NOVA SCOTIA COURT OF APPEAL

Citation: Dixon v. Nova Scotia (Director of Public Safety), 2012 NSCA 2

Date: 20120105
Docket: CA 343192
Registry: Halifax

Between:

Delilah Delores Dixon and
Peter Sheldon MacKinnon

Appellants

v.

The Director of Public Safety

Respondent

Judges:	MacDonald, C.J.N.S., Oland and Bryson, JJ.A.
Appeal Heard:	October 13, 2011, in Halifax, Nova Scotia
Held:	Appeal dismissed and the stay granted by this court pending appeal is dissolved, per reasons for judgment of Bryson, J.A.; MacDonald, C.J.N.S. and Oland, J.A. concurring.
Counsel:	Tony W. Mozvik and James Snow, for the appellants Catherine Lunn, for the respondent

Reasons for judgment:

[1] Delilah Delores Dixon and Peter Sheldon MacKinnon appeal the decision of the Honourable Justice Patrick J. Murray of the Supreme Court of Nova Scotia in which he granted a community safety order against them under s. 5 of the *Safer Communities and Neighbourhoods Act*, S.N.S. 2006, c. 6 ("*Act*") on the grounds that their property was being habitually used for the possession, use and sale of illicit drugs and was adversely affecting the safety and security of the community (2011 NSSC 5).

[2] Justice Murray ordered cessation of the impugned activities and required the appellants to vacate their property for a period of 70 days. This Court granted a partial stay, pending appeal (2011 NSCA 15).

[3] Ms. Dixon and Mr. MacKinnon argue that Justice Murray improperly interpreted the term "habitually used" as that relates to the illegal uses of their property; that he misinterpreted the term "reasonable inference" regarding the use to which their property was put; and that he misinterpreted the *Act* when considering the need for a community safety order. I see no such errors in the judge's reasons and would dismiss the appeal.

Facts:

[4] The appellants live with their three young children at 1437 (also known as 1421) Bay St. Lawrence Road, in the small community of Aspy Bay, Nova Scotia (the "Property"). The appellants have criminal records. Mr. MacKinnon has been convicted of assault causing bodily harm and being unlawfully in a dwelling house for which he was sentenced in August 2008 to 26 months incarceration and 10 months probation. He was released February 5, 2010. He also has convictions for assault, careless use of a firearm, possession of a prohibited weapon, breach of probation, refusal of breathalyzer, breach of undertaking, aggravated assault and two drug offences for possession in June 2006.

[5] Ms. Dixon was also sentenced in August 2008 for being unlawfully in a dwelling house, assault causing bodily, assault with a weapon and aggravated assault. She received a term of 18 months incarceration and one year probation. She was released in August 2009. She has convictions for breach of probation,

failure to comply with a condition, assault and mischief. She was also convicted of possession of cocaine and Methylphenidate at the Property in June 2006. More recently, she was convicted for possession of cocaine in December 2009 at the Property. At that time she was still subject to conditions imposed arising from her August 2008 conviction.

[6] On November 10, 2009 the Director of Public Safety ("Director") asked Keltie Jones to investigate a complaint concerning the use and trafficking of crack cocaine at the Property. Mr. Jones has 30 years experience as an HRM police officer, including 8 years as a drug investigator and 3 years as an undercover officer.

[7] Mr. Jones investigated the complaint. He spoke with approximately 12 to 15 complainants. All live in the community. All alleged that the appellants were involved in the use and sale of illegal drugs which was adversely affecting the community. They further alleged that a group of young people from the community began frequenting the Property following Ms. Dixon's release from prison in August of 2009. They claim that Ms. Dixon sells them crack cocaine.

[8] Mr. Jones said that the complainants did not give him any names of the young people visiting the Property. He said the complainants were nervous and fearful. The community is small and their houses are close to the Property, as is the local elementary school. Mr. Jones said that about half the people he approached refused to speak to him. He found it necessary to assure the complainants that he would protect their identity.

[9] Affidavits were also filed by Cst. Michael Somerton of the Cape Breton Regional Police and Csts. Fabian Kenny and Sharon Cornelisse of the RCMP. Constable Somerton described a meeting between Ms. Dixon and a known drug dealer at the Zellers parking lot in Sydney on July 13, 2010. Constables Kenny and Cornelisse recounted community fear as a result of activities at the Property. In one especially harrowing experience, Cst. Kenny described finding crack cocaine in a child's crib during a warrant-authorized search of the Property in December 2009. On that occasion, a Ms. Donna Connors, a guest or tenant of the appellants, was charged with possession for the purposes of trafficking. Constable Kenny also observed known drug users making brief visits to the Property. The Chambers judge was satisfied that such visits were consistent with drug activity.

[10] The police led evidence that since Ms. Dixon's release from prison in August 2009, complaints and criminal activity in the neighbourhood have sharply increased. For example, they describe six events of arson in the fall of 2009 on Bay St. Lawrence Road or the immediate vicinity.

[11] Like Mr. Jones, the RCMP officers reported that members of the community were fearful of giving evidence against the appellants.

[12] In response to the evidence led by the Director, 13 affidavits were filed on behalf of the respondents. Ms. Dixon was cross-examined on her affidavit. The Chambers judge was unimpressed with the appellants' evidence. For example, he said:

> [79] ...Ms. Dixon experienced difficulties with her evidence on cross examination. Clearly there were inconsistencies. ...
>
> [80] ...she said on more than one occasion "I'm not lying about that sir", when she was merely asked a question.
>
> [81] ...She provided no explanation for the score sheet and no explanation for the meeting with Mr. Cook in the Zellers parking lot, a person well known to be involved in drug activities in the Sydney area. ...
>
> [82] ...She denies being associated with or being a member of Society's Rejects. The evidence at every turn, points to her being directly involved with Society's Rejects...
>
> [83] None of the explanations she provided for these acts were persuasive. It was apparent from the cross examination of Ms. Dixon that her credibility was lacking. In short, she was not to be believed in the explanation she provided or the denials given in her affidavit. To this end, on a balance of probabilities, I must accept the evidence of the Director and in particular the Constables. I reject the evidence of Ms. Dixon and her common law husband, which I find to be unreliable.

[13] A perusal of the transcript of her cross-examination confirms that Ms. Dixon was an inconsistent, uncooperative and evasive witness.

[14] Justice Murray also rejected the other affidavit evidence tendered on behalf of the respondents. In some cases he found the evidence not credible; in others, not reliable.

[15] In the result, Justice Murray made the following factual findings:

> [103] I conclude from the totality of the evidence, including the affidavits and oral evidence of R.C.M.P. Constables Kenny and Cornelisse, that the following facts have been established on the balance of probabilities:
>
> 1. There has been a sharp increase in number of files, complaints, and investigations associated with 1437 Bay St. Lawrence Road since Delilah Dixon was released from prison in August of 2009.
>
> 2. There have been constant telephone calls, crime stopper tips, and contacts from the community at large which have all alleged that drug use and criminal activity are occurring at and from the Property.
>
> 3. That a group named Society's Rejects which were mostly teenagers are headed by Delilah Delores Dixon and this group held parties and congregated at the Property.
>
> 4. That there was a "second" increase in activities, files, complaints and investigations since Mr. MacKinnon was released from prison in February of 2010.
>
> 5. The R.C.M.P. officers conducted surveillance of the Property and noticed a high traffic volume to and from the Property.
>
> 6. Constable Kenny witnessed Tony Allan MacKinnon hitchhiking from his home in Bay St. Lawrence only to get dropped off at the home of the Respondents for a few minutes and then leave and hitchhike back to Bay St. Lawrence. This individual is known to have a drug related record.
>
> 7. There have been a total of six drug related charges laid and emanating from the Property over a period of three years. Those charges are as follows:
>
> (i) June 15th, 2006, Peter Sheldon MacKinnon charged with possession for the purposes of trafficking in cocaine.

(ii) June 15th, 2006, Peter Sheldon MacKinnon convicted of with**[sic]** possession of methylphenidate at the Property contrary to the Controlled Drugs and Substances Act.

(iii) June 15th, 2006, Delilah Delores Dixon charged with possession for the purposes of trafficking in cocaine. Convicted of possession of Cocaine contrary to the Controlled Drugs and Substances Act (CDSA).

(iv) June 15th, 2006, Delilah Delores Dixon charged with possession of methylphenidate at the Property contrary to the Controlled Drugs and Substances Act.

(v) December 18, 2009, Delilah Delores Dixon charged with possession of cocaine for the purposes of trafficking. Convicted of possession of cocaine at [the] Property contrary to Controlled Drugs and Substances Act at which time she was subject to probation conditions imposed on August 27th, 2008.

(vi) Donna Connors, a member of Society's rejects, is charged with trafficking of cocaine at [the] Property on December 18th, 2009 contrary to the CDSA. Her trial on this charge is pending before the Courts.

8. When surveillance on the property was "stepped up" the frequency of the visitors declined, however, Mr. MacKinnon than**[sic]** began leaving the Property more often.

9. That crack cocaine was secreted in the baby's crib. Persons having [been] seen driving to and from the Property in an irate manner.

10. The two drug searches in 2006 and 2009 revealed that the Property contained drugs including cocaine and marihuana, a score sheet, scales, baggies and crack cocaine were found at the residence in both 2006 and 2009.

[16] As earlier indicated, the Chambers judge then ordered cessation of the illicit activities and required the appellants to vacate the Property for 70 days. But he delayed implementation of the order to vacate so as to accommodate the appellants' personal circumstances and employment in the fishing industry.

Section 7 of the *Act*:

[17] Section 7 of the *Act* sets out the burden which the Director must meet in order for the Court to issue an order:

> 7 (1) The Court may make a community safety order if it is satisfied that
>
> (a) activities have been occurring on or near the property that give rise to a reasonable inference that it is being habitually used for a specified use; and
>
> (b) the community or neighbourhood is adversely affected by the activities.

[18] Section 2(1)(i)(ii) describes the specified use relevant in this case:

> 2(1) In this Act,
>
> (i) "specified use", in relation to property, means use of the property
>
> > (ii) for the possession, use, consumption, sale, transfer or exchange of a controlled substance, as defined in the Controlled Drugs and Substances Act (Canada), in contravention of that Act,

<u>Issues</u>:

1. Did the Chambers judge misinterpret "habitually used" in s. 7(1) of the *Act*?

2. Did the Chambers judge misinterpret "reasonable inference" in s. 7(1) of the *Act*?

3. Did the Chambers judge err in determining that there was a need for a community safety order?

Leave and Standard of Review:

[19] Appeals to this Court against a community safety order are on questions of law alone and require leave (*Act*, s. 21). Leave was granted by a judge of this Court on August 31 (2011 NSCA 75).

[20] The appellants' grounds of appeal are framed as questions of statutory interpretation. These are questions of law, as is the application of a legal standard to a set of facts (*Mahoney v. R.*, [1982] 1 S.C.R. 834; *R. v. Shepherd*, 2009 SCC 35, para. 20). Leave was granted on this basis; but it is apparent from the appellants' arguments that they descend into the evidence before the trial judge and occasionally trespass on his fact finding role. This is addressed further in the discussion of each issue.

ISSUE 1 – Habitually Used

[21] The appellants argue that Justice Murray misinterpreted the words "habitually used" in s. 7(1)(a). They fault the judge for construing this phrase too generously in favour of the Director. The judge noted:

> [96] With respect to the term "habitually", (as contained in Section 7 of the *Act*), I would note that in **Cochrane, supra**, Justice Warner concluded at para. 64:
>
> > "Finally I find that at the time this application was made, the use of the property had been habitual. **Two recent searches of the property a month apart produced similar results.** There is evidence from Ms. Morse that the activity has been a **long term problem** for the neighbourhood." (Emphasis in original)
>
> [97] The word "habitually" itself was judicially considered in the case of Rex v Johnson, V 74, CCC 324 Court of Appeal. In that case it was stated:
>
> > "The word "habitually" is not used in the broad sense given to it in the dictionaries – meaning "usually, continually or customarily". It must be considered with its context and in relation to the subject matter and it is sufficient if it can be shown, not that the man was in the prostitute's company hour after hour and day after day, but that within the times specified he was for the most part in her company. **The meaning is similar to the definition given by Dicey, Conflict of Laws, 5th ed., p. 66 "The word 'habitual' in the definition of residence, does not mean presence in a place either for a long or short time, but the presence there for the greater part of the period, whatever that period may be whether ten years or ten days referred to in the particular case**." [Emphasis in original]
>
> As this definition is provided in the context of a residence the Court finds it to be relevant here. Accordingly there is no set number of days, months or

> years which can be used to delineate or conclude whether in any given situation a use has been "habitual". Its meaning will depend on the facts of each case.

[22] Neither the *Act* nor its Regulations define “habitually used”. That phrase must be interpreted in accordance with general principles. Regarding the proper approach to statutory interpretation, one only need quote this Court in *Cape Breton (Regional Municipality) v. Nova Scotia (Attorney General)*, 2009 NSCA 44:

> [36] The Supreme Court of Canada had endorsed the “modern approach” to statutory interpretation as expounded by Elmer Driedger, **Construction of Statutes**, 2nd ed. (Toronto: Butterworths, 1983) at p. 87:
>
> > ... the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> See **Re Rizzo and Rizzo Shoes Ltd.**, [1998] 1 S.C.R. 27 at 41; **Canada (House of Commons) v. Vaid**, 2005 SCC 30, [2005] 1 S.C.R. 667; and **Imperial Oil Ltd. v. Canada; Inco Ltd. v. Canada**, 2006 SCC 46, [2006] 2 S.C.R. 447.

[23] One of the means of testing contextual meaning is to examine the consequences of a proposed interpretation. This is often the third and last question asked in cases of statutory interpretation (*Cape Breton v. Nova Scotia*, *supra*, para. 38; *Nova Scotia (Health) v. Morrison Estate*, 2011 NSCA 68, para. 6).

Ordinary Meaning:

[24] Applying the first criterion, the appellants argue that the ordinary meaning of the word “habitually” connotes a degree of regularity, continuity and permanence. They say that this definition requires evidence of recent and ongoing drug related activity. They contend that the evidence does not approach this standard. But this latter argument questions the judge’s interpretation of the evidence of drug activity following the December 2009 drug offences. The standard of review is palpable and overriding error. Here the appellants collide with the judge’s findings (paras. 107, 126, 131):

> [107] I further find that on the balance of probabilities that the use was habitual within the meaning of the *Act*. To conclude that it was not habitual simply because there are only two sets of convictions in 2006 and 2009, is to ignore the remaining evidence and the facts as they have been established.

> [126] I do not consider that so much time has passed since the last offence(s) occurred in December of 2009 so as to conclude that the community no longer needs relief. I find there is still a present need in the community for an order to ensure its safety and protection and to prevent the adverse effects normally associated with drug activity from occurring in the future. The message must be sent that this is no longer a house where persons can congregate to use and obtain drugs. There is no set time line or continuum when the awareness of that ceases notwithstanding the usual delay in bringing an application.
>
> [131] Based on the evidence heard I find the community in question has been adversely affected and is in need of relief. I find it is in need of a pronouncement in the form of an order that these activities must cease so as to allow the community a measure of protection, to which it is entitled. The court therefore is satisfied on the balance of probabilities that the order requested by the Minister should be granted.

It is clear that Justice Murray did not think that the last evidence of drug activity at the Property arose from the December 2009 offences. Even so, he did not consider that the six-month passage of time since the last offences relieved the community's need for an order.

[25] There was ample evidence for the judge's conclusion of drug related activity after December of 2009 and of a present need for a community safety order:

- Meeting of Delilah Dixon with a known drug dealer on July 13, 2010 (October 6, 2010 Affidavit of Cst. Michael Somerton, Appeal Book, Volume 2, page 199);

- Surveillance disclosing known drug traffickers coming and going from the Property within the last 1½ years (July 13, 2010 Affidavit of Cst. Fabian Kenney, Appeal Book, Volume 2, page 214);

- Evidence of known drug users attending at the Property for a period of time over the last "few months" (July 13, 2010 Affidavit of Cst. Sean Cornelisse, Appeal Book, Volume 2, Page 316);

[26] With respect, the appellants' attachment to a dictionary meaning of "habitually" cannot succeed. The law requires – and the Chambers judge

recognized – a more contextual approach. Certainly, the term would not describe an isolated incident or ancient history. On the other hand, the "continuance", "permanence" and "daily presence" which the appellants advocate, is not reasonable. Habitual use involves more than a discrete event. Occasional activity implying ongoing conduct would suffice. In my view, it is unnecessary and unwise to say more by trying to provide an *a priori* definition of "habitually used". I agree with the Chambers judge when he said "Its [habitual] meaning will depend on the facts of each case." (para. 97 of decision).

Legislative Intent

[27] There is no preamble or object clause to assist with discerning the Legislature's intention. That must be gleaned from reading the *Act* as a whole. Again here, the appellants complain that Justice Murray took too broad an approach. He said:

> [18] The object and purpose of the *Act* can be taken from the plain wording of its name. It is designed to make communities and neighbourhoods safer to live in, and to eliminate sources of fear, threats and activities which would prevent the use and enjoyment of others who own neighbouring properties. The right to quiet enjoyment of one's Property is fundamental and basic. A Warranty Deed, which is the common method of conveying property in Nova Scotia and elsewhere, contains a covenant warranting that an owner shall have the quiet use and enjoyment of their property. While this case does not deal with real estate law, it is worth noting that this is a right incident to property ownership. That right also applies equally to Mr. MacKinnon and Ms. Dixon as well. Any Order to close the property is therefore a serious consequence of an Order under the *Act.*
>
> [19] In the case of **Director of Public Safety v Cochrane**, 2008, NSSC, 60, Warner J. discussed the purpose of the *Act* (in the context of its constitutionality) at paragraph 31 as follows:
>
> > "In contrast, I am satisfied that the purpose of this legislation is to regulate the use of property so as to suppress uses that adversely affect the property of others or interferes with others' enjoyment of their property, and that its most important characteristic or dominant feature is not to supplement the criminal law."
>
> Further at para. 67 the Justice stated:

> "This is a civil proceeding, whose purpose is to protect the health, safety or security of persons in the neighbourhood. It is not intended to be punitive. My sense is that, because of the outstanding proceedings in criminal court, the Cochranes will tread very carefully."

[28] Justice Murray correctly noted that the burden of proof on the Director is the civil one of "balance of probabilities".

[29] The appellants concede that the *Act* is broad, (Factum, para. 42). But they argue that it is not as "all encompassing" as the Chambers judge found. He did not limit himself to "sources of fear, threats and activity" arising from 'bootlegging', prostitution, "illegal gaming" and "drug houses". They assert that the *Act* was not intended to apply to "one-off events or sporadic occurrences", (Factum, para. 41). That may be - but that is not how the judge interpreted the *Act*. He understood that the Director was obliged to prove habitual use for a specified (i.e., illegal) purpose. He made that determination (Decision, para. 105). And he found that this illegal activity was not confined to the matters for which the appellants were convicted. There was other evidence of illegal activity, (Decision, para. 107).

[30] Justice Murray took a purposive approach. He was right to do so. That is encouraged both by general principles of statutory interpretation and the *Interpretation Act*, R.S.N.S. 1989, c. 235, s. 9(5):

> 9(5) Every enactment shall be deemed remedial and interpreted to insure the attainment of its objects by considering among other matters
>
> (a) the occasion and necessity for the enactment;
>
> (b) the circumstances existing at the time it was passed;
>
> (c) the mischief to be remedied;
>
> (d) the object to be attained;
>
> (e) the former law, including other enactments upon the same or similar subjects;
>
> (f) the consequences of a particular interpretation; and
>
> (g) the history of legislation on the subject.

[31] The analysis can be further informed by the statutory definition of "adversely affected":

> 2(2) For the purpose of this Act, a community or neighbourhood is adversely affected by activities if the activities
>
> (a) negatively affect the health, safety or security of one or more persons in the community or neighbourhood; or
>
> (b) interfere with the peaceful enjoyment of one or more properties in the community or neighbourhood, whether the property is privately or publicly owned.

[32] This broad language, embraces a wide array of adverse consequences. It speaks of health, safety or security of persons and peaceful enjoyment of property. Both "safety" and "peaceful enjoyment" are very broad terms. They suggest a broad interpretation. Likewise, the definition shows concern for the "...health, safety of *one* or more persons..." and "peaceful enjoyment of . . . *one* or more properties...". That only one person or property need be affected also encourages a broad interpretation.

[33] Similarly, the *Act* provides a wide spectrum of powers – investigation, warning, informal resolution, a type of statutory injunction, removal of persons or fortifications from property. This range of remedy indicates a legislative intention of effective and flexible remedial action to obviate adverse effects on individuals and their properties. The interpretation of "habitually used" promoted by the appellants ignores this broad language and would frustrate the effective and purposive approach which it mandates. Examining this phrase in light of the Legislature's intention, accords with periodic and intermittent or occasional use, implying continuity. Regular, permanent and present practice which the appellants would require, is not necessary.

Interpretative Consequences:

[34] The appellants argue that the *Act* focuses on the present and prospective conduct which may be enjoined under the *Act*. The *Act* is not retrospective and is not designed to "punish" isolated instances of criminal conduct which are better addressed under federal jurisdiction through the *Criminal Code* or other criminal legislation. They assert that the drug-related activity on the Property was not continuous or contemporaneous with the Director's application to court.

[35] Two errors are implicit in the appellants' submission. First, it is not necessary to prove recent criminal convictions to establish that illicit activities are occurring at the Property. That can be reasonably inferred from circumstantial evidence, and the judge did so. Second, there was an evidentiary basis for his inference (see discussion under Issue 2, below).

[36] The consequences of the appellants' interpretation would preclude applications in the absence of recent convictions and would circumscribe inferential findings of ongoing illegal activities. But that would neuter the legislation and would focus on criminal convictions rather than regulation of property. The peaceful enjoyment of one's property can be disturbed by relatively intermittent events, especially if the timing, nature and extent of further disturbances are unknown. This uncertainty alone can itself diminish the enjoyment of one's property. The appellants' demand that the criminal activity emanating from their property be persistent, overt and very recent is inconsistent with the problems the *Act* seeks to address and the solutions it provides. In any event, the evidence supported and the judge found regular drug-related activity in the six-month period prior to the Director's application.

[37] The trial judge did not err in his interpretation of "habitually used".

ISSUE 2 – Reasonable Inference

[38] The appellants say that the Chambers judge misinterpreted the term "reasonable inference". In effect, they assert that there was no evidentiary foundation on which he could rely to reasonably infer that the Property was being used for the possession, use, consumption, sale, transfer or exchange of drugs. In particular, the appellants criticize the evidence of the Director's investigator, Keltie Jones, and RCMP Csts. Kenny and Cornelisse. They all relied on unnamed sources that the Property was a "drug house". The RCMP testified that it was

“common knowledge”, that the Property was a source of the drug trade in the neighbourhood.

[39] The judge found:

> [104] An "inference" is a deduction from an established fact. In this case I find there is ample evidence, on the balance of probabilities, that Delilah Dixon and Sheldon MacKinnon were involved in the use, consumption and sale of controlled substances under the *Controlled Drugs and Substances Act*.
>
> [105] Based on these facts I am satisfied that pursuant to Section 7(1)(a) that the Property in question is being habitually used for a specified purpose, namely, the possession, use, consumption, sale, transfer or exchange of a controlled substance as defined by the *Controlled Drugs and Substances Act*.
>
> [106] On the basis of the evidence, it is the court's finding that not only is this a reasonable inference to be taken from the facts but that it is the only inference that can reasonably be drawn on the basis of the evidence.

[40] The appellants suggest that the sources of fear, threats and activities emanating from the Property must clearly relate only to criminal activity because those are the activities that comprise “specified use” as defined in s. 2 of the *Act*.

[41] The appellants say that the Chambers judge’s findings in para. 103 of his decision do not all relate to drug activity, or are not recent. Three of His Lordship’s findings relate to the 2006 and 2009 searches. The fourth refers to the calls and contacts from the community with the police and the Director’s investigator alleging drug use at the Property. The appellants argue that the 2006 and 2009 offences are “old news”. The hearsay evidence of drug use cannot be used by the Court to establish recent illicit drug activity at the Property. The information from unidentified sources relied upon by police cannot found a reasonable inference because insufficient detail from these anonymous sources means the “Debot criteria” are not met. That case set out the circumstances when reasonable grounds exist to justify issuance of a search warrant based on confidential sources (*R. v. Debot*, [1986] O.J. No. 994 (Ont. C.A.), appeal dismissed [1989] 2 S.C.R. 1140).

[42] The appellants also argue that the court inappropriately relied on evidence from Ms. Dixon which the court had already rejected.

[43] The parties appear to agree on the law with respect to reasonable inference. By way of one common example, they both cite this Court's decision in *Kern v. Steele*, 2003 NSCA 147. In *Kern*, Justice Oland described the difference between an inference and a conjecture:

> [98] Two of the leading cases on the difference between inference and speculation or conjecture are *Jones v. Great Western Railway Co.* (1930), 47 T.L.R. 39 (H.L.) and in *Caswell v. Powell Duffryn Associated Collieries, Limited*, [1940] A.C. 152. In the former, Lord Macmillan stated at p. 45:
>
> > The dividing line between conjecture and inference is often a very difficult one to draw. A conjecture may be plausible but it is of no legal value, for its essence is that it is a mere guess. An inference in the legal sense, on the other hand, is a deduction from the evidence, and if it is a reasonable deduction it may have the validity of legal proof.
>
> In the latter, Lord Wright stated at p. 169-170:
>
> > Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture.
>
> *Jones*, supra and *Caswell*, supra are often cited in the case law. See for example *R. v. German* (1979), 33 N.S.R. (2d) 565 (C.A.), *Parlee v. McFarlane* (1999), 210 N.B.R. (2d) 284 (C.A.) and *Lee v. Jacobson* (1994), 53 B.C.A.C. 75 (C.A.).

[44] With respect, the appellants' arguments on this issue are unpersuasive.

[45] Dealing first with the evidence of Ms. Dixon, it is clear that the trial judge accepted her inculpatory evidence but rejected her attempts to distance herself from drug activity at the Property (para. 7 above). The Chambers judge accepted admissions made by Ms. Dixon while rejecting her denials, particularly where it contradicted other evidence which he accepted. This is apparent from his opening discussion of her evidence:

> [77] As to whether the activities were occurring at the Property that would give rise to a reasonable inference I turn to the evidence of Ms. Dixon herself, given on cross examination. [Emphasis added]

[46] This shows that the Chambers judge intended to rely on some of Ms. Dixon's own evidence. For example, he refers to Ms. Dixon's admission that she possessed cocaine at the Property "for the benefit of others". Again, at para. 82, the judge begins:

> [82] In her affidavit she did not deny using cocaine or possessing cocaine. She denies being associated with or being a member of Society's Rejects. ...

[47] Considering his decision as a whole, it is apparent that the Chambers judge's rejection of Ms. Dixon's denials did not extend to her admissions.

[48] The appellants object that some of the evidence emanates from anonymous sources and should not have been admitted or relied upon by the Chambers judge. An example of this evidence can be found in Keltie Jones' July 12, 2010 Affidavit:

> 10. On behalf of the Director, I received complaints from several complainants living in the neighborhood and community of the Property concerning its use for the use and sale of illegal drugs, namely, crack cocaine, and the adverse impact of that activity has on the neighborhood and the community. Their complaints included:
>
> (B) Delilah Dixon is selling crack cocaine from the Property;
>
> . . .
>
> (D) Delilah Dixon is attracting people from other areas into the community and affecting people from Ingonish to Bay St. Lawrence because the kids are all traveling to the Property to get high and going out into the community and committing crime acts;
>
> . . .
>
> (N) Peter Sheldon MacKinnon and Delilah Delores Dixon had young kids doing break and enters;

> (O) Peter Sheldon MacKinnon and Delilah Delores Dixon accept stolen goods in exchange for drugs;
>
> . . .
>
> (W) some houses are burned to intimidate people in the community to keep their mouths shut;
>
> (Y) he/she has no doubt that Sheldon MacKinnon would kill him/her or have him/her killed if he learned that he/she had complained about the activities at the Property; ...

[49] With respect to the criticism that the police – and ultimately the court – relied on anonymous informers, it is important to recall that complainants are entitled to anonymity under the *Act*:

> 32 (1) No person, including the Director, shall, without the prior written consent of the complainant,
>
> (a) disclose the identity of the complainant, or any information by which the complainant may be identified, to another person or to a court, body, agency or government department; or
>
> (b) disclose, provide access to or produce the complaint, or another document or thing by which the complainant may be identified, to another person or to a court, body, agency or government department without severing any information by which the complainant may be identified.

[50] Section 32 of the *Act* assists the investigative process but it does not alter the evidentiary requirements of the adjudicative process. An application under the *Act* is subject to the *Civil Procedure Rules*, unless otherwise specified, (*Act*, s. 6). Those *Rules* only permit hearsay evidence in limited circumstances that comply with the criteria set out by Justice Davison in *Waverley (Village Commissioners) v. Nova Scotia (Minister of Municipal Affairs)* (1993), 123 N.S.R. (2d) 46; and see *Rules* 22.5 and 39. As a general proposition, and absent an exception to the hearsay rule, anonymous complainant information would not be admissible for the truth of the contents of the information. Nevertheless, the fact that the complaints were received by police would be admissible for that purpose.

[51] The statutorily protected anonymity of complainants responds to at least two related policy concerns. It encourages reporting and candour. Equally, it protects against retaliation. On the other hand, reliance on anonymous informers prejudices those responding to an application because they cannot directly test the credibility, accuracy or reliability of such evidence. However that does not render the evidence inadmissible: rather, the Court must "... carefully consider the quality of the evidence received..." (*per* McMurtry, J. in *Saskatchewan (Director of Community Operations) v. S.M.M.*, 2006 SKQB 19 at para. 18). Whether the anonymous informants meet the definition of 'complainant' under the *Act*, the same policy reasons for preserving anonymity would extend to them.

[52] Leaving aside whether the anonymous complaints could satisfy the "Debot criteria", the hearsay evidence received by the police must be placed in a wider context. Standing alone, this evidence would not be sufficient to give rise to a reasonable inference of drug use at the Property. There is a lack of detail in Mr. Jones' and police accounts of anonymous complaints. But in a small rural community, greater detail could disclose the source. It is likely that police reliance on such sources would be even heavier in these communities. Certainly their modest size and relative remoteness strains police resources of investigation, response and deterrence. Absent the protection which anonymity affords, such communities would likely generate few complaints.

[53] Moreover, the anonymous complaints here were numerous, extended over a period of many months and were reported to at least three different officers (including Mr. Jones). They must be considered with all the other evidence, including the drug offences, the police observations of use of the Property by known drug offenders, Ms. Dixon's admissions about possession and use of illicit drugs at the Property by "others" and Ms. Dixon's July 10, 2010, meeting with a known drug dealer. In this broader context, the fact that complaints were made by anonymous informers is corroborative and supports a state of affairs which is otherwise well documented.

[54] The Chambers judge found and the appellants acknowledged that the *Act* was attempting to eliminate "sources of fear, threats and activities" in the community (Factum, para. 39). In this connection, it is useful to refer to rebuttal evidence tendered by the Director, prior to the hearing. Keltie Jones deposed that he received a complaint after the application was filed that a man named Sheldon

and a woman named Delilah were intimidating local residents into providing affidavits that they were not drug dealers. Mr. Jones said that he believed these individuals were the appellants. This evidence was both challenged and denied by the appellants. They reiterated their concern about the anonymity of the source. But there was evidence which corroborated intimidating behaviour by the appellants. Constable Cornelius deposed (September 12, 2010):

> 8. (Y) Mr. MacKinnon and Ms. Dixon have attempted to intimidate me, including by following me to my home in Dingwall (which is more than 10 kilometers from the Property), driving slowly by my home and yelling at me while I was conducting roadside police check stops;

[55] The appellants have convictions for violence. It is reasonable to infer that people willing to harass a police officer would not hesitate to do the same to a private citizen. The *Act* anticipates this behaviour with the anonymity it confers on complainants.

[56] The Chambers judge did not err in law in his understanding or application of "reasonable inference".

ISSUE 3 – Need for a Community Safety Order

[57] To some extent this issue overlaps with the previous question of reasonable inference. The need for a community safety order is not fundamentally a question of law, but a question of mixed fact and law. Absent an extricable question of law, the standard is palpable and overriding error.

[58] The appellants criticize the Chambers judge for taking into account activities not specifically listed in s. 2 of the *Act*. As previously described, they complain that four of the judge's findings in para. 103 of his decision do not directly relate to drug activity. In assessing whether the appellants breached the *Act*, the Chambers judge relied in part on evidence of a sharp increase in crime when the appellants returned to their property, a sharp increase in complaints about the use of the Property when the appellants were released from prison, the congregating of "Society's Rejects" at the Property, and observations of people driving to and from the Property in an irate manner. The appellants say that none of this establishes drug use.

[59] The appellants refer to the doctrine of "implied exclusion" to argue that activities not specifically mentioned in the *Act* cannot be considered by the court:

> 83. Silence in the enumeration of particular "specified uses" attracts application of the doctrine of implied exclusion. The doctrine is described in *Driedger* (*supra*) at page 168 as:
>
> > An implied exclusion argument lies whenever there is reason to believe that if the legislature had meant to include a particular thing within the ambit of its legislation, it would have referred to that thing expressly. Because of this expectation, the legislature's failure to mention the thing becomes grounds for inferring that it was deliberately excluded.

[60] With respect, this rule of statutory exclusion has no application here. The question is not what activities the statute prohibits, but rather how they are proved. This is a question of evidence, not statutory interpretation. The following answers the appellants' criticism of the Chambers judge's approach:

> Each piece of evidence need not alone lead to the conclusion sought to be proved. Pieces of evidence, each by itself insufficient, may however when combined, justify the inference that the facts exist. Accordingly, a trial judge must be careful not to exclude individual pieces of evidence if there is an undertaking that the evidence tendered is part of a larger combination. Whether or not there is a rational explanation for that evidence other than the guilt of the accused is a question for the jury.

(Alan W. Bryant, Sidney N. Lederman and Michelle K. Fuerst, *The Law Of Evidence in Canada*, 3rd ed. (Markham, ON.: LexisNexus Canada, 2009) at c. 2.77. Sopinka on Evidence)

[61] The appellants' argument descends into the evidence and questions the judge's weighing of it. That is not a question of law. Moreover, it ignores other supportive evidence which the Chambers judge accepted, (e.g., para. 25 above).

Conclusion and Disposition:

[62] The *Act* establishes a civil means by which the insidious erosion of neighbourhoods and communities flowing from criminal activity can be forestalled. Justice Murray received eight affidavits in support of the Director's

application. Thirteen were filed in response. Many affiants were cross-examined at length. The case was heard October 6th, 7th, 13th, 14th and 15th, 2010. Justice Murray reserved his decision until January 6, 2011. He granted the community safety order sought by the Director. He did not err in law in doing so.

[63] I would dismiss the appeal, dissolve the stay granted by this Court pending appeal and order the appellants to vacate the Property for a period of 70 days commencing Monday, February 6, 2012. I would order the appellants to pay the respondent costs of $2,000, inclusive of disbursements and inclusive of the costs on the stay application.

Bryson, J.A.

Concurred in:

MacDonald, C.J.N.S.

Oland, J.A.