NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Siek*, 2007 NSCA 23

Date: 20070216
Docket: CAC 266726
Registry: Halifax

Between:

Her Majesty The Queen

Appellant

v.

Rady Siek Respondent

Judges:	Roscoe, Oland and Hamilton, JJ.A.
Appeal Heard:	December 7, 2006 in Halifax, Nova Scotia
Held:	Appeal allowed per reasons for judgment of Oland, J.A.; Roscoe and Hamilton, JJ.A. concurring.
Counsel:	Mark J. Covan for the appellant D. Brian Newton, Q.C. for the respondent

Reasons for judgment:

[1] In this appeal, the Crown argues that its application for forfeiture of the respondent's residential property located at 16 Brookhill Drive, Grand Lake, Halifax Regional Municipality (the "Property") should have been granted, and asks this court to order forfeiture. In October 2005 the respondent, Rady Siek, pled guilty to three charges relating to the period between September 1, 2004 and October 4, 2004 at or near Grand Lake. These were (a) unlawful production of a substance in Schedule 11 of the *Controlled Drugs and Substances Act* S.C. 1996, c. 19 ("*C.D.S.A.*"), namely, cannabis marihuana, contrary to s. 7.(1) of the *C.D.S.A.*; (b) unlawful possession of cannabis marihuana, for the purpose of trafficking, an amount in excess of three kilograms, contrary to s. 5.(2) of the *C.D.S.A.*; and (c) fraudulently, maliciously, or without colour of right, diversion of electricity, contrary to s. 326(1)(a) of the *Criminal Code*.

[2] On February 9, 2006 Provincial Court Judge D. William MacDonald sentenced the respondent to two years in a federal penitentiary in respect of the production charge, two years to be served concurrently in respect to the possession for the purpose of trafficking charge, and one year to be served concurrently in respect of the diversion of electricity charge. He also imposed a victim surcharge totalling $300, made a weapons prohibition order under s. 109, and ordered forfeiture of certain offence-related personal property, including lights and shields, exhaust fans, electrical panels, ballasts, growing nutrients, and growing mix.

[3] The Crown's application for forfeiture of the Property was not heard at the same time that the respondent was sentenced. That hearing was adjourned to May 2, 2006. The judge dismissed its application and the Crown appeals.

[4] For the reasons which follow, I would allow the appeal and order forfeiture.

Facts

[5] At the hearing for forfeiture of the Property, Corporal William Carroll, an expert in marihuana growing operations, provided a written report and gave evidence concerning the Royal Canadian Mounted Police search, pursuant to a search warrant, of the Property in late 2004. What the police discovered inside the

single story residence with full basement and attached garage at the Property was a marihuana growing operation.

[6] The main floor of the building consisted of a kitchen, three bedrooms, two bathrooms, living room and hallways. There was no furniture in any of these rooms. In the living room, the police found some blankets on the floor, several items of clothing, and a telephone. One bathroom, which had been set up as a cloning room, contained 180 clones under fluorescent lights. The master bedroom contained a ventilation system leading to a turbine on the roof, several boxes of florescent light tubes, and a number of growing pots. Another bedroom served as a storage room for growing equipment and supplies such as fertilizers, grow material, and electrical equipment. None of the bedrooms appeared to be occupied; only one contained any personal effects.

[7] In the full basement, three of the four rooms had been converted into marihuana grow rooms, with high intensity lights, reflective shields, and ventilation systems. In one room in which 13 such lights and shields had been installed, the police found boxes containing over nine kilograms of cannabis marihuana bud and over two kilograms of shake. Another room contained an active grow of 61 budding marihuana plants under 11 such lights and shields. The third contained another 13 lights and shields over 118 pots filled with earth. Ventilation flex tubing ran from the basement to the attic.

[8] The electricity to the Property had been diverted at the power mast on the main residence and that on the garage, which had a separate power service. The two-car garage housed over 200 cannabis marihuana plants of different sizes (from clones to 18 inches tall) under two high intensity lights. Turbines had been installed to provide fresh air and allow venting.

[9] In total, 518 plants were found, consisting of 279 mature plants and 239 plants in the cloning stage. Corporal Carroll estimated that, using a conservative yield of 3 ounces per plant, this number of plants at maturity would produce a minimum of 97 pounds or 43.5 kilograms of marihuana. In his opinion, the profit potential, if sold on a gram level, would be between $435,000 and $870,000 and, if sold on a pound level, between $242,000 and $339,000. He valued the equipment (ballasts/condensers, 1000 watt lights and reflective shields) at $20,000, excluding the cost of the wiring, timers, pots, soil, nutrients and labour. Nova Scotia Power

Corporation (“NSPC”) calculated the value of the electricity that had been diverted at over $5,500.

[10] Corporal Carroll’s report concluded:

> . . . it is readily apparent that this residence and garage have been converted for and were being used solely for a commercial marihuana growing operation. The large number of lights, the diversion of electricity, the sophistication of the set-up and the space occupied by the growing operation support my belief that it was a commercial venture. Although this residence may have been occupied on an occasional basis, there is no indication that it had full time occupants. The considerable amount of money invested in setting up this operation, exclusive of the purchase price of the residence, suggests that those responsible were committed to a long term growing operation that would provide substantial profits. The presence of three distinct stages of production - clones, vegetative and bud - confirms that those responsible were intending to conduct an ongoing and continuous operation. The packaged and loose “bud” along with shake, stalks and empty pots indicate that a crop had been recently harvested.
>
> The calculations that I made with respect to potential profit were based on a single yield, however, it is possible to produce 3-4 crops per year from such an operation, which would greatly increase the potential profits from this illegal activity.

[11] At the forfeiture hearing, the respondent testified that he was working for an airline at a Toronto airport when he came to Nova Scotia on vacation. He purchased the Property in 2004, thinking that it might be possible to transfer his station attendant position to Halifax. For the down payment, he used some $51,000 from the sale of property he owned in Niagara Falls. His evidence was that it was only after he had acquired the Property that a friend gave him the idea of growing marihuana there. The respondent used his line of credit for the $20,000 to purchase the equipment, and paid that off with proceeds from the sale of another Niagara Falls property. He did not know how to divert electricity and had someone else do this for him. The respondent did not obtain a job transfer. He continued to live and work full-time in Toronto, and travelled often to Nova Scotia and the Property.

[12] According to the respondent, he did not make any money from the marihuana grow at the Property. He intended to cultivate marihuana for six to eight months, for one or two crops, and then to close down. His one crop of some

22 pounds was not sold because he did not know where to sell it. That single crop was seized by the police. The respondent thought he could get $1,750 per pound for it in Toronto. Corporal Carroll acknowledged that this would not be an unreasonable wholesale price. If sold at that price, the profit potential would be about $170,000. The respondent's plan was to apply the profits to the Property, to reduce the mortgage payments.

[13] When sentenced, the respondent was 38 years old. He had almost always been gainfully employed since coming to Canada, and in 2005 earned about $43,000. He is divorced and supports his son. He had no criminal record. His pre-sentence report was positive, describing him as "a quiet, respectful, remorseful first offender that deeply regrets his actions," and as "a low risk/need offender" who has a supportive family, excellent employment record, a stable lifestyle, and no previous convictions. It considered him a suitable candidate for community supervision.

[14] The Property is the respondent's only asset. He testified that he lived in the house and was the only person who did so. Until his incarceration, he made the mortgage payments and paid the property taxes. He made full restitution to the NSPC for the electricity that had been diverted.

[15] The trial judge was satisfied that, in the circumstances, forfeiture of the Property would be disproportionate. His denial of the Crown's application for forfeiture led to this appeal.

Issues

[16] The issue on appeal is whether the sentencing judge erred by failing to order forfeiture of the Property. In particular, did he err in principle by failing to properly apply the "disproportionality test" for forfeiture of real property pursuant to s. 19.1 of the *C.D.S.A.* and, in any event, was his decision refusing forfeiture unreasonable and unfit.

Standard of Review

[17] As will be explained in greater detail below, s. 16.(1) of the *C.D.S.A.* provides for orders of forfeiture of offence-related property. Here, the Crown's appeal is against the judge's refusal to make such an order. Section 16.(3) provides that:

> 16.(3) A person who has been convicted of a designated substance offence or the Attorney General may appeal to the court of appeal from an order or a failure to make an order under subsection (1) as if the appeal were an appeal against the sentence imposed on the person in respect of the offence. [Emphasis added.]

[18] It follows that the standard of review for forfeiture orders is the same as that applicable to review of sentences generally. *R. v. Yates* (2002), 169 C.C.C. (3d) 506 (B.C.C.A.); *R. v. Harb* (1994), 88 C.C.C. (3d) 204 (N.S.C.A.). Section 687(1) of the *Criminal Code* sets out how this court is to proceed on a sentence appeal:

> s. 687(1) Where an appeal is taken against sentence, the court of appeal shall, unless the sentence is one fixed by law, consider the fitness of the sentence appealed against, and may upon such evidence, if any, as it thinks fit to require or to receive,
>
> > (a) vary the sentence within the limits prescribed by law for the offence of which the accused was convicted; or
> >
> > (b) dismiss the appeal.

[19] The role of a court of appeal when reviewing a sentence pursuant to that provision has been established in cases such as *R. v. C.A.M.*, [1996] 1 S.C.R. 500, (1996), 105 C.C.C. (3d) 327 (S.C.C.), *R. v. Shropshire*, [1995] 4 S.C.R. 227, (1995), 102 C.C.C. (3d) 193 (S.C.C.), and *R. v. Proulx*, [2000] 1 S.C.R. 61, (2000), 140 C.C.C. (3d) 449 (S.C.C.). In *R. v. Harris (P.J.)* (2000), 181 N.S.R. (2d) 211 (C.A.), Glube, C.J.N.S. reviewed *Shropshire*, supra and *C.A.M.*, supra, and set out the general principles at ¶ 41 as follows:

> The function of the Court of Appeal in determining "the fitness of the sentence appealed against" within the meaning of s.687(1) is to determine whether there is an error in principle, or a failure to consider a relevant factor, or an overemphasis of appropriate factors, or that the sentence is "demonstrably unfit", or clearly unreasonable. (citations omitted)

The Legislation

[20] Each of the charges of unlawful production and possession for the purpose of trafficking to which the respondent pled guilty is a “designated substance offence” as defined in s. 2 of the *C.D.S.A.* That definition expressly excludes simple possession of a substance included in Schedules I to IV of that legislation. The offences which it captures include the more serious ones such as trafficking, importing and exporting, and production of substances included in those Schedules.

[21] In determining whether to forfeit real property pursuant to s. 19.1(3) of the *C.D.S.A.*, the judge must conduct a two-part analysis. First, the judge considers whether the property is "offence-related property" and the offence committed in relation to it. Such property is subject to forfeiture under s.16 of the *C.D.S.A.* which states:

> 16. (1) Subject to sections 18 to 19.1, where a person is convicted of a designated substance offence and, on application of the Attorney General, the court is satisfied, on a balance of probabilities, that any property is offence-related property and that the offence was committed in relation to that property, the court shall
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> > (a) in the case of a substance included in Schedule VI, order that the substance be forfeited to Her Majesty in right of Canada and disposed of by the Minister as the Minister thinks fit; and
> >
> > (b) in the case of any other offence-related property,
> >
> > > (i) where the prosecution of the offence was commenced at the instance of the government of a province and conducted by or on behalf of that government, order that the property be forfeited to Her Majesty in right of that province and disposed of by the Attorney General or Solicitor General of that province in accordance with the law, and
> > >
> > > (ii) in any other case, order that the property be forfeited to Her Majesty in right of Canada and disposed of by such member of the Queen's Privy

> Council for Canada as may be designated for the purposes of this subparagraph in accordance with the law. (Emphasis added)

[22] The definition of “offence-related property" in s. 2 of the *C.D.S.A.* is broadly worded:

> “offence-related property” means, with the exception of a controlled substance, any property, within or outside Canada,
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> (a) by means of or in respect of which a designated substance offence is committed,
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> (b) that is used in any manner in connection with the commission of a designated substance offence, or
>
> (c) that is intended for use for the purpose of committing a designated substance offence;

With the exception noted in the definition, this term encompasses any property. In particular, the definition is not limited to personal property; it also includes real property.

[23] I observe at this point that property becomes offence-related property, not because of any inherent characteristic of that property, but because of the use made of it. For example, one can legally purchase or possess high intensity lights or hydroponic equipment. It is only when property is used or intended for use in the commission of a designated substance offence that it is transformed into offence-related property subject to forfeiture to the Crown.

[24] At this first stage of the analysis applicable to the forfeiture of real property described above, the Crown has the burden of persuading the judge that the property which is the subject of its forfeiture application qualifies as offence-related property, and that the offence was committed in relation to that property. If it successfully discharges this onus then, unless the property is real property or a dwelling-house, which will be more fully explained below, the judge shall grant forfeiture. That is, once the judge is satisfied, the legislation calls for automatic forfeiture.

[25] Only two types of offence-related property may be saved from forfeiture to the Crown. One is a dwelling-house – s. 19.1(4) requires the court to consider the impact of its forfeiture on the members of immediate family of the person charged or convicted, who live there, and the members' involvement, if any, in the offence. In the case under appeal, the respondent acknowledged that no other members of his family lived at the Property. Consequently, s. 19.1(4) did not apply.

[26] The other type of offence-related property which might escape forfeiture is real property for which the court is satisfied that the impact of a forfeiture order would be disproportionate. Section 19.1(3) of the *C.D.S.A.* requires the court to apply a disproportionality test. It lists the three factors which are to be considered in that regard:

> 19.1(3) Subject to an order made under subsection 19(3), if a court is satisfied that the impact of an order of forfeiture made under subsection 16(1) or 17(2) in respect of real property would be disproportionate to the nature and gravity of the offence, the circumstances surrounding the commission of the offence and the criminal record, if any, of the person charged with or convicted of the offence, as the case may be, it may decide not to order the forfeiture of the property or part of the property and may revoke any restraint order made in respect of that property or part. (Emphasis added)

[27] Under this second part of the analysis applicable to the forfeiture of real property, the offender has the burden of persuading the court that forfeiture should not be granted. Both *R. v. Nguyen,* [2007] O.J. No. 152 (Ont. Ct. Just.) at ¶ 54 and *R. v. Luu,* [2005] B.C.J. No. 2062 (B.C. Prov. Ct.) at ¶ 31 noted that the Court of Quebec Criminal Division in *R. v. Oullette,* [2004] J.Q. no. 6258 (C.Q. C.P.) described the burden thus at ¶ 19:

> . . . For a court to be satisfied that forfeiture is disproportionate, given the circumstances and gravity of the offence, evidence of such disproportion must be presented to the court, or at a minimum representations to that effect must be made based on the evidence put forward. While the legislation does not require that disproportionality be proven, it does impose on the accused the burden of persuasion. (Emphasis added)

The Trial Judge's Decision

[28] In the case under appeal, it was undisputed that the Property was offence-related property subject to forfeiture pursuant to s. 16 of the *C.D.S.A.* As a consequence, the evidence and submissions at the forfeiture hearing were directed to the second part of the analysis pertaining to forfeiture of real property, namely whether or not, as set out in s. 19.1(3), forfeiture would be disproportionate.

[29] In dismissing the Crown's application for forfeiture, the judge reviewed the evidence and commented that it was a reasonable conclusion that the police had seized his first crop, so that the respondent had not actually sold any of the marihuana from the grow operation. He continued:

> . . . The result then of this from what I can see is that Mr. Siek put what I characterize as his life savings into the purchase of 16 Brookhill Drive. He paid out twenty thousand dollars ($20,000) for equipment and set up costs that he's lost. He repaid five thousand five hundred dollars ($5,500) for power that was used in the grow operation which has come out of his own pocket so twenty-five thousand five hundred dollars ($25,500) and of course, there's the victim surcharge so it's about twenty-six thousand dollars ($26,000) plus of course, there's no doubt some legal fees and other expenses including travel to Nova Scotia for Court and so on. And he has and is now serving a sentence of two years in prison in the penitentiary. He's hopeful for early release but that's for the authorities and for him to earn. The prosecution in this case is asking for the forfeiture of the house which would mean that Mr. Siek would have no opportunity to recover any of the remaining fifty thousand or fifty-one thousand dollars which he used as the downpayment on the house. And the mortgagee will be protected by the security of the mortgage. And it is urged that this additional fifty thousand dollars ($50,000) penalty ought to be imposed to add to the deterrent effect of other sentencing that's appropriate for these offenses. And to focus on the pocketbook of offenders participating in crimes of a substantial profit. The section that I have to weigh is, as I've already said, one that determines - - says that I should make the Forfeiture Order unless I'm satisfied that the impact of an order for forfeiture in respect of the real property would be disproportionate to the nature and gravity of the offense and the circumstances surrounding the commission of the offense and the criminal record of Mr. Siek. He has no criminal record as I've said already. The circumstances do not disclose to me the - - a sophisticated criminal and in at least that Mr. Siek isn't a sophisticated criminal and his work history and life history indicates that he has been employed and been a contributing member of the Canadian society and that he used the earnings from lawful employment to make the purchase which he would lose if there is this forfeiture.

. . .

> . . . taking all of the factors into account, including the sentence which I imposed already for these offenses the fact that evidence shows Mr. Siek used the - - used his own money for the purchase of the - - own lawfully earned money for the purchase of the property. And that although he had some sophisticated help there is not an indication to me that Mr. Siek, himself, is a sophisticated criminal. I would say that the Defense has met its burden on the balance of probabilities, satisfying me that forfeiture would be disproportionate in the present case under Section 19.1(3) and accordingly the application for the Forfeiture Order is dismissed. . . . (Emphasis added)

Analysis

[30] It is clear from his reference to the test set out in s. 19.1(3) of the *C.D.S.A.* that the judge understood what he was required to consider in deciding the forfeiture application. However, in my respectful opinion, he erred in his application of the test, by over-emphasizing certain matters, by not considering all of the factors stipulated, and by considering one which is not appropriate.

[31] Section 19.1(3) provides that the court "may" decline to order forfeiture of real property if the offender can satisfy the court that it would be disproportionate in light of

(a) the nature and gravity of the offence,

(b) the circumstances surrounding the commission of the offence, and

(c) the criminal record, if any, of the person charged or convicted of the offence.

According to his reasons, the judge here considered the circumstances of the offence and the respondent's criminal record or, rather, the fact that he had none. In refusing forfeiture, he emphasized:

(a) the respondent had not made any profit from the illegal activity,
(b) he used his legitimate earnings towards purchasing the Property, and

(c) he had been sentenced to two years' imprisonment.

[32] In my respectful opinion, the sentence imposed was not a valid consideration and by over-emphasizing the lack of profit and the loss of equity obtained by legal means, and by failing to consider the nature and gravity of the offence and other circumstances surrounding its commission, the judge erred.

[33] In addition, after having heard evidence that the marihuana grow showed three distinct stages of production and that considerable time and money had been invested, the judge did not make any finding that the grow operation would close after only six to eight months as the respondent had testified. Thus the fact that the respondent had not made any profit is more a function of when the police executed the search warrant than anything else. Had the grow operation not been discovered, it may have continued, and he would have had more time to sell the product. The respondent's failure to have made a profit from his illegal activity was not a particularly significant consideration in making forfeiture disproportionate.

[34] Furthermore, the source of the monies the respondent expended to establish the grow operation is not a factor of great consequence. By his own admission, shortly after he acquired it, the respondent converted the Property into a marijuana grow operation, and thus into an offence-related property. Whether he used his own legitimate earnings, proceeds of crime, or another source of financing for its acquisition does not alter the fact that what he did to it made the Property subject to forfeiture, unless the court could be satisfied that the disproportionality test was met. Similarly, his loss of $20,000 that he spent for grow equipment, his repayment of $5,500 for the diverted electricity, and his having kept the mortgage and other payments current as long as he did, are not heavily significant considerations in determining disproportionality.

[35] I turn then to the final factor the judge considered, namely the sentence he had imposed on the respondent earlier. The Crown argues that forfeiture is part of the sentencing process, but not part of the sentence itself. As a consequence, the application of the disproportionality test should not include any consideration of the sentence imposed, and a forfeiture application may be heard separate from the sentencing hearing. According to the respondent, forfeiture is punitive and forms

part of the sentence. As a result, the sentence and forfeiture, if any, should be decided at the same hearing.

[36] In the course of his submissions regarding consideration of the sentence imposed in forfeiture applications, the respondent noted that in every reported case where the court ordered forfeiture of real property, the offender either received a conditional sentence or a period of incarceration in a provincial facility whereas he was sentenced to two years' imprisonment in a federal institution. At his sentencing hearing, the Crown had asked for two to two and a half years' federal incarceration, a weapons prohibition order, and forfeiture of all offence-related property, including the Property. The respondent had sought a conditional sentence which, among other things, would allow his employment with the airline to continue.

[37] In my view, while forfeiture is part of the sentencing process, it is not a component of the sentence for the offence. The judge erred in considering the sentence in determining whether the disproportionality test had been met. Moreover, it is not essential that an application for forfeiture be heard at the same time that sentence is imposed.

[38] No appellate court has determined that an order of forfeiture under s. 16 of the *C.D.S.A.* is part of the sentence, or that the sentence imposed is a factor of the disproportionality test. A few provincial courts have considered that forfeiture should be taken into account when determining sentence. For example, in *R. v. Luu*, supra, the judge first decided the forfeiture application regarding the dwelling-house. In doing so, he stated at ¶ 33 that in *R. v. Oullette*, supra the Court of Quebec Criminal Division (Dufour, J.C.Q.) had said that:

> . . . [an] order of forfeiture is part of the sentencing process and must be considered part of the repressive aspect. Therefore, it must be taken into account in imposing a fair and reasonable sentence.

In then imposing sentence, the judge took into consideration the order of forfeiture. In *R. v. To*, [2005] O.J. No. 2137, the Ontario Court of Justice was presented with a joint submission for a conditional sentence and an application for forfeiture of a dwelling-house. In deciding that forfeiture would be disproportionate, at ¶ 136 the judge cited *Oullette*, supra, as authority for the statement that a decision on

forfeiture is an aspect of sentencing. In *R. v. Wu*, [2005] B.C.J. No. 2993 (B.C.P.C.) (Q.L.), in discussing the factors to be considered in deciding an application for forfeiture of real property, the judge commented at ¶ 20, without providing any authority, that:

> . . . It is also important that forfeiture, if the order is to be made, be considered as part of the sentence at the end of the day.

In *R. v. Nguyen*, [2006] B.C.J. No. 3202, the British Columbia Supreme Court first ordered forfeiture of the residence of a couple convicted of unlawful production of marihuana and possession for the purpose of trafficking. The judge there considered forfeiture an adequate level of general deterrence, and then imposed a conditional sentence rather than a custodial one.

[39] I begin my analysis by examining the legislation which empowers the courts to impose an order for forfeiture of property.

[40] The intention of Parliament in enacting the forfeiture legislation was discussed by the Alberta Court of Appeal in *R. v. Gisby*, [2000] A.J. No. 1145 (Alta. C.A.). The court stated:

> ¶ 19 The CDSA was enacted by Parliament to combat the illicit drug industry. A review of the CDSA and in particular, the provisions related to the forfeiture of property, indicate that the CDSA does so both through punishment and deterrence. The forfeiture provisions are punitive to the extent that they deprive one of offence-related property, broadcasting the message that Canadian society regards designated substance offences with abhorrence. But they also introduce an element of deterrence in relation to designated substance offences. In this respect, the forfeiture provisions attach a very real cost to the business of drug crime directly equivalent to the monetary value of the offence-related property that is subject to forfeiture, thus raising the stakes associated with the commission of those offences.
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> ¶ 20 The forfeiture provisions serve another purpose. In addition to punishment and deterrence, they help prevent or at least reduce the likelihood of future offences by removing from the illicit drug industry property which, by virtue of the definition found at s. 2(1), is being used to facilitate the commission of a designated substance offence. Provided that all requisite conditions are met, property that has been used to facilitate such offences will be forfeited and thus cannot be used to aid the perpetration of future offences.

. . .

> ¶ 23 . . . The forfeiture provision is therefore designed to prevent, or at least impede, the commission of further offences by ensuring that offence-related property cannot be used to facilitate those offences.

This passage setting out purposes of the forfeiture provisions has been cited in cases, such as *R. v. Doak*, [2001] B.C.J. No. 2793 (B.C. Prov. Ct.) at ¶ 20, and *Canada (Attorney General) v. Huynh,* [2005] B.C.J. No. 2168 at ¶ 2.

[41] The legislative history of the forfeiture provisions is also helpful. In both its predecessor legislation, namely the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, s. 2, and the current *C.D.S.A.*, real property has been accorded special consideration not given to personal property. Earlier, only real property that had been "built or significantly modified" for the purpose of committing the offence came within the definition of offence-related property. The judicial interpretation of that phrase created significant impedients to the forfeiture of real property, including that used for marihuana grow operations. See, for example, *Gisby*, supra and *R. v. Dupuis* (1998), 130 C.C.C. (3d) 426 (Sask. Q.B.). Amendments to the *C.D.S.A.* removed the requirement that real property be "built or significantly modified" in order to be offence-related property. (See *Act to Amend the Criminal Code*, S.C. 2001, c. 32, 47)

[42] As a consequence, the definition of "offence-related property" expanded. At the same time, special considerations applicable to the forfeiture of real property were added. In the result, the current approach to forfeiture of real property in the *C.D.S.A.* contains a broad definition of offence-related property in s. 2 and calls for presumptive forfeiture pursuant to s. 16.(1), unless the offender can persuade the court that forfeiture would be disproportionate pursuant to s. 19.1.

[43] As indicated earlier, s. 16.(1) applies only whenever an offender has been convicted of a designated substance offence, such as trafficking or production. The Crown is not permitted to apply for forfeiture for offences such as simple possession of certain substances. That feature, in combination with the broad definition of offence-related property, indicates that Parliament intended that, once used in the commission of the more serious offences which come within the definition of a designated substance offence, property would be taken from the offender and forfeited to the Crown, unless specifically exempted.

[44] This feature of the legislative scheme relating to forfeiture in the *C.D.S.A.* is striking. Once there is a finding that property constitutes offence-related property, forfeiture will automatically follow, unless the property is real property and the offender can satisfy the court under s. 19.1(3) that forfeiture would be disproportionate, having regard to the factors listed in that provision. This presumption in favour of forfeiture serves to emphasize that forfeiture is a consequence of the offender having chosen to use an asset in the commission of the offence and having purposely converted it into offence-related property.

[45] That presumption is displaced only when, pursuant to s. 19.1(3), the offender satisfies the court that the impact of an order of forfeiture would be disproportionate to the nature and gravity of the offence, the circumstances surrounding the commission of the offence and the criminal record, if any, of the offender. The sentence imposed is not included in the factors to be considered by the court. Nor does the *C.D.S.A.* provide that forfeiture of offence-related property is to be considered part of the punitive sanction.

[46] Having considered the intention of Parliament in enacting the forfeiture provisions, their legislative history, and having examined the provisions themselves, I am of the view that the judge erred in taking into account the sentence imposed on the respondent in determining whether forfeiture was disproportionate. Forfeiture is a consequence of property having been converted into offence-related property. While part of the sentencing process, it is not part of the sentence itself. It follows that forfeiture, if granted, should not affect the sentence imposed for the offence. Similarly, the sentence should not be impacted by a forfeiture order. Finally, it is not essential that forfeiture and sentencing be dealt with in the same hearing.

[47] With respect, the judge over-emphasized the source of the funds and the lack of profit in his determination that the respondent had met the burden of persuasion that forfeiture would be disproportionate. He erred in taking into account the sentence imposed. He also did not take into account factors which were included in the disproportionality test, such as the nature and gravity of the offence, and many of the other circumstances surrounding the offence. In his factum, Mr. Covan, for the Crown, succinctly and helpfully summarized what might be considered, as follows:

In the appellant's submission, the factors set out in s. 19.1(3) must be examined and applied in light of the manner in which the property itself was used in the commission of the offence. The court must consider the nature of the property and its relationship to the offence.

A. *The Nature and Gravity of the Offence*

In considering the nature and gravity of the offence, the sentencing judge should consider the substance involved, the quantities involved, and degree of sophistication of the offence. Here, a key question will be whether the offence involved commercial or non-commercial production or distribution of drugs. Where the offence is a large scale commercial operation, this should weigh in favour of forfeiture. On the other hand, where the offence involves non-commercial production or distribution (i.e. trafficking to support a drug habit or social trafficking) this should weigh against forfeiture.

B. *The Circumstances Surrounding the Commission of the Offence*

In considering the circumstances surrounding the commission of the offence, the judge should take into account:

> The offender's role in the commission of the offence. Where the offender was the principal actor or a central figure in the offence, this weighs in favour of forfeiture, whereas if the offender's role was minimal or peripheral, this weighs against forfeiture.
>
> Any evidence regarding the offender's motivation for becoming involved in the offence. Where there is unrebutted or unchallenged evidence that the offence was motivated by greed, this weighs in favour of forfeiture. Conversely, where there is evidence, either from the circumstances of the offence as related by the Crown, or put forward by the offender, that the offender was pressured or manipulated into becoming involved in the offence (for example, in order to supply his or her own drug habit), this weighs against forfeiture.
>
> Any aggravating or mitigating factors, particularly those that bear on the nature of the property itself. For example, where there is evidence that the manner in which the property was used represented a danger to the public, this weighs in favour of forfeiture.
>
> The nature of the property and the manner in which it was used in the offence. Where a large proportion of the property is devoted to the

commission of the offence, this should weigh in favour of forfeiture. Conversely, where only a small portion of the property was used in the commission of the offence, the remainder being devoted toward legitimate uses, this should weigh against forfeiture.

The value of the property itself, in comparison to the magnitude of the drug offence. Where the offender's equity in the property is not significant in comparison to the value of the drugs that were involved in the offence, this weighs in favour of forfeiture. By contrast, where the offender has substantial equity in the property, and the offence involved a very small quantity of drugs with minimal value, this will weigh against forfeiture.

Whether the use of the property to commit the offence detrimentally affected its legitimate uses. Where the use of the property in the offence presented risks to the property itself, of a sort that a legitimate property owner would not be prepared to tolerate, this suggests forfeiture would not be disproportionate. Similarly, where using the property to commit the offence detrimentally affected the quality of use or enjoyment for legitimate purposes, this weighs in favour of forfeiture. On the other hand, where the commission of the offence had no bearing on the offender's legitimate use and enjoyment of the property, this weighs against forfeiture.

C. *Criminal Record, If any, of the Offender*

The court must consider whether the offender has a criminal record. Where the offender has no prior criminal record, this clearly weighs against forfeiture. While any prior convictions would be relevant, prior drug convictions obviously weigh most heavily in favour of forfeiture.

D. *Spectrum of Proportionality*

It is helpful to consider the factors in s. 19.1(3) of the ***C.D.S.A.*** on a spectrum or sliding scale of proportionality. At one end of the spectrum would be a large scale, commercial drug operation, motivated by greed, where the property in question is nothing more than a business asset used in the operation, and the offender has a prior history of drug offences. On the other end of the spectrum would be a small, non-commercial or social trafficking offence, where the offender uses the subject property for *bona fide* purposes with only a small proportion of the property used to commit the offence, and the offender has no prior criminal history.

[48] The size and value of the grow operation at the Property shows that the respondent was engaged in the production and distribution of marihuana at the wholesale level. His significant investment in this commercial grow operation would indicate an intention to be involved over an extended period.

[49] The Property was used and intended for use in the commission of the production and possession offences to which the respondent pled guilty, and thus constituted "offence-related property" within the meaning of the statutory definition in s. 2 of the *C.D.S.A.* It was never a personal residence, having been completely converted to a grow operation shortly after the respondent acquired it. The respondent himself lived elsewhere, and no member of his family would be displaced if the Property were forfeited.

[50] The respondent, a mature person, was the principal actor in this endeavour. Despite his stable employment, he was motivated by greed in choosing to actively involve himself in an illegal activity. He invested $51,000 for the down payment on the home, $20,000 for the grow equipment, and made mortgage and other payments. The value of one crop of the plants grown at the Property ranged from $170,000 (the respondent's estimate) to $339,000, which indicates the sort of return the respondent sought and strengthens the likelihood that the operation was intended to be a continuing one.

[51] While he had not appealed his sentence of 24 months' incarceration for unlawful production and unlawful possession for the purpose of trafficking, the respondent suggested during argument respecting its consideration on the forfeiture application that it was too severe, particularly where he had no previous criminal record. In my view, the sentence was not so different from others for similar offences. In *R. v. McCurdy*, 2002 NSCA 132 (C.A.), this court imposed a sentence of three years' incarceration for conspiracy to possess cannabis marijuana for the purpose of trafficking. The offender, who had no prior drug-related offences, was involved with several others in a marihuana grow operation involving more than 500 plants in three sites, including his own home. See also *R. v. Collette*, [1999] N.S.J. No 190 (C.A.), where the sentencing judge had given the offender a conditional sentence of two years less a day for possession of 10 kilograms of cannabis resin for the purpose of trafficking. This court increased the sentence to three years' imprisonment.

[52] Having considered the factors set out in the disproportionality test, I turn finally to the impact of forfeiture of the Property upon the respondent. He would lose his considerable investment in the Property and the grow equipment, but any loss by way of forfeiture would be of his own doing by having chosen to convert it into offence-related property. However, the respondent would not be left homeless, as he had another place to live, and had a relatively good financial position and a strong employment history. Taking the factors and the impact into consideration, I would allow the appeal and order forfeiture of the Property.

Oland, J.A.

Concurred in:

Roscoe, J.A.

Hamilton, J.A.