.A.) at para. 17; *Coast-to-Coast Industrial Development Co. v. 1657483 Ontario Inc.*, [2009] O.J. No. 5212 (Ont. S.C.J.) at para. 14. In my view, paying down a mortgage constitutes a direct acquisition of an interest in property for the purposes of the *CRA*.

42 The trial judge concluded, at para. 60, that Do used drug money to finance both the downpayment and the mortgage payments on the Darlington property. Do purchased the property in February 2000, four and a half years before the police discovered the marijuana grow-op in the residence. Even if the evidence supports the inference that the grow-op at the Darlington property was in place for quite some time before the August 2004 search, that evidence cannot reach back to 2000. There is no evidence connecting Do to any drug operation at the Darlington property or anywhere else in 2000 when he purchased the Darlington property. There is no evidence from which it could reasonably be inferred that Do used the proceeds of the production and sale of drugs to fund the purchase of the Darlington property in 2000.

43 The evidence does, however, support the inference that Do paid his mortgage using money generated from the marijuana growing operation. That operation was large and well-established at the time of the search. There was almost $500,000 in product on site. It is a fair inference that Do had been running the marijuana growing business at the Darlington property for some time and that a business of that size had generated considerable income.

44 Although Do indicated in his affidavit that he had a job, he did not provide any details of the income earned by him from that job or any details as to the sources of the funds used to pay down the mortgage. Do did admit that he had very large gambling debts. Those debts no doubt put further strain on any source of income that Do had. The

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only source of income alluded to by Do was rent paid to him on the Darlington property by a person who Do knew was using the property to grow marijuana.

45 I do not think the application judge drew any adverse inference against Do from his failure to identify sources of income and the source of the funds used to pay down the mortgage. Do was not cross-examined. The application judge was entitled to draw inferences from the facts established by the AG's material and in doing so she was entitled to have regard to the absence of any evidence documenting any other sources of income or other sources for the funds used to pay the mortgage on the Darlington property. The inferences urged by the AG stood unanswered except for Do's bald assertion that he had a job. It was open to the application judge to draw the inferences she did concerning the funding of the mortgage payments on the Darlington property. On those findings, the property was properly characterized as being the "proceeds of unlawful activity".

46 The application judge's findings that the Aubin property and the Halpin property, both owned by McDougall, were the "proceeds of unlawful activity" can be considered together. The evidence supported the inference that McDougall was in the business of producing and selling marijuana and had been in that business for several years. McDougall was criminally implicated in three separate grow-ops between 2001 and 2004. He also had a prior conviction for drug trafficking.

47 In cross-examination on his affidavit, McDougall admitted that Hamilton, his tenant at the Halpin property, produced marijuana on the property and that the rent paid to McDougall by Hamilton likely came from the sale of marijuana produced on the property. McDougall acknowledged using that drug money to pay his mortgage on the Halpin property. These admissions provide a further basis for finding that the Halpin property constituted the "proceeds of unlawful activity".

48 In his affidavit, McDougall presented himself as an entrepreneur who operated two or three different businesses. McDougall made these assertions presumably to demonstrate that he had sources of income other than the income derived from his marijuana growing business.

49 McDougall refused to provide any details of his income or to identify the sources used to pay down the mortgages on his properties (other than money received from his drug-producing tenant). McDougall's counsel, at the cross-examination of McDougall and in this court, maintained that McDougall was not required to answer questions about the mortgage or his income because the AG's material filed on the application did not provide any factual basis for the AG's allegations concerning the property.

50 An affiant is not entitled to refuse to answer relevant questions in cross-examination because the affiant, or his lawyer, thinks the opposing party's case is insufficient to warrant a response. The allegations made in the application, the supporting material filed by the applicant, and the responding material, including the affiant's affidavit, draw the boundaries of relevance for the purpose of cross-examination. The acquisition of the properties through unlawful activity was a central allegation in the application. Those allegations made the source of the funds used to pay down the mortgages a relevant fact. McDougall was required to answer questions concerning the payment of the mortgages and his income sources regardless of his view of the sufficiency of the AG's material filed in support of the allegations that the properties were the proceeds of unlawful activity.

51 In refusing to answer questions, McDougall risked, at a minimum, that the inferences available from the AG's evidence would remain unchallenged and, therefore, more likely to be drawn. I think he also risked an adverse inference. The application judge was not obliged to draw that inference, but it was within her discretion to do so. She did not misuse McDougall's refusals to answer relevant questions concerning the property. I would affirm her findings that both properties were the "proceeds of unlawful activity".

(ii) Did the application judge err in holding that the AG was required to prove that the properties were the proceeds of unlawful activity on the balance of probabilities, rather than beyond a reasonable doubt?

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52 Section 16 of the *CRA* specifically provides that findings of fact in proceedings under that *Act* "shall be made on the balance of probabilities". That standard of proof reflects and is consistent with the civil nature of the forfeiture proceedings.

53 As I understand counsel's submission, he argues that a forfeiture order made under the *CRA* on a balance of probabilities standard violates s. 7 of the *Charter* in that it infringes an individual's liberty interest in a manner that is inconsistent with the principles of fundamental justice. Counsel identifies the liberty interest as "a right to property". I take him to identify the principle of fundamental justice at play as a requirement that the state meet the reasonable doubt standard when seeking an order that interferes with an interest protected by s. 7.

54 Section 7 of the *Charter* does not protect economic interests. I am far from satisfied that the liberty right includes a "right to property". I am, however, firmly convinced that the application of the balance of probabilities standard in a civil proceeding, even where s. 7 rights are implicated, is not inconsistent with the principles of fundamental justice. To the contrary, the balance of probabilities standard is a basic tenet of our civil justice system: see *C. (R.) v. McDougall*, [2008] 3 S.C.R. 41 (S.C.C.).

55 Many civil proceedings in which the government and an individual are the protagonists involve the individual's s. 7 rights. I am not aware of any case in which the court has held that if a litigant's constitutional rights are engaged in a civil proceeding, s. 7 demands the abandonment of the balance of probabilities standard in favour of a reasonable doubt requirement. In my view, the balance of probabilities standard is consistent with the principles of fundamental justice as they apply in civil proceedings.

(iii) Did the application judge err in law in placing the onus on Do and McDougall to demonstrate that they fell within the "legitimate owner" exception to forfeiture?

56 In his factum, counsel argued that the application judge wrongly put the onus on Do and McDougall to prove they were "legitimate owners". Counsel ties this submission to s. 15.5 of the *CRA*. That section directs that notice of forfeiture proceedings must be given to certain entities, including those who appear through the parcel register of the property to have an interest in the property.

57 I cannot see any connection between s. 15.5, essentially a procedural notice provision, and the operation of the "legitimate owner" exception to forfeiture orders. Section 3(3) of the *CRA* requires the party claiming to be a "legitimate owner" to "prove" that he or she meets the criteria in that definition. Section 16 of the *CRA* requires the party who carries the onus on a particular fact to meet that onus on the balance of probabilities.

58 The statute is crystal clear. The party relying on the "legitimate owner" exception bears the burden of proving that the exception applies.

(iv) Did the application judge err in holding that the AG was not estopped from pursuing a forfeiture application?

59 Do and McDougall were prosecuted for drug offences by the federal Crown. The federal Crown did not seek forfeiture orders as part of the sentencing process, though it could have done so under the relevant legislation: *Controlled Drugs and Substances Act*, S.C. 1996, c. 19. There is no suggestion that the federal prosecutor made any representations to Do or McDougall one way or the other in relation to forfeiture. It would appear that forfeiture was never an issue in the criminal proceedings.

60 The AG in right of the provincial Crown brings this application. This is a civil *in rem* proceeding and is not connected to or dependent upon the prior criminal proceedings, although the outcome of those proceedings can have evidentiary value in this proceeding: *CRA* s. 17.

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61 Counsel submits that the federal Crown in the criminal prosecution and the provincial AG in these proceedings are "indivisible" and that the decision made by the federal prosecutors not to pursue a forfeiture order in the criminal proceedings is binding on the provincial AG in this proceeding. Counsel cites no authority for this proposition.

62 The submission cannot survive the analysis in *Chatterjee*. In the course of discussing the potential intersection of proceedings under the *CRA* and forfeiture applications in the course of sentencing proceedings, Binnie J., after recognizing the possibility of abusive re-litigation of factual issues, said, at para. 49:

> ... but where no forfeiture is sought in the sentencing process, I see no reason why the Attorney General cannot make an application under the *CRA*. Where forfeiture is sought and refused in the criminal process, a different issue arises.

63 I would dismiss the appeals brought by Do and McDougall.

IV

The AG's Appeal

(a) The Atwater property

64 The AG appeals the application judge's refusal to order the forfeiture of the Atwater property. Tran purchased the property in June 2001 for $166,000 with a downpayment of $41,500. The Royal Bank took a mortgage in the amount of $124,500. Tran paid $833 a month on the mortgage.

65 Tran lived in the Atwater property with her children. In February or March 2004, she rented the property to her then-boyfriend, Do. Tran continued to live in the property until June or perhaps July 2004 when she learned that Do was married. Tran, who was angry with Do, moved out of the Atwater property and went to Toronto to live with her children. Do continued to live in the Atwater property and pay rent. Tran returned to Windsor from time to time in the summer of 2004 to, among other things, check on the property. According to her, she did not enter the house.

66 The police executed a search warrant at the Atwater property on August 13, 2004. They found 854 marijuana plants with a street value of over $1,000,000. They also found equipment, including a hydro bypass, indicating that the property housed a large-scale active marijuana grow-op. The evidence found at the property was consistent with the grow-op having been in operation through at least one grow cycle, a period of three months.

67 Do and Tran were charged with cultivating marijuana and with trafficking in marijuana. Do pled guilty to both charges. The charges were withdrawn against Tran. In his affidavit filed on the application, Do insisted that Tran had nothing to do with the marijuana grow-op. Tran filed an affidavit denying any knowledge of the grow-op at the Atwater property. She was cross-examined on her affidavit. Tran testified that she was also unaware of Do's marijuana grow-op at the Darlington property, even though she visited him there a number of times in the summer of 2004.

68 Tran indicated that Do paid her $1,200 a month in rent between February and August 2004. He paid in cash and she applied the cash to the payment of the mortgage. The Atwater property was sold under power of sale sometime after the application was heard. The proceeds of the sale were less than the outstanding amount owed on the mortgage.

(b) The application judge's findings

69 The application judge found, at para. 75, that the Atwater property was the proceeds of unlawful activity by virtue of Tran's admitted use of the rent payments from Do to make her mortgage payments. The application judge concluded that Do's income came from the cultivation and sale of marijuana at the Darlington and Atwater properties.

70 The application judge declined to make a forfeiture order in respect of the Atwater property for two reasons. First, she concluded that Tran's conduct was "consistent with that of a legitimate owner" (para. 79). Second, she held that a

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forfeiture order on the Atwater property "would clearly not be in the interests of justice" (para. 82). The AG challenges both findings.

(c) Was Tran a "legitimate owner" within the meaning of s. 2 of the CRA?

71 Counsel for the AG submits that the application judge erred in holding that the "legitimate owner" exception to a forfeiture order was available to Tran. Counsel contends that this error flowed from a misapprehension of evidence, an improper placing of the burden on the AG to disprove that Tran was a "legitimate owner", and a failure to draw adverse inferences from Tran's refusal to answer questions concerning her income and the funding of her purchase of the property.

72 As explained earlier, the "legitimate owner" exception comes into play only if the court is satisfied that the AG has established that the property is the "proceeds of unlawful activity". The exception provides potential protection for the property interests of those who can "prove" on the balance of probabilities that they meet the qualifications of a "legitimate owner", even though the property is the "proceeds of unlawful activity". Contrary to the submissions of counsel for Tran, I do not think that the phrase "legitimate owner" in s. 3 has anything to do with the question of standing under the *Act*.

73 I find it unnecessary to deal with the specific arguments made by the AG in support of the contention that the application judge misapplied the "legitimate owner" exception. On a plain reading of the statutory language, there is no evidence capable of bringing Tran within the definition of "legitimate owner".

74 Tran was the rightful owner of the Atwater property before the unlawful activity occurred. The relevant definition of "legitimate owner" is therefore found in subsection (a):

> "legitimate owner" means, with respect to property that is proceeds of unlawful activity, a person who did not, directly or indirectly, acquire the property as a result of unlawful activity committed by the person, and who,
>
> > (a) was the rightful owner of the property before the unlawful activity occurred <u>and was deprived of possession or control of the property by means of the unlawful activity</u>
>
> [Emphasis added.]

75 To fall within the definition of "legitimate owner" set out above, three requirements must be met:

- the person did not acquire the property as a result of unlawful activity;
- the person was the rightful owner of the property before the unlawful activity occurred; and
- the person was deprived of possession or control of the property by means of the unlawful activity.

76 On the evidence, Tran meets the first and second requirements. The application judge did not turn her mind to the third requirement. There was no evidence that Tran was ever deprived of possession or control of the Atwater property by means of Do's unlawful cultivation of marijuana at that property. To the contrary, on the evidence, the only possession or control Do had was that given to him under the lease. Had the application judge turned her mind to the third requirement in the definition of "legitimate owner", she would have found that Tran did not prove that she was a "legitimate owner" of the Atwater property.

(d) Did the application judge err in the interpretation of the "clearly not in the interests of justice" exception to forfeiture?

(i) The reasons

77 The application judge interpreted the "interests of justice" exception in s. 3(1) as having application only where the AG had established that the property was forfeitable under s. 3. She put it this way, at paras. 26 and 30:

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> ... First, the interests of justice test is only triggered when the standard of proof has been met. If the Crown has failed to discharge its burden, there is no need to weigh the interests of justice; the case for forfeiture has not been made out. The enactment discloses a recognition by the Legislature there will be cases in which forfeiture should not be ordered, notwithstanding that it has been proved that the property is proceeds or an instrument of unlawful activity. The court retains a residual discretion to weigh competing interests and determine whether, independent of the statutory criteria, it is fair and just to issue the order.
>
> . . .
>
> ... Viewed in this light, it makes sense that the court is empowered to consider overarching issues of fairness and proportionality before ordering forfeiture, even where the standard of proof has been met.

78 The application judge exercised her discretion against forfeiture of the Atwater property for three reasons. First, she found that Tran was not connected to the unlawful activity at the Atwater property either by actual criminal participation, or by knowledge of the criminal activities that were going on at the property (para. 84). Second, the application judge observed that Tran had owned the property since 2001, over three years before the unlawful activity occurred in 2004 (para. 88). Third, she concluded that a forfeiture application following the withdrawal of criminal charges against Tran created an appearance of unfairness (para. 87).

(ii) The AG's arguments

79 Counsel for the AG submits that the application judge gave an unwarranted and overly broad reading to the phrase "interests of justice". Counsel argues that the application judge's interpretation ignored the purposes of the *CRA* and the requirement that the party resisting forfeiture show that forfeiture is clearly not in the interests of justice.

80 Counsel for the AG further contends that proportionality in the sense of the relationship between the role played by the property owner in the unlawful activity and the harm suffered by the property owner should a forfeiture order be made plays no role in deciding whether forfeiture would be "clearly not in the interests of justice". Counsel maintains that proportionality is a criminal law concept and has no place in the civil regime created under the *CRA*.

81 Counsel for the AG next submits that the strength of the nexus between the property and the unlawful activity is the primary, if not the sole, consideration in determining whether forfeiture would "clearly not be in the interests of justice". On this submission, a weak nexus between the property and the unlawful activity could result in a finding that forfeiture was "clearly not in the interests of justice". Counsel argues that the Atwater property was being used as a grow-op, making the connection between the property and the unlawful activity a strong one.

82 Finally, counsel challenges the findings of fact made by the application judge. While counsel urges this court to find that the nature of Tran's involvement in the criminal activity at the Atwater property had little, if any, relevance to whether the forfeiture order should be made, counsel also argues that the application judge misapprehended the relevant evidence. Counsel submits that on a reasonable reading of the evidence, Tran must have at least known that Do was operating the marijuana grow-op at the Atwater property in the summer of 2004.

(iii) Analysis

83 The relevant part of s. 3(1) reads:

> ... the Superior Court of Justice shall, subject to subsection (3) [the legitimate owner exception] and except where it would clearly not be in the interests of justice, make an order forfeiting property that is in Ontario to the Crown in Right of Ontario if the court finds that the property is proceeds of unlawful activity.

84 I agree with the application judge that the "interests of justice" exception to forfeiture operates where the Crown has otherwise shown that the property is subject to forfeiture and the respondent has not brought herself within the

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"legitimate owner" exception. The "interests of justice" exception to forfeiture recognizes that, given the very broad definition of "proceeds of unlawful activity" and the narrow exception to forfeiture carved out by the definition of "legitimate owner", there will be cases that fall within the scope of the forfeiture power where, on any reasonable view, forfeiture would be a draconian and unjust result. The Legislature, rather than attempting to identify with specificity factors that would justify granting relief from forfeiture, used the broad phrase "interests of justice" and left it to the court on a case-by-case basis to determine when forfeiture was "clearly not in the interests of justice". [3]

85 I do accept counsel for the AG's contention that s. 3(1) does not contemplate that the question of forfeiture will be decided based on a mere balancing of the pros and cons of making a forfeiture order. The word "clearly" modifies the phrase "interests of justice" and must be given some meaning. I think the word "clearly" speaks to the cogency of the claim advanced for relief from forfeiture. The party seeking relief must demonstrate that, in the circumstances, the forfeiture order would be a manifestly harsh and inequitable result.

86 The application judge analogized the discretion to refuse forfeiture to the discretion to refuse to issue a search warrant even though the statutory preconditions for the issuing of a warrant were met. I think a better analogy is the civil remedy of relief from forfeiture. Courts of equity have always had the power to relieve against the forfeiture of property consequent upon a breach of contract: see *McBride v. Comfort Living Housing Co-operative Inc.* (1992), 7 O.R. (3d) 394 (Ont. C.A.), at 402 . That power is now expressed in various statutes dealing with specific kinds of contracts (*e.g.* contracts of insurance, leases) and has been given more general expression in s. 98 of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43:

> A court may grant relief against penalties and forfeitures, on such terms as to compensation or otherwise as are considered just.

87 The power to relieve from forfeiture is discretionary and fact-specific: *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, [1994] 2 S.C.R. 490 (S.C.C.) at p. 504. The power is predicated on the existence of circumstances in which enforcing a contractual right of forfeiture, although consistent with the terms of the contract, visits an inequitable consequence on the party that breached the contract. Relief from forfeiture is particularly appropriate where the interests of the party seeking enforcement by forfeiture can be fully vindicated without resort to forfeiture. Relief from forfeiture is granted sparingly and the party seeking that relief bears the onus of making the case for it: *1497777 Ontario Inc. v. Leon's Furniture Ltd.* (2003), 67 O.R. (3d) 206 (Ont. C.A.) at paras. 67-69, 92.

88 In *Saskatchewan River Bungalows*, at p. 504, Major J. identified the factors relevant to the exercise of the power to grant relief against forfeiture:

> ... The factors to be considered by the court in the exercise of its discretion are the conduct of the applicant, the gravity of the breaches, and the disparity between the value of the property forfeited and the damage caused by the breach.

89 The first factor, the conduct of the breaching party, requires an examination of the reasonableness of the breaching party's conduct as it relates to all facets of the contractual relationship, including the breach in issue and the aftermath of the breach. Osborne J.A. explained the nature of this inquiry in *Williams v. Paul Revere Life Insurance Co.* (1997), 34 O.R. (3d) 161 (Ont. C.A.) at p. 175:

> <u>The reasonableness test requires consideration of the nature of the breach, what caused it and what, if anything, the insured attempted to do about it.</u> All of the circumstances, including those that go to explain the act or omission that caused the lapse (forfeiture) of the policy, should be taken into account. It is only by considering the relevant background that the reasonableness of the insured's conduct can be realistically considered.
>
> [Emphasis added.]

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90 The examination of the reasonableness of the breaching party's conduct lies at the heart of the relief from forfeiture analysis. A party whose conduct is not seen as reasonable cannot hope to obtain relief from forfeiture: see *Paul Revere* at p. 175; *Saskatchewan River Bungalows* at pp. 504-05.

91 The second factor identified in *Saskatchewan River Bungalows*, the gravity of the breach, looks both at the nature of the breach itself and the impact of that breach on the contractual rights of the other party: see *Leon's Furniture* at paras. 75-78. If, for example, the forfeiture provision operated as a means of securing payment of the rent required under a lease, the fact that the breaching party had paid all amounts owing could obviate the need to resort to forfeiture and support a claim for relief from forfeiture.

92 The third factor identified in *Saskatchewan River Bungalows* engages a kind of proportionality analysis. If there is a large difference between the value of the property to be forfeited and the amount owing as a result of the breach, equity will favour relief from forfeiture. For example, in *Liscumb v. Provenzano Estate* (1985), 51 O.R. (2d) 129 (Ont. H.C.), aff'd (1986), 55 O.R. (2d) 404 (note) (Ont. C.A.), the trial judge, in granting relief from forfeiture, observed that the property to be forfeited was worth between three and four times the amount owing on the debt giving rise to the breach. The trial judge relied on this disproportionality between the debt owing and the consequences of the forfeiture as one factor in favour of granting relief from forfeiture.

93 There are several similarities between a relief from forfeiture provision like s. 98 of the *Courts of Justice Act* and the "clearly not in the interests of justice" exception in s. 3(1) of the *CRA*. Both accept that the unqualified enforcement of one party's legal right to take the property of another, whether under contract or statute, is not always in the best interests of justice and that exceptions should be made based on specific circumstances. The discretion in s. 3(1), like the discretion in s. 98, is framed in broad terms that invite a case-by-case consideration of the specific circumstances. Finally, the power to relieve from forfeiture under s. 3(1), again like the power in s. 98, will not be routinely exercised to allow a party to avoid prescribed statutory or contractual consequences. Relief from forfeiture is very much the exception and will be granted only where the party seeking that remedy clearly makes the case that forfeiture would be an inequitable and unjust order in all of the circumstances.

94 While I regard the "interests of justice" exception in s. 3(1) as a relief from forfeiture provision that has much in common with the more generic form of that remedy, I acknowledge that s. 3(1) does not operate in exactly the same way as does relief from forfeiture in the realm of private law. Relief from forfeiture in the contractual context pits competing private rights against each other. Those rights are generally quantifiable in economic terms. A forfeiture claim under the *CRA* engages important public concerns. The interests of justice in s. 3(1) encompass both public and private interests.

95 I agree with counsel for the AG that forfeiture orders under the *CRA* are intended to further the purposes of the *Act* as set out in s. 1. It follows that in deciding whether to grant relief from forfeiture under s. 3(1), the court must consider the effect of granting relief on the achievement of those purposes. The power to relieve from forfeiture cannot be allowed to subvert the purposes of the *CRA*.

96 I do not, however, agree that the "interests of justice" in s. 3(1) are limited to the purposes of the *CRA* identified in s. 1. Those purposes are part of, but cannot be equated with, the "interests of justice". That phrase is a broad one and includes maintaining public confidence in the civil justice process. That confidence is promoted by orders that are, broadly speaking, in accord with the community's sense of fairness. A forfeiture order made in circumstances where any reasonable person would regard the order as excessive, while perhaps serving the purposes of the *CRA* in the narrow sense, would do a real disservice to the administration of justice and thereby undermine rather than promote the "interests of justice".

97 A court asked to grant relief from forfeiture under s. 3 must consider all factors that are relevant to the "interests of justice". It is not possible to catalogue all of the factors that could properly be taken into account in evaluating the interests of justice in any given case. Those factors certainly include the closeness of the connection between the property

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and the illegal activity: see, for example, *Ontario (Attorney General) v. 170 Glenville Road (In Rem)*, [2010] O.J. No. 2865 (Ont. S.C.J.) at para. 72.

98 I will focus on three factors that are significant to the decision not to order the Atwater property forfeited. Two of those factors, the conduct of the party whose property is the subject of the forfeiture application, and the value of that party's interest in the property compared to the value of the property that is tainted by the unlawful activity, are analogous to two of the considerations that figure prominently in the relief from forfeiture jurisprudence. The third factor examines the interplay between the purposes of the *CRA* and the exercise of the "interests of justice" discretion in s. 3.

99 As explained above, the reasonableness of the conduct of the breaching party is a crucial consideration when that party seeks relief from forfeiture in private law matters. In the context of a forfeiture application under s. 3 of the *CRA*, it is the conduct of the party whose property is the target of the forfeiture application as it relates to the unlawful activity that is important. That conduct is not limited to any involvement in the criminal activity. It extends to any knowledge of the criminal activity, the failure to take reasonable steps to prevent the criminal activity, any profit derived knowingly or unknowingly from the criminal activity, and any steps taken after the property owner became aware of the criminal activity.

100 In holding that the property owner's conduct as it relates to the unlawful activity is an important consideration in determining whether to grant relief from forfeiture, I do not suggest that actual involvement in the criminal activity is in any way a prerequisite to a forfeiture order under the *CRA*. It is not. However, nothing in the *CRA* precludes the common sense recognition that the conduct of the property owner will be important when deciding whether it is clearly not in the interests of justice to order forfeiture. Surely, a property owner who had no involvement in the criminal activity, was unaware of that activity, had acted reasonably throughout and did not profit from the activity, should, as a matter of elementary justice, be treated differently on a forfeiture application than the property owner who was involved in and directly profited from the unlawful activity. If *170 Glenville Road, King*, at para. 78, stands for the proposition that a consideration of the property owner's involvement in the criminal activity in issue is irrelevant to the "interests of justice", I must, with respect, disagree.

101 It is suggested that by considering the property owner's conduct in respect of the unlawful activity, one confuses the civil process of forfeiture with concepts of criminal liability and sentencing. I see no confusion. There are obvious and important differences between civil and criminal proceedings. Those labels cannot, however, obscure the reality underlying any particular proceeding. Regardless of whether a forfeiture proceeding is labelled as civil, criminal, *in personam* or *in rem*, taking a person's property away from that person has a punitive component: see *Chatterjee* at para. 4. The interests of justice require that punitive orders made by the courts be reasonably perceived by the community as being deserved by those against whom they are made.

102 The application judge found that Tran did not participate in, and had no knowledge of Do's unlawful activity at the Atwater property before the police raid in August 2004. She also found that Tran was unaware that Do was paying the rent with drug money. In making these findings, the trial judge relied on Tran's evidence. There was considerable evidence to the contrary, indicating that at a minimum Tran was aware of the drug activity.

103 It was for the application judge to assess the evidence. I cannot describe her findings as unreasonable on the totality of the evidence. Those findings stand and are entitled to significant weight in assessing Tran's claim for relief from forfeiture.

104 The second factor I will address is the difference in the value of Tran's total interest in the Atwater property and the value of the part of the Atwater property acquired directly or indirectly through Do's drug activities. On the application judge's findings, Tran purchased the property in June 2001 with a downpayment of $41,500. There is no evidence connecting that downpayment to any unlawful activity. Tran presumably paid the mortgage for the next three years. There is no evidence connecting any of those payments to unlawful activity. Do began paying rent in February 2004. The rent was used to pay the mortgage. On the application judge's findings, the criminal activity began in about June

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2004. Tran received three months' rent totalling $2,499 between June 2004 and August 2004. That money, unbeknownst to Tran, came from Do's drug activity. The property interest acquired by Tran as a result of Do's unlawful activity was limited to three mortgage payments totalling $2,499. That amount is small compared to the value of Tran's entire interest in the property, which included the $41,500 downpayment and some three years of mortgage payments.

105 The application judge did not specifically refer to the disparity in the value of Tran's total interest in the property, and the value of the interest acquired as a result of unlawful activity. She may have been indirectly referring to that disparity when she observed that Tran had purchased the property in June 2001 with a sizeable downpayment, and that the rent payments from the drug proceeds did not begin until three years later and continued for only three months.

106 The significant disparity described above was a relevant consideration in determining whether forfeiture would "clearly not be in the interests of justice". It is particularly significant where the property owner is not implicated in or aware of the criminal activity. An order requiring forfeiture of an entire interest in property based on the fact that a small part of that interest was unknowingly acquired through unlawful activity could well be seen as an unwarranted and unjust use of the forfeiture power.

107 I turn now to the third factor, the interplay between the purposes of the *CRA* and the exercise of the discretion to relieve from forfeiture. Section 1 of the *CRA* identifies compensation of victims, crime prevention and deterrence as the purposes motivating the remedies provided by the *CRA*. It is fair to say that in most circumstances those purposes are furthered by a forfeiture order. As explained earlier, the purposes of the *CRA* are part of, but not synonymous with, the "public interest" concerns in s. 3.

108 The purposes identified in s. 1 of the *CRA* do, however, mandate the drawing of a distinction, for the purposes of determining whether to relieve from forfeiture, between innocent property owners and those who are involved in or at least have knowledge of the relevant criminal activity. Directing forfeiture of the property of a person who had no involvement in, knowledge of, or responsibility for the relevant criminal activity would hardly seem to further the deterrence objective of the *CRA*. There is no need to deter the innocent and responsible property owner by seizing his or her property. Indeed, it could be argued that disregarding the property owner's lack of involvement in or knowledge of the criminal activity when deciding the question of forfeiture could well undermine the deterrence goals of the *CRA*. If forfeiture falls indiscriminately on the innocent and the complicit, there may seem to be little value in avoiding involvement in criminal activity. Given the application judge's findings of fact, an order requiring Tran to forfeit her interest in the Atwater property would not promote the deterrence goals underlying the *CRA*.

109 The three factors discussed above, considered in combination, justified the application judge's decision not to order forfeiture of Tran's interest in the Atwater property. I would not interfere with the exercise of that discretion. I will, however, address one additional consideration relied on by the application judge that, in my view, has no relevance to the exercise of her discretion.

110 The application judge found the forfeiture application created the appearance of unfairness because it followed the withdrawal of criminal charges against Tran by the federal prosecutor. In her view, the forfeiture application could be seen as an attempt to gain forfeiture while avoiding the more rigorous criminal standard of proof in favour of the civil balance of probabilities requirement.

111 I see no unfairness in the bringing of the application. The federal Crown, responsible for the drug prosecution, chose not to prosecute Ms. Tran. The provincial AG, responsible for the operation of the *CRA*, chose to pursue a forfeiture order. The AG's claims did not depend upon demonstrating, to any standard of proof, that Tran was complicit in any criminal activity. The AG's decision to pursue a forfeiture claim can hardly be described as arbitrary or unfair when, under the terms of the legislation, the AG established a *prima facie* entitlement to the forfeiture order, subject to the "interests of justice" exception in s. 3. That exception saved Tran's interest in the Atwater property.

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112 In summary, even though I reject the application judge's finding of an appearance of unfairness in the proceedings, I would affirm her decision that forfeiture of the Atwater property was "clearly not in the interests of justice". On the application judge's findings, Tran was innocent of any involvement in the unlawful activity, and only a small fraction of her interest was acquired as a result of unlawful activity. To order forfeiture in those circumstances would constitute a punitive and excessive exercise of the forfeiture order that would not further the purposes of the *CRA*.

V

Tran's Appeal from the Costs Order

113 The application judge made no order as to costs in respect of either application. Counsel for Tran seeks leave to appeal from that order, asks the court to grant leave, and order costs in favour of Tran. Counsel submits that the application judge erred in not giving the parties an opportunity to make submissions on costs and that there is no reason to depart from the normal rule that the successful party, in this case Tran, should get her costs.

114 I would agree with Tran's counsel that the application judge should have entertained submissions on costs. That said, we have now done so and can, therefore, address the merits of the submission. As our analysis reveals, the application brought by the AG had considerable merit in that the preconditions to a forfeiture order were all established by the AG. Tran escaped forfeiture only by virtue of the relief from forfeiture provision in s. 3. A "no costs" order aptly reflects the outcome of this application. I would grant leave to appeal the costs order, but would dismiss that appeal.

VI

Conclusion

115 I would dismiss all of the appeals. On the appeals brought by McDougall and Do, I would order costs in favour of the AG as against Do in the amount of $4,500 and as against McDougall in the amount of $4,500, inclusive of disbursements and HST.

116 In respect of the litigation between the AG and Tran, that is, the Crown's appeal and Tran's costs appeal, I would consider the two together and order costs in favour of Tran in the amount of $7,000, inclusive of disbursements and HST.

***David Watt J.A.*:**

I agree

***Gloria Epstein J.A.*:**

I agree

Appeals dismissed.

Appendix A

Civil Remedies Act, 2001 S.O. 2001, CHAPTER 28

Part I — Purpose

Purpose

1. The purpose of this Act is to provide civil remedies that will assist in,

(a) compensating persons who suffer pecuniary or non-pecuniary losses as a result of unlawful activities;

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(b) preventing persons who engage in unlawful activities and others from keeping property that was acquired as a result of unlawful activities;

(c) preventing property, including vehicles as defined in Part III.1, from being used to engage in certain unlawful activities; and

(d) preventing injury to the public that may result from conspiracies to engage in unlawful activities. 2001, c. 28, s. 1; 2007, c. 13, s. 26.

Part II — Proceeds of Unlawful Activity

Definitions

2. In this Part,

. . .

"legitimate owner" means, with respect to property that is proceeds of unlawful activity, a person who did not, directly or indirectly, acquire the property as a result of unlawful activity committed by the person, and who,

(a) was the rightful owner of the property before the unlawful activity occurred and was deprived of possession or control of the property by means of the unlawful activity,

(b) acquired the property for fair value after the unlawful activity occurred and did not know and could not reasonably have known at the time of the acquisition that the property was proceeds of unlawful activity, or

(c) acquired the property from a person mentioned in clause (a) or (b); ("propriétaire légitime")

"proceeds of unlawful activity" means property acquired, directly or indirectly, in whole or in part, as a result of unlawful activity, whether the property was acquired before or after this Act came into force, but does not include proceeds of a contract for recounting crime within the meaning of the *Prohibiting Profiting from Recounting Crimes Act, 2002*; ("produit d'activité illégale")

"property" means real or personal property, and includes any interest in property; ("bien")

. . .

Forfeiture order

3. (1) In a proceeding commenced by the Attorney General, the Superior Court of Justice shall, subject to subsection (3) and except where it would clearly not be in the interests of justice, make an order forfeiting property that is in Ontario to the Crown in right of Ontario if the court finds that the property is proceeds of unlawful activity. 2001, c. 28, s. 3 (1).

Action or application

(2) The proceeding may be by action or application. 2001, c. 28, s. 3 (2).

Legitimate owners

(3) If the court finds that property is proceeds of unlawful activity and a party to the proceeding proves that he, she or it is a legitimate owner of the property, the court, except where it would clearly not be in the interests of justice, shall make such order as it considers necessary to protect the legitimate owner's interest in the property. 2001, c. 28, s. 3 (3).

. . .

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Part III — Instruments of Unlawful Activity

Definitions

7. (1) In this Part,

. . .

"instrument of unlawful activity" means property that is likely to be used to engage in unlawful activity that, in turn, would be likely to or is intended to result in the acquisition of other property or in serious bodily harm to any person, and includes any property that is realized from the sale or other disposition of such property; ("instrument d'activité illégale")

"property" means real or personal property, and includes any interest in property; ("bien")

"responsible owner" means, with respect to property that is an instrument of unlawful activity, a person with an interest in the property who has done all that can reasonably be done to prevent the property from being used to engage in unlawful activity, including,

> (a) promptly notifying appropriate law enforcement agencies whenever the person knows or ought to know that the property has been or is likely to be used to engage in unlawful activity, and
>
> (b) refusing or withdrawing any permission that the person has authority to give and that the person knows or ought to know has facilitated or is likely to facilitate the property being used to engage in unlawful activity; ("propriétaire responsable")

. . .

Instruments of unlawful activity

(2) For the purpose of the definition of "instrument of unlawful activity" in subsection (1), proof that property was used to engage in unlawful activity that, in turn, resulted in the acquisition of other property or in serious bodily harm to any person is proof, in the absence of evidence to the contrary, that the property is likely to be used to engage in unlawful activity that, in turn, would be likely to result in the acquisition of other property or in serious bodily harm to any person. 2001, c. 28, s. 7 (2).

. . .

Forfeiture order

8. (1) In a proceeding commenced by the Attorney General, the Superior Court of Justice shall, subject to subsection (3) and except where it would clearly not be in the interests of justice, make an order forfeiting property that is in Ontario to the Crown in right of Ontario if the court finds that the property is an instrument of unlawful activity. 2001, c. 28, s. 8 (1).

Action or application

(2) The proceeding may be by action or application. 2001, c. 28, s. 8 (2).

Responsible owners

(3) If the court finds that property is an instrument of unlawful activity and a party to the proceeding proves that he, she or it is a responsible owner of the property, the court, except where it would clearly not be in the interests of justice, shall make such order as it considers necessary to protect the responsible owner's interest in the property. 2001, c. 28, s. 8 (3).

Part V - General

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. . .

Actions in rem

15.6 (1) All proceedings, including proceedings for an interlocutory order, under Parts II, III and III.1, whether by action or application, are *in rem* and not *in personam*. 2007, c. 13, s. 37.

. . .

Standard of proof

16. Except as otherwise provided in this Act, findings of fact in proceedings under this Act shall be made on the balance of probabilities. 2001, c. 28, s. 16.

Proof of offences

> 17. (1) In proceedings under this Act, proof that a person was convicted, found guilty or found not criminally responsible on account of mental disorder in respect of an offence is proof that the person committed the offence. 2001, c. 28, s. 17 (1).
>
> (2) In proceedings under this Act, an offence may be found to have been committed even if,
>
> > (a) no person has been charged with the offence; or
> >
> > (b) a person was charged with the offence but the charge was withdrawn or stayed or the person was acquitted of the charge. 2001, c. 28, s. 17 (2).

. . .

Footnotes

1 The AG also sought the forfeiture of $29,000 found on the Atwater premises. That request was refused and is not challenged on appeal.

2 A forfeiture application under s. 3 or s. 8 may be commenced by action or application: s. 3(2), s. 8(2). These proceedings were both commenced by way of application. While the appropriateness of proceeding by way of application is not in issue, with the benefit of hindsight, given the factual disputes and the refusals of Tran, McDougall and Do to produce certain relevant documents and answer relevant questions, it would have been better had the matters proceeded by action.

3 For example, the forfeiture provisions in the *Controlled Drugs and Substances Act*, S.C. 1996, c.19 provide for exemptions from forfeiture using much more specific language in ss. 19(3), 19.1(3)(4).

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EMMANUEL VILLAGE RESIDENCE INC.	and	ATTORNEY GENERAL OF ONTARIO	and	EMMANUEL VILLAGE RESIDENCE INC.

Court File No: CV-16-11424-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

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(Motion Returnable September 6, 2016)

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