IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. Doucette, 2007 NSPC 19

Date: 2007 April 27
Docket: 1056555-58
Registry: Halifax

Between:

Her Majesty the Queen

v.

Peter Victor DOUCETTE

Judge:	The Honourable Associate Chief Judge R. Brian Gibson, J.P.C.
Heard:	November 14, 2006 November 16, 2006 December 13, 2006 January 26, 2007 January 29, 2007 February 6, 2007
Date of Decision:	April 27, 2007
Charges:	7(1) & 5(2) of the Controlled Drugs and Substances Act
Counsel:	Monica McQueen, for the Crown Warren Zimmer, for the Defence

THE ISSUES

[1] The Crown, pursuant to the provisions of S.16(1) of the **Controlled Drugs and Substances Act**, herein called the CDSA, seeks an order of forfeiture of real property known as civic 22-24 Waddell Avenue, Dartmouth, Nova Scotia herein called the property. This application arises as a result of designated substance offences, being those contrary to S.5(2) and S.7(1) of the CDSA, herein called the offences, committed by Peter Victor Doucette, herein called the offender on April 6, 2001. The offender was convicted of the offences and sentenced to a term of imprisonment in a federal penitentiary on September 30, 2005.

[2] The property, at the time of the offences, was owned by 3029062 Nova Scotia Limited, herein called the Company. It appears that the property continues to be owned by the Company. The Company agreed to purchase the property pursuant to an agreement of purchase and sale dated August 31, 2000 which was signed by the offender on behalf of the Company. Title to the property was acquired by the Company some time after August 31, 2000. A notice of officers and directors dated October 12, 2000 and filed with the Registrar of Joint Stock Companies on that date establishes that the offender,

at that time, was the sole director, president and secretary of the Company and was the sole director and officer on the date of the offences. As such, he appears to have been the directing mind of the Company.

[3] Forfeiture applications are part of the sentencing process, but they are not a component of the sentence for the offence. (See R. v. Siek 2007 NSCA 23). Furthermore, such applications need not be heard when sentence is imposed.

[4] The offender, on September 30, 2005, consented to the forfeiture to Her Majesty the Queen in the Right of Canada of any interest that he may have had in the property. There is no evidence to indicate what, if any, interest the offender may have had in the property when he signed the consent to forfeiture. The evidence indicates that as of August 14, 2001 David Dunphy was the sole director and officer of the company. There is no evidence to support an inference that the offender's consent to forfeiture was given on behalf of the Company. The property is subject to a S.14 CDSA restraining order issued May 14, 2001 pursuant to a decision of Davidson, J. reported as R. v. Doucette at [2001] N.S.J. No. 232. Notionally, because this application is part of the sentencing process, the offender is a party to this application,

however the party that has a real interest in this application appears to be the Company.

[5] The provisions of the CDSA, relevant to forfeiture applications, were amended subsequent to April 6, 2001 but prior to the date of this application. However, because forfeiture applications involve substantive issues, the provisions of the CDSA applicable to this application are those which existed on the offence date of April 6, 2001. That position was jointly submitted by counsel for both parties to this application. At that time, the portion of S.16(1) of the CDSA particularly relevant to this application prescribed as follows:

> "16(1) Subject to sections 18 and 19, 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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> (b) in the case of any offence related property,
>
> > (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."

[6] The evidence and facts relevant to the offences, about which there will be further comment, clearly establishes that the offences were committed in relation to the property. That part of the apparent two-part test set out in S.16(1) of the CDSA is not in dispute.

Offence-Related Property

[7] The focus of this application has been upon the other part of the two-part test; whether the property is "offence-related property" as that term was defined in S.2 of the CDSA on April 6, 2001. At that time S.2 defined "offence-related property" as follows:

> "Offence-related property" means any property, within or outside Canada,
>
> (a) by means of or in respect of which a designated substance offence is committed,
>
> (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, but does not include a controlled substance or real property, other than real property built or significantly modified for the purpose of facilitating the commission of a designated substance offence;

[8] The aforesaid definition accords real property special consideration not given to personal property by specifically excluding real property from forfeiture unless it falls within the prescribed exception to exclusion. There is no evidence that the property was "built...for the purpose of facilitating the commission of a designated substance offence". There is evidence to indicate that the property was "modified" and used for the purpose of facilitating the commission of a designated offence". Before assessing that evidence to determine whether it establishes that the property was "significantly modified" for the aforesaid enumerated purpose, there is a need to determine the meaning of the words "significantly modified".

Meaning of "Significantly Modified"

[9] Parliament obviously had in mind two types of real property that could be subject to forfeiture; that which was "built" and that which was "significantly modified" for the impugned purpose "of facilitating the commission of a designated offence". It is fair to say that Parliament, through the use of the words "significantly modified", chose to employ

relatively imprecise language to guide the Court. An analysis to determine the meaning of the words “significantly modified”, in essence is directed at a determination of what Parliament intended by using these words.

[10] The words “significantly modified”, read in the context of the definition of offence-related property, have been judicially considered. However, the extent of case law is quite limited, likely due to the relatively short time that the definition of “offence-related property”, relevant to the date of the offence, prevailed. That definition existed from 1996 when the CDSA was enacted until that definition, and other provisions of the CDSA relevant to forfeiture applications involving real property, were amended. Those amendments were made in 2001 by C.32 and proclaimed in force on January 7, 2002.

[11] Not only is the case law dealing with the meaning of the words “significantly modified” limited, there are two groups of cases which have determined two differing definitions for these words.

[12] One group of cases, supporting a narrow definition, holds that in order for there to be a determination that real property has been significantly modified, there must be structural changes to the property that have an element of permanence and which affect the property in a consequential way. This group of cases includes: R. v. Stapleton, [1998] M.B.J. No. 429; R. v. Stapleton, [1998] M.B.J. No. 430; R. v. Dupuis, [1998] S.J. No. 695; which cases involved applications for restraining orders pursuant to S.14 of the CDSA, and the case of R. v. Gisby [2000] A.J. No. 1145 which case involved an application for forfeiture pursuant to S.16(1) of the CDSA. In R. v. Gisby at paragraph 55, Whitman, J., writing for the majority, stated:

> "In light of these contextual considerations, and in view of the plain meaning of the terms canvassed above, I am of the view that the term "significantly modified" requires an element of change to the nature and character of the property in question beyond the "more than trifling or transitory" change suggested by the Crown. Rather, the term denotes changes in or alterations to the physical characteristics of the real property in question that affect its nature in a greatly important manner. The changes must be more than merely transitory and thus imply an element of permanence that affects the physical characteristics of the property in a consequential manner to a noteworthy and readily apparent degree. To the extent that the changes required significantly impact the basic physical characteristics of the property in such a way as to have a lasting effect, it is not inaccurate to describe the changes as impacting the property in a material way. Considered in this way, both qualitative and quantitative considerations arise."

[13] The majority decision in R. v. Gisby also held that the extent of the use of the real property for the purpose of facilitating a designated offence is irrelevant, if the modifications do not involve structural changes having an element of permanence that affect the property in a consequential way.

[14] The other group of cases support a wider definition. They include the decision of Gagnon, J. in R. v. Pomerleau, [2003] J.Q. No. 5082, citing therein with approval the decisions in Attorney General of Canada v. Donat Page′, (560-01-003613-991, Q.C., District de Labelle, 10 December, 2001); and R. v. Denis Lefebvre, [2003] J.Q. No. 2647. In R. v. Pomerleau it was held that the extent to which a property is turned away from its primary purpose by the physical changes and used for the purpose of committing the designated substance offence is a relevant factor, regardless of the cost of the modifications or what is left when the modifications are withdrawn. In support of that conclusion, the following are excerpts from the decision of R. v. Lefebvre, (supra) quoted with approval by Gagnon, J. in the decision of R. v. Pomerleau, (supra) at paragraph 13:

> "The words "significantly modified for the purpose of facilitating the commission of a designated offence", suggest on the one hand physical changes to the real

> property, and on the other hand, the goal, finality or result, but obviously it is not the result that should control the determination of what is significant modification...
>
> With respect, it seems to the Court that in order to decide that if significant modifications have taken place, one must first and foremost imagine the property before and after, once the modifications have been installed, and not evaluate the significance of the modifications as a function of what is left once the changes have been withdrawn.

[15] Gagnon, J. goes on after quoting the aforesaid to state at paragraphs 14 and 15 in R. v. Pomerleau as follows:

> "To these remarks, I add that "significant modifications" are not necessarily or exclusively in correlation with the cost of the modifications. One must equally consider the determining factor of whether "the modifications were made for the purposes of facilitating the perpetration of the offence". To answer this question, it is not necessary to consider that modifications will only be significant if they are onerous. In fact, the more significant the modifications, regardless of their cost, the less the property will be useable for its original function, that is a residence to be occupied or a property to be used for this purpose.
>
> In other words, the more the property is turned away from its original purpose, the more this fact will lead to an inference that the modifications are significant."

[16] In the Pomerleau decision, Gagnon, J. states at paragraph 12:

> "...I am, firmly convinced that the words "significantly modified" must be interpreted in the manner of the dissent in the reasons in R. v. Gisby (2000), 148 C.C.C. (3d) 549 and in R. v. Doucette [2001] N.S.J. 232, 16 May 2001."

[17] Trussler, J., dissenting in R. v. Gisby (supra), accepted the dictionary meanings of "modified" and "significantly" cited in the majority decision, but rejected the ultimate conclusion of the majority decision regarding the meaning of the words "significantly modified for the purpose of facilitating the commission of a designated substance offence". Trussler, J. at paragraph 65 states as follows:

> "Real property subject to forfeiture is property "built or significantly modified for the purpose of facilitating the commission of a designated substance offence". With all due respect to the trial judge, I do not believe that there is any requirement for the property to have been structurally modified to fit within the definition, nor do I believe that the percentage of the property used is itself determinative."

Trussler, J. then went on to state in paragraph 66 as follows:

> "In this particular case the operation housed 1500 plants with a street value of $1,400,000. All of the basement or 50 percent of the square footage of the house was being used to cultivate plants."

Trussler, J., in the same paragraph, commenting on the extent of the modifications and their expense, stated:

> "Considerable expense had gone into setting up the operation. The changes were extensive."

[18] Similarly, Davidson, J. in R. v. Doucette (supra), rejected the narrow interpretation of the words "significantly modified" determined by the majority decision in R. v. Gisby. He also rejected the extent to which the majority in R. v. Gisby relied upon Hansard to determine Parliament's intention. Davidson, J. stated as follows at paragraph 11:

> "In my respectful view, to limit the interpretation of the exception to circumstances which would suggest a building similar to a fortified drug house is to look at the exception in too narrow a prospective. If this be an occasion to look at Hansard to determine the legislative intent, I certainly would not go further than determining the intent was to effect punishment and deterrence to persons who use property to effect the production and sale of illicit drugs."

[19] The principle of judicial comity might suggest that the majority decision in R. v. Gisby ought to be followed since it is the only appellate level decision in which the meaning of the words "significantly modified" was judicially determined. However, the principle of judicial comity has its limits. While there may be practical reasons which generally support the application of this principle, those practical reasons are less significant when considered in relation to other prevailing circumstances relevant to this matter. First, a different line of judicial decisions has emerged supporting a wider definition of the words "significantly modified for the purpose of facilitating the

commission of a designated substance offence" than was determined by the majority in R. v. Gisby. Secondly, this wider definition has been adopted in Nova Scotia in the case of R. v. Doucette (supra) where Davidson, J. adopts the dissent in the R. v. Gisby. The decision in R. v. Pomerleau follows the decisions in R. v. Doucette and the dissent in R. v. Gisby. Thus it can be said that the wider definition of the words "significantly modified" emerges from the dissent in R. v. Gisby. It is the dissent in R. v. Gisby which has been followed in subsequent decisions, rather than the majority decision in R. v. Gisby. Thirdly, it appears that the majority in R. v. Gisby may have erred relative to the use of Hansard and the legislative debates to determine legislative intent. (See reference to R. v. Heyward (1994), 94 C.C.C. (3d) 481 at 512, cited with approval at paragraph 10 in R. v. Doucette.)

[20] It becomes more apparent that Parliament's intention was correctly understood in the cases of R. v. Lefebvre (supra), R. v. Pomerleau (supra) and the dissent in R. v. Gisby (supra) when the full context of the exception to the exclusion of real property, found in paragraph (c)of the definition of "offence-related property" in the CDSA, is considered. Parliament actually employs the word "use" within paragraph (c). As judicially recognized, the

mere use of the property in and of itself is not significant but rather the extent of the use of the property. The majority decision in R. v. Gisby recognized that in some cases, the extent of the use of the property may be the only factor that might be available to determine if real property had been "built" for the purpose of facilitating the commission of a designated substance offence. At paragraph in R. v. Gisby the Court states:

> "For example, two warehouses used solely for the storage and distribution of marijuana could be of identical design and construction. If one was built for this purpose, it would be subject to forfeiture. But if the other was formerly used for the storage and distribution of tobacco, its new use, absent significant modification, would not be subject to forfeiture."

[21] I conclude that the rejection of the extent of use as a relevant factor by the majority in R. v. Gisby, when considering whether real property has been "significantly modified", is inconsistent with that Court's observation about the significance of use relative to whether a property was "built" to facilitate a designated offence. I do not believe that Parliament intended such inconsistency. In other words, I do not believe that Parliament intended the courts to exclude the extent of use as a relevant factor when considering whether real property was significantly modified, but rather intended the

Courts to also consider the extent of use, as a relevant factor, when considering whether real property was significantly modified to facilitate a designated offence.

[22] It appears that Parliament intended the courts to apply a proportionality test when considering the manner and extent to which real property is used for the purpose of facilitating the commission of a designated offence, made possible by the modifications to the property. The significance of the modifications will therefore spring not only from the structural or permanent nature of the modifications but the extent to which the modifications engage the property and involve the property in turning it away from its legitimate use.

[23] In my view, without specifically stating that a proportionality test was being employed, Trussler, J., in the Gisby dissent and the Court in R. v. Lefavre and R.v. Pomerleau implicitly were applying such a proportionality test.

[24] Further support for this conclusion that Parliament intended the application of a proportionality test is found in the subsequent amendments made to the

forfeiture provisions of the CDSA and, in particular, the specifically stated proportionality test now found in S.19.1(3) which states:

> "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 circumstance 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."

[25] The specifically described proportionality test found in S.19.1(3), together with the elimination of the presumption of exclusion of real property from the definition of offence-related property has resulted in both a more expanded and a more specifically stated proportionality test than that inherent in the wider meaning of the words "significantly modified" as determined in R. v. Pomerleau. Real property used in respect of the commission of a designated offence subsequent to January 2, 2002 is now presumed to be forfeited unless the offender can persuade the court, employing the "disproportionality" test set out in S.19.1(3), not to order forfeiture. See R. v. Siek (supra).

[26] If Parliament, when it enacted the CDSA, intended courts to narrowly define the words “significantly modified”, as determined by the majority decision in R. v. Gisby, thus making it more difficult to obtain an order of forfeiture of real property, it seems unlikely that Parliament would have amended the CDSA making it easier to obtain an order of forfeiture of real property.

[27] The subsequent amendments to the CDSA are not determinative as to whether a wider definition of “significantly modified” should be employed, as articulated in R. v. Pomerleau, but rather constitute a further factor supporting my conclusion that Parliament intended the courts to employ a wider, rather than a narrower, definition for the words “significantly modified”. It is within that wider definition that I have assessed the evidence, facts and submissions herein. The facts include those jointly submitted during the offender’s sentencing hearing.

[28] I considered paragraphs 39 to 42 found in R. v. Siek (supra) in which the Court considers the legislative history of forfeiture set out in the CDSA as well as some cases, including R. v. Gisby and R. v. Dupuis. However, the issue that is before me was not an issue before the Court in R. v. Siek and

therefore was not determined by the Court. I concluded the comments in paragraphs 39 to 42 to be no more than *obiter dicta* and not sufficiently persuasive to cause me to alter my conclusion that the wider definition of "significantly modified" should be employed.

THE PROPERTY

[29] At the time of the offences, the property consisted of a two-storey industrial building, herein referred to as the building, measuring 40 by 80 feet with a paved parking area in front of the building and a paved driveway along the south side of the building. Beyond the building and the paved areas, relatively little land was associated with the property. The building was constructed on a concrete slab and has a flat roof. It has a structural steel frame with exterior walls consisting of ten inch concrete block, except for the front exterior wall which is made of brick. The second storey rests on a four-inch structural concrete slab supported by a metal floor resting on 12 inch open web joists.

[30] The evidence of Alison Douglas Tupper, called by the Respondent as an expert witness, indicates that the building consisted of five units. There is no evidence to indicate that the property was being used for any other commercial purpose, other than that related to the production of marijuana, at the time of the offences.

[31] The evidence indicates that some of the units were being used by several occupants for legitimate business purposes a few months before the use to which the property was being put on April 5, 2001. Aside from the still posted signage on April 5, 2001 indicating that other former occupants had used the building until at least November 1, 2000, there were four electrical meters installed in the utility room near the front entrance of Unit 1 consistent with previous use by four different occupants.

[32] Exterior access to the ground floors of Units 3, 4 and 5 was available through a man door and an overhead door in each unit. Access to the second floor of Units 4 and 5 was through a stairwell in each unit leading from the ground floor of each unit. Access to the second floor of Unit 3 was through a stairwell leading from inside the front entrance area of Unit 1. Access to

Unit 2, which was immediately above Unit 1, was also through the same stairwell used to gain access to Unit 3. A hallway ran the full width of the building from north to south between Unit 2 and the second floor of Unit 3. The evidence indicates that notwithstanding the partitioning walls, apparently dividing the units from one another, the ground level of all units and the second level of all units could be accessed through internal doorways found in all partitioning walls. Thus, a single use occupant could have used the building having access to all Units through these internal doorways.

[33] Aside from the aforesaid partitioning walls between the units, there were some internal partition walls within some of the units which likely existed before the grow operation began.

MODIFICATIONS AND USE OF THE PROPERTY

Erection of Internal Partition Walls , Doors and Ceilings

[34] Additional internal partitioning walls were erected in some units which I conclude were erected to facilitate the offences. They were the following: 1)

a wood studded, gyproc wall running east to west and dividing the first floor of Unit 3 into approximately two equal halves. This created grow room 1 being the north half of the ground floor area of Unit 3. Access through this newly erected partition wall was through a doorway in which a door had been hung. The north side of this partition wall consisted of exposed wooden studs. 2) A steel studded gyproc wall was installed on the main floor of Unit 5. The north side of this wall was not covered with gyproc. This steel studded gyproc wall ran east to west and fully divided the first floor of Unit 5 into two areas. The area on the north side of the partition wall consisted of approximately 66 percent of the ground floor area of Unit 5, herein referred to as grow room 2. Access to grow room 2 was limited to a door leading from the ground floor of Unit 4. 3) A door was installed at the top of the stairwell leading to the second floor of Unit 5. 4) The top floor of Unit 4 was divided into two, approximately equal, halves by a partition wall running east to west thereby creating grow room 4, being the south half of the top floor of Unit 4. Access to grow room 4 was through a doorway installed in the erected partition. A door was also installed in an existing doorway found in the north/south partition wall dividing the upstairs floor areas of Unit 4 and Unit 5.

[35] Grow rooms 3 and 3B were created in areas on the second floor of Unit 5 created by pre-existing partitioning walls. Grow room 5 was also created in an already partitioned area of the second floor of Unit 3.

[36] A ceiling was erected in grow room 1. To erect that ceiling, a wooden framework was first installed using two by four lumber. This framework was installed in the area of the metal web joists supporting the metal floor upon which the second story rested. The wooden framework was used to support the ceiling that covered an area of approximately 400 square feet. Ceiling strapping was nailed to the wooden framework and sheets of "black and white poly" were attached with staples to that strapping. Additional strapping was placed over the poly and attached to the wooden strapping that had been nailed to the wooden framework. Considerable effort was seemingly required to install the ceiling.

Wall and Window Coverings

[37] The sheets of “black and white poly” attached with staples and strips of strapping were not only attached to the ceiling constructed in grow room 1, but were also attached to the south wall of grow room 1, the ceiling and east wall of grow room 3, the ceiling and all walls of grow rooms 3B and 4 and the south wall and ceiling of what was referred to as the chimney room located in the northeast corner of the second floor of Unit 5.

[38] In addition to the sheets of black and white poly, some walls of the grow rooms were covered with what appeared to be a wallboard or styrofoam covered with a silvery reflective material referred to as mylar. The windows of the so-called chimney room were covered with plywood and then covered by the black and white poly.

Venting

[39] Flexible plasticized duct work was installed in a number of areas of the building. Portable electric blowers were connected to this duct work to provide ventilation in various grow rooms. Holes were cut in some of the partition walls through which the plasticized duct work was run from one room or unit to another room or unit. One such hole was cut near the ceiling

of the partition wall dividing the ground floor portions of Units 3 and 4. The duct work extended through that hole from grow room 1 in Unit 3 to Unit 4 which thereafter extended along the north wall, near the ceiling of Unit 4 to the east wall of Unit 4. Duct work extended from grow room 1, along the floor of the front portion of Unit 3, and through a hole cut in the partition wall dividing Unit 3 and 4 in the man door entrance area of Unit 4 located just inside the south wall of the building.

[40] On the second floor flexible duct work, running from a window located in the south wall of Unit 4, extended about halfway into grow room 4. Duct work also extended through a hole cut above the door in the partition wall creating grow room 4 extending, near the ceiling, across the north portion of Unit 4 and through a hole cut in the east partition wall of Unit 4. That duct work thereafter extended across a hallway and through a hole cut in the west side partition wall of the chimney room. Duct work also extended through a hole cut in the north partition wall of grow room 3B. That duct work and two other sleeves of duct work, originating in grow room 3, were suspended near the ceiling of grow rooms 3 and 3B and extended through holes cut near the top of the south wall of the chimney room.

[41] Above the chimney room a hole was cut in the roof of the building to accommodate the installation of a prefabricated metal chimney extending from the chimney room. A portable, inline, blower was attached to the bottom of the chimney with duct tape. On the roof, flashing was installed around the prefabricated metal chimney and the pebbled rock found on the top of the roof, was spread over the flashing.

Electrical

[42] In the utility room where the main electrical supply for the building was located, electrical alterations were made involving the illegal installation of new wiring in the electrical splitter box. This modification enabled electricity to be illegally drawn from the main power box and thereby bypass the electrical meters. A hole was cut in one end of the metal splitter box to allow the illegal electrical wires to be drawn out of the splitter box. This illegal electrical wire was used to distribute the stolen electricity to areas of the building where power was required for the grow operation in various grow rooms. A small piece of wood was screwed to the wall adjacent to the

end of the splitter box to hide the illegal wires from view as they came out of the hole cut in the splitter box.

[43] Illegal electrical wiring was installed leading from the electrical room to grow rooms 1, 2, 3, 3B, 4 and 5. The illegal electrical wiring appeared to first lead to an electrical disconnect switch box screwed to a piece of plywood which in turn was screwed to a partition wall just outside grow room 1. It appears that this box could be used to shut off power to the entire grow operation.

[44] In grow rooms 1, 2, 4 and 5, electrical panel assemblies were screwed to interior walls. Two electrical panel assemblies were found in the building unaffixed and not hooked up to any electrical power source. The electrical panel assemblies were quite sophisticated, each having a disconnect switch, a timer device, duplex electrical outlet and other electrical components, all affixed to a plywood panel. Illegal electrical writing connected the electrical panel assemblies to lighting ballast transformers in each of grow rooms 1, 2, 4 and five. The transformers were placed on shelves supported by L-brackets which were screwed to the walls. Numerous 1000 watt grow lights

were hung with power cords from hooks screwed into ceiling strapping in grow rooms 1, 2, 3, 3B, and 4. Florescent fixtures were set up in the format of a triple shelving assembly in grow room 5. The electrical panel assemblies, lighting ballast transformers and the grow lights all drew electricity from the same illegal source found in the electrical splitter box located in the utility room. Although the illegal wiring within the grow rooms was exposed within the grow rooms, the illegal wiring leading from the utility room to other rooms was hidden from view. The distribution of illegal electricity throughout the building was extensive. Notwithstanding the extensive distribution of illegal electricity throughout the building, the legal electrical power throughout the building was unaltered and therefore usable throughout the building as well.

[45] While all the illegal wiring was relatively easy to remove after disconnecting the electrical power, the time, expertise and expense to install the illegal electrical modifications was significant and sophisticated. It enabled a certain level of automation through the use of electrical timers.

Miscellaneous

[46] Various saw horses and specially designed grow table tops were placed in each of the grow rooms. Water was supplied to the grow table tops and the plants growing thereon through plastic piping which was connected to circulation pumps placed on the floors of the grow rooms. The water was supplied from already existing internal sources of water within the building. Nevertheless the manner of water distribution was sophisticated, capable of being operated through timing devices.

[47] The front office of Unit 1 was not modified, however two beds and appliances, including a refrigerator, were located therein, seemingly to accommodate those charged with monitoring and tending to the grow operation. The evidence indicated that another area of the second floor of Unit 3 was either being readied as a further grow room or used as a construction area to cut lumber for the grow operation.

Extent of Use and Magnitude of the Grow Operation

[48] All Units except Unit 2, which was on the second floor of the building above Unit 1, were engaged to support or accommodate the grow operation.

Within each of the units, except Unit 2, there was some level of modification made to the building to accommodate the grow operation. In summary, those modifications involved cutting holes in walls or, in the case of the chimney room, a hole in the roof to accommodate the installation of the prefabricated metal chimney, the erection of partition walls, the erection of a suspended ceiling, the hanging of doors, affixing with nails or screws the electrical panels, shelving to accommodate the ballasts for the grow lights and strapping, the covering of walls with poly plastic or other materials and the installation of electrical wiring which was also illegally connected to the main electrical power source located in the utility room and strung extensively throughout the building.

[49] Regardless of the particular use to which an industrial or commercial building might be put, it can be assumed that the use would be legal. A legal industrial or commercial use would likely give rise to a variety of individuals coming to the building, either to work there or otherwise transact business thereat. By converting the use of the building to an illegal use and making the modifications to accommodate that illegal use, effectively all individuals, except those involved in the illegal operation, of necessity

would need to be excluded from those parts of the building being used to accommodate the illegal operation in order to prevent detection of the illegal operation. In my view that is the test to determine the extent to which the building was converted from its legal to its illegal use. Employing that test, approximately 80 percent of the building was used to support the grow operation. I have excluded Unit 2 from the illegal use. However, Unit 2 could only have been used for legal purposes if doors had been installed and locked thereby excluding access to the upstairs portion of Unit 3. I have also excluded from the grow operation the one-third portion of the ground floor of Unit 5, provided that the door at the top of the stairs leading to the second floor of Unit 5 was locked. From the fact that such doors aforesaid were not installed, it could be inferred that there was no intention to use any part of the property for legal purposes.

[50] If the building had not been previously used for legal purposes, and had the grow operation, as it was being conducted on April 6, 2001, been its first use, there would be no other reasonable conclusion to reach other than that the building had been built for the purpose of facilitating the commission of a designated substance offence. The building, through the modifications that

were made to accommodate and support the illegal grow operation, had been significantly turned away from its original purpose, being that of a single or multi-occupant commercial/industrial building used to accommodate legitimate commercial or industrial activities. It appears that the offender, as the sole director and officer of the Company, intended from the outset to use the property to facilitate a designated offence. The extent and magnitude of the grow operation on April 6, 2001, as well as the facts presented when the offender was sentenced, lead to no other conclusion.

[51] On April 6, 2001 when the police executed a search warrant at the property they found a total of 663 marijuana plants, including plants in certain levels of the grow stage as well as those harvested and placed in garbage bags. Plants were found either growing or in garbage bags in grow rooms 1, 2 , 3B, 3, 4 and 5. Four garbage bags containing a total of 80 marijuana plants were also found in another room. Thirty-seven grow lights and 18 grow tables with grow tops were seized. Each of those grow tables could accommodate 32 pots in which to grow the marijuana plants. Six power panels were seized. When the offender was sentenced, a restitution order was imposed in the amount of $4,000 representing the quantity of electricity

stolen. This was a sophisticated and substantial commercial level, indoor, marijuana grow operation started not long after the building was purchased, as revealed, in part, by the basis used to calculate the stolen electricity. In accordance with facts presented at the time that the offender was sentenced, the estimated value of the seized marijuana when seized was between $300,000 and $371,280. The grow operation was estimated to be capable of producing cannabis marijuana having a value of $1,000,000 per annum at that time.

Permanence of the Modifications

[52] The expert witness testified to the relative ease and minimal expense required to remove or repair these modifications. While that may be a relevant factor to be considered, it is not a controlling factor. Notwithstanding the apparent ease to remove or repair the modifications, they nevertheless constituted fixtures and involved structural changes resulting in damage to existing structures within the building, including partitioning walls and the roof which had been breached to accommodate an otherwise useless prefabricated metal chimney. It is noteworthy that when the expert witness attended the property approximately one year later, the

prefabricated metal chimney remained; within Unit 3, the wooden framework erected to accommodate the suspended ceiling and a portion of the erected, wood-studded wall both remained; in other units, some of the holes cut in the partition walls to accommodate the duct work remained, and those that were repaired, were done so in a makeshift manner requiring further repair work to return the wall to an altered appearance. Nail and screw holes remained in the walls where strapping, shelving and electrical panels had been attached. Further repair work, including painting, was required to eliminate all signs of the modifications made to accommodate the grow operation.

CONCLUSION

Offence-Related Property Issue

[53] In summary, the modifications made to the property were, in part, structural. The modifications were also extensive in as much as they were made in and involved four of the five units thereby engaging approximately eighty percent of the property. These modifications clearly turned the property away from its original purpose, being that of a property used to facilitate or accommodate a legitimate commercial or industrial enterprise or operation. The extent of the modifications and the illegal use of the property was so

extensive that effectively the property was rendered useless to carry on a legitimate commercial or industrial operation while the illegal grow operation was being conducted. Considerable effort and expense was obviously required to establish this grow operation. To conclude that the modifications were not significant, only because the modifications to the property were capable of being reversed at a relatively lower cost and with relatively greater ease than that involved to make the modifications to facilitate the grow operation, is to focus too greatly on one factor. Such focus would not be consistent with Parliament's intention regarding the meaning to be attributed to the words "significantly modified for the purpose of facilitating the commission of a designated offence".

[54] I conclude that the property was significantly modified to facilitate a designated offence. As such, the property is offence-related property. The only issue remaining to be addressed are those related to S.19(3) of the CDSA.

S.19 CDSA Issues

[55] Based upon submissions from both counsel, I conclude that notice pursuant to S.19(1) of the CDSA was provided to the Company in advance of this application. The Company has been represented by counsel and has been the only party, other than the Crown, who has participated in the hearing of issues arising from the Crown's application under S.16 of the CDSA.

[56] The focus of this application has been upon a determination of whether the property is offence-related property. Ordinarily a determination that the property is offence-related property would result in an order forfeiting the property to Her Majesty in the Right of Canada. However, at the outset of this application, counsel for the Company indicated that if the property was found to be offence-related property, the Company may wish to be heard relative to issues contemplated by S.19(3) of the CDSA prior to the Court deciding to issue any order of forfeiture pursuant to S.16 of the CDSA.

[57] Although the Crown has established a *prime facia* basis upon which an order of forfeiture relative to the property should be made, I will postpone any formal issuance of such order until May 28, 2007 to give the Company an opportunity to indicate to the Crown and the Court, in writing, on or before

May 25, 2007 that it wishes to be heard further with respect to issues contemplated by S.19(3) of the CDSA. I suggest that Crown counsel prepare a draft of the proposed order of forfeiture and provide a copy of such draft order to both the Court and counsel for the Company on or before May 25, 2007 for review.

[58] This matter will be scheduled on the Court's docket at 9:30 a.m. on May 28, 2007, unless another date is mutually arranged by the parties with the Court, for purposes of either issuing a forfeiture order or scheduling a hearing of the issues inherent in S.19(3) should the Company have indicated on or before May 25, 2007 its desire to be heard on those issues.

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R. Brian Gibson, J.P.C.
Associate Chief Judge