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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

BETWEEN:

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 OF THE PLAINTIFFS IN THE ACTION BEARING COURT FILE NO. CV-10-8597-00CL (Motion Returnable December 14, 2016)

Date: December 8, 2016

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INDEX

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INDEX

TAB 1

1993 CarswellNat 364
Federal Court of Canada — Trial Division

Dimatt Investments Inc. v. Presidio Clothing Inc. / Vêtements Presidio Inc.

1993 CarswellNat 364, [1993] F.C.J. No. 281, 39 A.C.W.S. (3d) 682, 48 C.P.R. (3d) 46, 4 W.D.C.P. (2d) 252, 62 F.T.R. 142

Dimatt Investment Inc., Plaintiff v. Presidio Clothing Inc./Vêtements Presidio Inc. (formerly Genesis Fashions Inc./ Modes Genesis Inc.), Defendant

MacKay J.

Judgment: March 23, 1993
Docket: Doc. T-1883-88

Counsel: *D. Allsebrook*, for the Plaintiff.
R. Uditsky, for the Defendant.

Subject: Intellectual Property; Property; Civil Practice and Procedure

***MacKay J.* reasons for judgment:**

1 This was a show cause hearing at which, pursuant to the Order of Madame Justice Reed issued August 5, 1992, the defendant Presidio Clothing Inc./Vêtements Presidio Inc. (formerly Genesis Fashions Inc./Modes Genesis Inc.) (herein after "Presidio"), and Howard Vineberg and David Talbot were directed to appear and show cause why they should not be condemned for contempt of this Court for breach of an injunction order granted, on consent, by Giles, A.S.P. on December 19, 1989.

2 The matter was heard on October 19, 1992, in Toronto when counsel appeared for the plaintiff, and counsel also appeared for the defendant Presidio and for Messrs. Vineberg and Talbot. The latter two defendants, who are officers of Presidio, were present as well. Affidavits were filed on behalf of the plaintiff, and on behalf of the defendant Presidio by Howard Vineberg of Montreal, President of Presidio and by David Talbot of Mississauga, Ontario, Vice-president of Presidio. Affidavits were also filed on behalf of the defendant from officers of companies that are customers or suppliers of Presidio, and from the manager of the bank where Presidio maintains its accounts. No witnesses were called at the hearing and counsel for the parties advised that, as there was no dispute on essential facts, the matter should be disposed of on the basis of affidavits filed and argument presented.

3 Following the hearing, after deliberation, I rendered oral judgment by which I found the defendant Presidio in breach of the Order of December 19, 1989, and that the defendants Howard Vineberg and David Talbot, with knowledge of that Order, as officers of Presidio aided and abetted Presidio in breaches of the Order. In my view, those breaches interfered with the orderly administration of justice and impaired the authority or dignity of the Court. I imposed fines, upon Presidio in the amount of $2,000., and upon each of Messrs. Vineberg and Talbot in the amount of $1,000., all to be paid within 30 days, with reasonable solicitor and client costs payable to the plaintiff.

4 Written Judgment was filed on October 26, 1992. I now confirm and expand upon oral reasons given, in explanation of the Judgment and for compliance with section 51 of the *Federal Court Act*, R.S.C. 1985, c. F-7 as amended.

5 The Order of December 19, 1989, granted on consent, upon application by the plaintiff, was directed against the

defendant Presidio, then named Genesis Fashions Inc./Modes Genesis Inc. It provided, so far as it is relevant here, as follows:

> 1. The Defendant shall forthwith change its corporate names to a name or names not including the word GENESIS or any word or phrase confusingly similar thereto;
>
> 2. The Defendant and its directors, officers, servants, agents, employees and persons under their control having notice of this order are restrained from using the trade names Genesis and/or Genesis Fashions and/or Modes Genesis Inc. and/or Genesis Fashions Inc. or any trade name or trade mark confusingly similar thereto from and after February 3, 1990.

6 The Order of Madame Justice Reed, granted on August 5, 1992, upon application of the plaintiff filed July 30 directed Presidio and Messrs. Vineberg and Talbot to appear and show cause why they should not be condemned for

> (1) breach of the Court's Order of December 19, 1989, on the grounds that since February 3, 1990,
>
> > (i) Presidio continued to carry on business in the trade names Genesis Fashions Inc., Genesis Fashion Inc., and Modes Genesis.
> >
> > (ii) Presidio is causing signs to be displayed at 462 Wellington Street West, Toronto, Ontario which display the trade names "Genesis Fashion Inc.", "Genesis Fashions Inc." and "Modes Genesis";
> >
> > (iii) Presidio is using the trade name Genesis Fashion Ltd. in the Metropolitan Toronto Telephone Directories, April 1991-1992 and April 1992-1993;
> >
> > (iv) David Talbot has used the trade name Genesis to carry on the business of Presidio with knowledge that this breaches the injunction contained in the Judgment and has thereby aided and abetted Presidio in its breach of the said injunction;
> >
> > (v) Howard Vineberg, as a principal and guiding mind of Presidio and with knowledge of the injunction contained in the Judgment, has been negligent in his attempts to change the listing for Genesis Fashion Ltd. in the Metropolitan Toronto Telephone Directory and has neglected to cause Presidio and Talbot to comply with the terms of the Judgment and in particular to cease and refrain from the activities described in subparagraphs (i) to (iv) inclusive, above, and has thereby aided and abetted Presidio in its breach of the said injunction;
>
> (2) acting in such a way as to interfere with the orderly administration of justice, and to impair the authority or dignity of this Court and rendering nugatory an order of this Court by reason of the acts set forth above.

7 With regard to the particular allegations of breach of the Court's Order set out in the Order of Madame Justice Reed, I found that there was no evidence that Presidio continued to carry on business in the trade names Genesis Fashions Inc., Genesis Fashion Inc. and Mode Genesis, as alleged. Nor did I find any evidence that David Talbot has used the trade name Genesis to carry on the business of Presidio in any significant way.

8 I did find that the corporate defendant Presidio did, after February 3, 1990, continue to display signs at 462 Wellington Street West, Toronto, Ontario, including as trade names "Genesis Fashions Inc.", "Genesis Fashion Inc." and "Mode Genesis", and that the defendant Presidio had continued to use the trade name Genesis Fashion Ltd. in the Metropolitan Toronto Telephone directories, April, 1991-1992 and April 1992-1993. By so doing the defendant Presidio breached and was in contempt of the Order of the Court dated December 19, 1989. I further found that the defendants Howard Vineberg and David Talbot, with knowledge of the Order of the Court, as responsible officers of the defendant Presidio, aided and abetted Presidio in its breach of the Order and were thus in contempt of the Order made December 19, 1989.

9 I am satisfied that as a result of settlement between the parties in November 1989, which led to the Order of December

19, 1989, rendered on consent, Howard Vineberg as President of Presidio took substantial steps to ensure that the corporation would not be in violation of the Court's Order. These steps included the following.

(1.) The name of the corporate defendant was formally changed. Originally incorporated under the Quebec Companies Act on November 3, 1987, with the corporate name Genesis Fashions Inc./Mode Genesis Inc., that name was changed to Presidio Clothing Inc./Vêtements Presidio Inc. and a certificate of notification of the change, dated November 14, 1989, was issued by the appropriate Quebec Government office.

(2.) All business forms and documents of the defendant corporation were changed after November 1989 so that the only name used thereafter on any documents of the company was that of Presidio Clothing Inc./Vêtements Presidio Inc.

(3.) All customers and suppliers, and the corporate defendant's bank, were advised of the change of name at the time the change was made and thereafter all corporate documents of the defendant corporation used in its business transactions bore only the new name of the company. This is confirmed by affidavits of officers of companies that were suppliers or were purchasers of goods from Presidio, and by affidavit of the manager of the defendant corporations's bank. All of them affirm that from and after November or December 1989 all transactions with the corporate defendant were carried on with the new name of the company, Presidio Clothing Inc./Vêtements Presidio Inc. being the only corporate name used.

(4.) In April 1990, Howard Vineberg wrote to Bell Canada in Toronto to direct a change in the corporate telephone listing for the corporate defendant asking that it thereafter be listed in the new name of the company. He assumed that this change had been made, never having been made aware by any customer, supplier, consumer, or the plaintiff until the service of the plaintiff's notice of motion of July 31, 1992, for a show cause order, that Bell Canada had failed to correct the telephone listing in Toronto. Upon receipt of the notice of motion Mr. Vineberg again communicated with Bell Canada in Toronto, again explicitly instructing them to effect the change of listing in all future Toronto telephone directories. He has been assured this has been undertaken by the telephone company and has confirmed by calling the information number 411 in Toronto, that no listing for Genesis Fashions Inc. is now carried by Bell Canada in Toronto but that a listing for Presidio Clothing Inc. is carried by the telephone company.

(5.) By his affidavit David Talbot affirms that following settlement of the matter with the plaintiff in the fall of 1989 he was instructed by Howard Vineberg not to use the former name of the corporate defendant, or the name Genesis, and to use his own personal name when answering the telephone at the company's office at 462 Wellington Street in Toronto. He further avers that he followed these instructions and that he could recall that after the change of the company's name he had received only one telephone call at those premises, nearly two years ago, where the caller asked for Genesis Fashions Inc. and he advised the caller that this name was no longer in use and that the company now had the new name, Presidio.

(6.) Howard Vineberg had also advised the landlord of the premises at 462 Wellington Street West in Toronto of the change in corporate name in the late fall of 1989. He had done so orally in anticipation that the owner of the premises would see to changes in the name used for reference to the company at those premises. The name Genesis Fashions Inc. was originally included on the "buzzer" panel at the exterior door used to acquire access to the building, on the directory board in the lobby of the building, on the door of the premises leased by the corporate defendant, and on the parking lot sign adjacent to the building. By July 1992 no changes had been made in the original signs, which were only changed by the landlord of the premises after written instructions from Mr. Vineberg following service of the plaintiff's notice of motion of July 30 for the show cause order. All such signs at the premises were changed to display only the new name Presidio at the premises in Toronto.

10 The defendants Vineberg and Talbot acknowledge by affidavit that they were careless in ensuring that the changes requested by Vineberg for the telephone listing and for signs at the Toronto premises were not made following the original requests by Vineberg to Bell Canada and to the landlord.

11 I was less concerned with the listing in the Toronto telephone directory for 1991-92 than I was for the succeeding year's directory and for the continuing use of the name at the company's premises in Toronto. There was no evidence before me of the appropriate timing for information to Bell Canada for a change in directory listing of the first directory, apparently

issued to be effective April 1991. At least for the second year's directory listing I assume that the defendant company at its Toronto office would have been in receipt on a regular basis of a statement of service charges for telephone service, including listing the name of Genesis Fashions Inc., though again there was no evidence of this. In my view, there can be no excuse for the continuing use of the original name of the company at its premises in Toronto, where Mr. Talbot was based and he was responsible for the company's operations there. He knew of the instructions of Mr. Vineberg to the landlord of the Toronto premises and simply assumed, without checking for more than two years, that the corporate name of the defendant corporation would be changed on signs at the Toronto premises. It is hard to believe that he would not have noticed that the original corporate name continued to be displayed, particularly at the parking space and at the door to the office of the company, without the new name Presidio, even if he did not examine the outside buzzer access panel or the directory board in the lobby of the building.

12 I note that the nature of the defendant's business is such that only very occasionally would persons visit its premises at 462 Wellington Street West in Toronto. The defendant company is a manufacturer of apparel, primarily for women, which it sells in the low to mid-price range. As a manufacturer it does not sell on any retail basis but sells to buyers for retail chains or stores. It has never had more than 30 customers purchasing its goods and only ten of those have been in the Toronto area. In that area Mr. Talbot, who is responsible for sales, does most of his work by visiting purchasers at their premises and only very occasionally would anyone visit Presidio's premises in Toronto. That general practice is reflected in their experience by one or two of the affiants who are purchasing officers of customer companies.

13 In terms of the general allegation set out in the second main clause of the show cause order of August 5, 1992, I did not find that Presidio, or Howard Vineberg or David Talbot, willingly acted "in such a way as to interfere with the orderly administration of justice, and to impair the authority or dignity of this Court in rendering nugatory an Order of this Court". However, on the basis of the facts averred by affidavit and by the acknowledgements of Messrs. Vineberg and Talbot, I did find that all three of the defendants named in the show cause order, that is, the corporate defendant and Messrs. Vineberg and Talbot, were negligent in failing to ensure that the terms of the Court's Order were adhered to, in particular in regard to the continued listing of Genesis Fashion Ltd., on behalf of the defendant Presidio, in Toronto telephone directories, and more especially by the continued use of the name Genesis Fashions Ltd. on signage related to the company's premises at 462 Wellington Street West in Toronto. That negligence, in my view, does interfere with the orderly administration of justice, impairing the authority of an Order of this Court and thus impairing the dignity of the Court.

14 The terms of a court order as expressed are to be followed strictly and failure to do so interferes with the orderly administration of justice and impairs the authority or dignity of the Court. Here the defendant corporation, its directors, officers, servants, agents, employees and others under their control having notice of the Order were expressly restrained from using certain trade names after February 3, 1990, yet prohibited names continued to be listed in the Toronto telephone directory and at the company's leased premises in Toronto until after July 30, 1992.

15 In light of these findings, it was, in my view, appropriate that in this case fines be imposed, in the amount of $2,000. in the case of the corporate defendant, and in the amount of $1,000. for each of the defendants Howard Vineberg and David Talbot.

16 Those fines seemed to me appropriate in light of the following factors. There were substantial steps taken by Mr. Vineberg, President of Presidio, to comply with the Court's Order, including a written request to Bell Canada to change the telephone listing in Toronto and an oral notification to the company's Toronto landlord that the name of the corporate defendant had been changed. The only incidents of breaching the Court's Order were the continuing listing until after July 1992 of the original name in the Toronto telephone directory and in the display of the original name of the company at its Toronto premises. There was no evidence that the original name was used in dealing with telephone messages at the Toronto premises; indeed the only evidence is that that name was not used in accepting telephone calls, or in any other way, except for the signs at the Toronto premises, after the formal change in the corporate name of Presidio. The head office and principal place of business of Presidio, is Montreal, where it does not maintain any telephone listing and there is no evidence of any continuing use of its former name in its business operations there.

17 In my view, the actions of Messrs. Vineberg and Talbot cannot be characterized as contumacious, or demonstrating any intended disdain of the Court's Order. Both acknowledge they were negligent in ensuring instructions of Vineberg to Bell Canada and to the landlord were followed. By their negligence, which resulted in carrying on, for some two and a half

years, the use in relation to the company's Toronto operations of a trade name which the Court's Order had prohibited, the Order was breached. That constitutes contempt, and it impairs the authority and dignity of the Court, and impairs the orderly administration of justice.

18 I consider that the following factors warrant consideration in mitigation and in fixing the appropriate sanctions. Howard Vineberg, when he learned by the plaintiff's notice of motion for a show cause order issued July 30, 1992, acted quickly to remedy the failures to ensure the telephone listing in Toronto and the signs at the Toronto premises were changed to include only the new corporate name of Presidio. Messrs. Vineberg and Talbot formally, and I accept sincerely, apologized for their failure to observe strictly the Order of December 19, 1989, and Mr. Vineberg, as President of Presidio, averred his determination to ensure that there be no further breach of the Court's Order. As I understand counsel, Mr. Vineberg had also apologized to the plaintiff in this matter.

19 In addition to imposing fines, I ordered that reasonable costs, on a solicitor and client basis be awarded to the plaintiff. This accords with normal practice in a successful application for an Order finding contempt, ensuring that the role of the party acting to support compliance with an Order of the Court does not result in undue costs for the applicant. In a number of recent cases in this Court costs awarded on that basis have been set at a fixed amount, but since there was no evidence of the costs actually incurred by the plaintiff and thus of what might be considered reasonable in this case, I declined to fix the amount in the expectation that reasonable costs on a solicitor and client basis would be agreed upon, or failing agreement could be taxed.

End of Document

TAB 2

2012 ONSC 3307
Ontario Superior Court of Justice

Whitehall Homes & Construction Ltd. v. Hanson

2012 CarswellOnt 8062, 2012 ONSC 3307, 217 A.C.W.S. (3d) 823, 23 C.L.R. (4th) 272

Whitehall Homes & Construction Ltd., Plaintiff and Brian Hanson and Elaine Hanson, Defendants

J.A. Milanetti J.

Heard: January 12-13, 2012
Judgment: June 5, 2012***
Docket: 06-28661

Proceedings: additional reasons at *Whitehall Homes & Construction Ltd., v. Hanson* (2012), 2012 ONSC 4741, 2012 CarswellOnt 10356, J.A. Milanetti J. (Ont. S.C.J.)

Counsel: Jon-David Giacomelli, Raong Phalavong, for Plaintiff
Brian Campbell, for Defendants

Subject: Civil Practice and Procedure; Contracts

CROSS-MOTION by contractor to enforce settlement.

J.A. Milanetti J.:

Background

1 The defendants Hanson bring this motion to amend their statement of defence and cross-claim.

2 The plaintiffs Whitehall bring a cross-motion to enforce a settlement entered into by the parties on June 13th, 2008. Whitehall seeks Judgment in accordance with the Minutes of Settlement pursuant to Rule 20, saying that there is no genuine issue requiring a trial. If Whitehall is unsuccessful on this cross-motion, they consent to the amendments being sought by the defendant Hanson's.

3 Voluminous materials were filed before me including the motions, transcripts of cross-examinations, and very lengthy factums/books of authorities.

4 I had virtually a full day's argument from the plaintiff moving party on the cross-motion. They spent considerable time going over the contract between the parties - a contract deriving from the Minutes of Settlement signed by each of the parties to the action and the Tarion Warranty Corporation on June 13th, 2008.

Facts

5 The background to this action is quite straightforward. Whitehall was engaged to build a high end luxury home for the Hanson's for $1.425 million dollars. The Hanson's claimed significant deficiencies in the construction and thus held back

$200,000; making complaint to the builder and to Tarion.

6 Whitehall launched this action seeking payment of the $200,000 hold back money. The Hansons, who moved into the house on April 26th, 2006, defended and advanced a cross-claim.

7 A settlement meeting/mediation was arranged by Tarion between the parties and was held May 12th, 2008. The meeting/mediation was unsuccessful. Neither of the parties had lawyers with them at the mediation.

8 Discussions between the parties continued after the failed mediation; ultimately minutes of settlement were signed by all on June 13th, 2008.

9 The final paragraph of the minutes (at paragraph 15) states that:

> The parties acknowledge having had the opportunity to seek legal advice and acknowledge that these are a binding agreement on them freely entered into.

10 The agreement is broken down by heading. These are: Preamble; Homeowners Agreement to Settle; Builders Agreement to Settle; Releases and Discontinuance of Litigation; and Tarion's Agreement to Settle.

11 While the agreement references the exchange of mutual releases (in respect of the discontinuance of the civil action), and obtaining of orders reflective of that discontinuance (on a without costs basis), such steps were never completed.

12 I learned that Whitehall's solicitor had drafted a release and forwarded it to the Hanson's solicitor. Hanson's solicitor said he was seeking instructions but had some concerns about the wording. He provided no alternate version. The release was never signed by the defendants Hanson.

Positions of the Parties

13 The plaintiffs argue that the signed minutes represent a contract between the parties; a contract this court should enforce.

14 While the documentation presented on these motions is extensive, and the argument long, the plaintiff suggests that the case is quite simple - should the three page Minutes of Settlement signed by the parties be seen as an enforceable agreement/contract between them thereby terminating this litigation. They further suggest that the defendants Hanson changed their mind after the fact and now raise a number of issues, all irrelevant and mainly red herrings to make the matter seem more complicated than it is.

15 The Hansons say there was no enforceable settlement as:

1. No release was provided;

2. The agreement was signed when the defendants were under duress/being pressured to do so;

3. The plaintiff and Tarion had held back the key Thermal Imaging Report outlining numerous significant flaws in construction (the report was dated June 11th, 2008 and the agreement was signed June 13th, 2008). Both Tarion and the plaintiff denied that they had the report before signing the settlement document;

4. The plaintiff did not fulfill his end of the agreement thereby vitiating it, i.e. they did not provide the defendant the manufacturers warranties referenced in paragraph 11 of the agreement;

5. Tarion was in a conflict of interest.

6. The agreement was ambiguous, incomplete, and unenforceable.

16 It is important to note that each of the parties was represented by counsel throughout - and certainly at the time the minutes were signed. As such, I accept that while counsel were not invited to the Mediation itself (May 12, 2008), counsel were available to the parties before and after it (although I did understand the defence counsel for the Hansons was away on vacation for some of the period between the settlement meeting and the actual signing of the minutes on June 13,2008). A notice of change of solicitor was filed by the defendants in May 2009.

17 It is the position of Whitehall that between the June 2008 agreement and the May 2009 change of solicitors, the parties were acting on the agreement. The Hanson's were handling the subtrades themselves - contractors were coming into the house, and correcting deficiencies, often without remuneration. Whitehall did nothing to recover the $200,000 it claimed to be owed in the statement of claim.

18 As such, they argue that if the settlement is not enforced, the defendant Hansons have had a windfall. They kept the $200,000 Whitehall sought in their claim, had deficiencies corrected at no charge, and have lived in the home since 2006.

19 Further, the plaintiff alleges prejudice. They have not had the benefit of the $200,000 they say they were owed under the contract, and are unable to effectively defend the allegations of the Hanson's as remedial work has been undertaken over the past six years. They are thus unable to establish the state of their own work product alleged to be deficient.

20 Whitehall also claims it destroyed some documentation as a result of the settlement arrived at in 2006.

The Law

21 The recent Court of Appeal decision of *Combined Air Mechanical Services Inc. v. Flesch*, 2011 ONCA 764 (Ont. C.A.) sets out the current test for summary judgment. A motions judge must ask if:

> Can the full appreciation of the evidence and issues that is required to make dispositive findings be achieved by way of summary judgment, or can this full appreciation only be achieved by way of a trial?

22 While the record before me is most voluminous, and the arguments extensive, I find that the issue for my consideration is quite narrow. *Should the settlement arrived at between the parties on June 13th, 2008 be enforced?*

23 I read with interest and could quote extensively from the decision of Chapnik, J. in *Cellular Rental Systems Inc. v. Bell Mobility Cellular Inc.*, [1995] O.J. No. 721 (Ont. Gen. Div.) affirmed [1995] O.J. No. 3773 (Ont. C.A.), Justice Chapnik was faced with a motion under Rule 49.09 for a judgment based on an accepted offer to settle. She quotes *Canada Square Corp. v. Versafood Services Ltd.* (1981), 34 O.R. (2d) 250 (Ont. C.A.) and the *Bawitko Investments Ltd. v. Kernels Popcorn Ltd.* (1991), 79 D.L.R. (4th) 97 (Ont. C.A.) which state:

> An agreement to settle a claim is a contract. To establish the existence of a contract, the parties' expression of agreement must demonstrate a mutual intention to create a legally binding relationship and contain agreement on all its essential terms. (para. 17)

24 I was taken carefully through the minutes by counsel. I found them to be clear and comprehensive.

25 I have significant context from reading the materials filed, most particularly the minutes and the pleadings in the action.

26 The statement of defence is extensive and cites numerous deficiencies and inadequacies. It states it is not limited to deficiencies then known. Paragraph 24, for instance, says the deficiencies listed "...are not intended to constitute a complete

enunciation of unacceptable work or to prejudice Hanson from calling evidence as to further deficiencies". Despite this language, both parties agreed to end the litigation between them.

27 The context of the pleadings before me suggest that the parties contemplated litigation of all deficiencies in construction. These pleadings were in place at the time of the settlement entered into by the parties, in consultation with their respective lawyers.

28 I am not to look beyond the plain meaning of the words used in the settlement document, understood in context, unless to do so would lead to some absurd or illegal result. I see no need to look behind the wording set out.

29 Moreover, the parties are presumed to have intended the legal consequences of their actions. This is particularly so when both are represented by counsel throughout. The intentions of the parties seem fair to me - they are each agreeing to resolve the dispute they have with one another as a result of construction of this home.

Releases

30 As is common, the minutes call for mutual exchange of releases and an order dismissing both the action and counterclaim. The defendants Hanson argue that these are essential terms of the contract; non-compliance effectively repudiates the contract. I must determine if they are essential terms.

31 It is clear that the onus of proving repudiation is on the party claiming it. I note that it would be rare for conduct subsequent to a settlement agreement to amount to repudiation (*Fieguth v. Acklands Ltd.* [1989 CarswellBC 88 (B.C. C.A.)], 1989 CanLII 2744).

32 In the case before me Whitehall provided a release, the Hansons neither signed nor provided an alternate version. The obligation to exchange releases was a mutual one. It did not rest with Whitehall alone.

33 Over and above, rather than treating the contract as at an end, I find that both parties continued to act upon the agreement struck on that day in June 2008.

34 I find that in the context of the case before me, the agreement was complete when the settlement minutes were signed. The releases/order are merely reflections of that written settlement. The defendants should not be allowed to set aside the contract when they did not hold up their end of the mutual obligation relating to the provision of releases and the dismissal order.

35 This is particularly so given that I have an executed document, (signed by sophisticated individuals with the benefit of legal counsel), and significant steps taken in furtherance of it. The plaintiff no longer pursued the $200,000 they say they were owed. The defendants Hanson began to deal directly with the subtrades to remedy the deficiencies (presumably utilizing these funds).

36 While the defendants argue that the plaintiffs failed to provide the warranties agreed to in the settlement document, I was presented no evidence that the defendants were ever thwarted in their effort to have work done by this non-production. It seems clear that Whitehall did not provide these warranties nor did the homeowner ask for them. I was presented no evidence that demonstrated that the Hanson's had any trouble pursing these warranties.

37 The defendants Hanson argue that the plaintiffs told the subtrades not to cooperate with them but provided no independent evidence from those subtrades to substantiate this allegation.

38 I would have expected such evidence given the power nature of a Rule 20 motion and the requirement that a responding party "put their best foot forward/lead trump". They did not. Moreover, the homeowner admits that he received benefits from the subtrades.

39 At the end of the day I find that there was a contract; a valid agreement between the parties. The defendants Hanson then ask whether such a contract should be enforced.

Duress

40 The defendants plead duress. There is no doubt that duress can serve to make an agreement unenforceable against a party who is compelled by the duress to enter into it. The defendants Hanson argue that they were forced to settle; pressured by Tarion and Whitehall to sign by June 13th, 2008.

41 I heard that Whitehall threatened to "walk away" from negotiations and Tarion threatened to write a "decision letter" wherein it would deny claims and compel the Hansons to appeal all items Tarion had rejected. Such positions would require the Hansons to fight both the Whitehall litigation and an appeal before Licence Appeal Tribunal if settlement was not arrived at.

42 As such, both Tarion (who the Hansons say were in a conflict of interest) and Whitehall exercised undue pressure on them.

43 I must say I was unimpressed with this argument. The defendants Hanson were not unsophisticated, vulnerable (emotionally or financially) or inexperienced individuals. Rather, they were both intelligent, well to do and experienced business people. Mr. Hanson is the Vice Chairman of CIBC World Markets with an MBA from Stanford University. Ms. Hanson was President of the Canadian Institute for Sustainability and Resilience at the time of the signing of the minutes.

44 I find it disingenuous to say that either of these individuals were under duress at the time of the signing.

45 Moreover, I find that the Hansons availed themselves of legal advice throughout the process and before and after signing the settlement document. The "duress" was not mentioned until the defendants responded to this motion to enforce the settlement.

Thermal Imaging Report

46 The Hansons contend that Whitehall and Tarion held back the Thermal Imaging Report dated June 11th, 2008 until after the minutes were signed on June 13th, 2008.

47 They contend that this document revealed significant additional damages and deficiencies that were unknown to them at the time of signing.

48 Whitehall denies having the report prior to the signing. Regardless, it is clear from the evidence presented that Mr. Hanson himself knew the substance of the report before he signed the minutes.

49 His email of June 11th, 2008 and the letter from his lawyer dated June 13th, 2008 (before the minutes were signed) reveal that they in fact had in-depth knowledge of the content of the report before it was ever released.

50 As such, I have not been persuaded that the allegations relating to the thermal imaging report have been proven on the evidence before me. It does indeed appear to be a 'red herring'. Moreover, I do not accept this as a basis for failing to enforce the settlement given the defendant's obvious familiarity with its contents before entering into the settlement.

Conclusion

51 At the end of the day, I find that the Minutes of Settlement signed by the parties to this litigation constitute an enforceable contract. I was not persuaded that they should be ignored or the contract set aside.

52 Settlement between parties should be encouraged and supported. It is contrary to public policy to merely set agreements aside because someone changes their mind; significantly after the fact. In this regard I accept the language of my colleague Justice Sproat that ...

> ...parties should be encouraged to take settlement discussions seriously and carefully and that their motivation to settle should not be eroded by a concern that settlements will be easily avoided by litigants having second thoughts.
>
> (*Vanderkop v. Manufacturers Life Insurance Company*, 2005 CanLII 39686ON S.C.)

53 Judgment shall go in accordance with the Minutes of Settlement entered into by the parties on June 13, 2008.

54 If the parties are unable to resolve costs they may provide 3 page written submissions within 20 days of this decision.

Cross-motion granted.

Footnotes

* Additional reasons at *Whitehall Homes & Construction Ltd. v. Hanson* (2012), 2012 ONSC 4741, 23 C.L.R. (4th) 281, 2012 CarswellOnt 10356 (Ont. S.C.J.).

** Further additional reasons at *Whitehall Homes & Construction Ltd. v. Hanson* (2012), 2012 ONSC 6691, 2012 CarswellOnt 15418 (Ont. S.C.J.).

End of Document

TAB 3

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 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:

> 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.

(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 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"?

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 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?

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.

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 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 and was deprived of possession or control of the property by means of the unlawful activity
>
> [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:

> ... 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 "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:

> 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. 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.]

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 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 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.

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;

(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).
. . .
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
. . .
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).

End of Document

EMMANUEL VILLAGE RESIDENCE INC.	-and-	ATTORNEY GENERAL OF ONTARIO	-and-	1250 WEBER STREET EAST, KITCHENER, ONTARIO OR THE PROCEEDS OF THE SALE THEREOF (IN REM)	
Applicant		Applicant			Respondent

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST
Proceeding commenced at Toronto

BOOK OF AUTHORITIES OF THE PLAINTIFFS IN THE ACTION BEARING COURT FILE NO. CV-10-8597-00CL
(Motion Returnable December 14, 2016)

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