SUPREME COURT OF NOVA SCOTIA

Citation: Nova Scotia (Public Safety) v. Dixon , 2011 NSSC 5

Date: 20110106
Docket: Syd 331105
Registry: Sydney

Between:

The Director of Public Safety

Plaintiff

v.

Delilah Delores Dixon and Peter Sheldon MacKinnon

Defendants

Editorial Notice

Some identifying information has been removed from this electronic version of the judgment.

Judge:	The Honourable Justice Patrick J. Murray
Heard:	October 6, 7, 13, 14, 15, in Sydney, Nova Scotia
Written Decision:	January 6, 2011
Counsel:	Glen Anderson, for the Plaintiff Tony Mozvik, for the Defendants

By the Court:

INTRODUCTION

[1] The matter before the Court is an application by the Director of Public Safety for a Community Safety Order in respect to the property of Sheldon MacKinnon and Delilah Delores Dixon at 1437 Bay St. Lawrence Road, (the "Property") Victoria County, Nova Scotia.

[2] The Director makes this application on the following grounds:

a) The property is being habitually used for the possession, use, consumption and sale of crack cocaine.

b) The possession, use, consumption and sale of crack cocaine on the property negatively affects the safety and security of the neighbours and interferes with the peaceful enjoyment of their properties.

[3] The Director alleges that the Property of the Respondents has been used as a "drug house" for some time. The activities of the Respondents and in particular, Ms. Dixon in association with a group known as Society Rejects, have instilled fear in the community as a result of criminal activity which the Director alleges is emanating from the Property and associated with the use of drugs on the Property.

[4] The Director alleges that since the return of the Respondent, Ms. Dixon and the Respondents to the Aspy Bay area, in August of 2009 and February of 2010 respectively, there has been an increase in drug activity and related offences.

[5] The Respondents live at the Property along with their three children, D. (6 years old), T. (4 years old) and an infant, J., (1 year old). Two of their children attend at the elementary school including the middle child, T. who is autistic. The youngest remains at home.

[6] The Respondents deny that their Property is involved in drug activity and object to the order requested by the Director being granted. The Respondents have each filed affidavits with an additional 13 affidavits from other deponents in support of their denial of the grounds set out by the Minister. In short the Respondents object to the Order being issued under the *Nova Scotia Safer*

Communities and Neighbourhoods Act (the "Act") and state that the Application is baseless.

BACKGROUND

[7] Ms. Dixon is alleged to be the leader of a group known as "Society Rejects". Many of this group are teenagers (some are now adults) who live in the Bay St. Lawrence, Sugarloaf area in Northern Cape Breton. It is alleged by the Director that this group congregates at the Property of the Respondents for "liquor" and "crack parties". It is also alleged by the R.C.M.P. officers, based on their knowledge, that this group is involved not only in the drug trade but in the commission of criminal offences not the least of which are a series of fires which have occurred since Delilah Dixon's release from incarceration.

[8] Two searches of the home pursuant to a drug warrant in June of 2006 and December of 2009 resulted in charges under the *Controlled Drugs and Substances Act.* Crack cocaine and cocaine were found in the residence along with drug paraphernalia on both occasions. Both of the Respondents were charged and convicted in 2006. Ms. Dixon was charged again in 2009 with possession for the purposes of trafficking. She pleaded guilty to possession of crack cocaine in April of 2010. A third person, Donna Connors stands charged with possession for the purposes of trafficking with respect to the search undertaken at 1437 Bay St. Lawrence Road, the home of the Respondents on December 18th, 2009.

ISSUES

[9] (1) Is the Director entitled to a Community Safety Order pursuant to the *Act?*

(2) If so, should the Property to be vacated and closed? and;

(3) If so, what provisions should be included?

THE ACT

[10] The *Safer Communities and Neighbourhoods Act* is relatively new and was passed in 2006 in Nova Scotia. The official title is "An Act to make Communities and Neighbourhoods Safer".

[11] An application under the *Act* must start with a complaint, (pursuant to Section 3) to the Director that a person's community or neighbourhood is being adversely affected by activities at or near a Property in the community or neighbourhood. In addition the activities must indicate that the Property is being "habitually" used for a "specified use."

[12] Pursuant to Section 4(1) upon receiving a complaint the Director has certain discretion as to how he may respond to same. Section 4 (2) states that the decision to do any of the things referred to Subsection (1) or to stop doing any of them at any time is within the Director's discretion. Among other things the Director may investigate the complaint and apply for an Order under Section 5 of the *Act*.

[13] In this case the Director decided to investigate the complaint under 4(1)(a) and apply for an Order under Section 5.

[14] Section 5 sets out that:

> "The Director may apply to the Court for a Community Safety Order if the Director has received a complaint."

[15] However the twofold test for the granting of an Order is set out in Section 7 which reads:

> 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 is being habitually used for a specified purpose; and
>
> (b) the community or neighbourhood is adversely affected by the activities.

[16] The term "specified use" is defined *Act* under Section 2(i) as follows:

> "Specified use in relation to property means the 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."

[17] It is in respect of this use which the Director seeks the Order closing the Property of Peter Sheldon MacKinnon and Delilah Delores Dixon for a period of 90 days.

PURPOSE OF THE ACT

[18] The object and purpose of the *Act* can be taken from the plain wording of it's 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 it's 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."

[20] The Director points out that the Court may draw the reasonable inference under the Act notwithstanding there have not been criminal charges laid under the *Controlled Drugs and Substances Act*. The burden of proof, therefore, which has been accepted in these cases is known as the civil burden, namely on the balance of probabilities. The Director has the onus of discharging that burden.

BURDEN OF PROOF

[21] Referring once again to Warner, J. in the **Director of Public Safety v Cochrane** case, supra, the burden was discussed at para. 48 as follows:

> "The burden of proof as to what gives rise to a reasonable inference is contextual. I know of no burden in any civil context that is not at least a burden of establishing the facts on a balance of probabilities. The nature of the remedies in the Act are not dissimilar to those associated with an injunction, or equitable remedies in general. I apply that burden in this case."

[22] Also in the Decision of **Public Safety v. CMHC and Lisa Lawrence,** 2009 NSSC 391, Coughlan J. stated as follows:

> "The burden is on the Director of Public safety to prove, on a balance of probabilities the facts necessary to justify the order sought."

[23] Justice Coughlan, in particular, discussed the nature of the evidence that the Director must put forward in establishing and satisfying the burden of proof on the balance of probabilities.

NATURE OF THE EVIDENCE

[24] At para. 5 of the **Lawrence** decision, Coughlan, J. further stated as follows:

> "The *Act* provides a complaint may be made to the Director and, upon receiving a complaint, the Director may, among other things, investigate the complaint. The Director may apply to the Court for a community safety order. Section 33 of the *Act* provides no evidence may be given by which a complainant may be identified. Therefore, the respondent has no opportunity to cross-examine or test the evidence of the complainant. The complainants could be persons who have a grudge against the respondent. One does not know, the evidence is untested. **Quite appropriately, the complaint is information which allows the Director to investigate the situation and determine if it is a proper case for seeking a community safety order. I am not prepared to consider, and do not consider, the anonymous complaints as evidence upon which this Court may grant an order."** (emphasis)

[25] There are a number of Saskatchewan cases which have been referred to by both counsel for the Applicants and the Respondents, in which Community Safety Orders have been dealt with under similar legislation. As to the nature of the evidence required, in **Saskatchewan (Director of Community Operations) v S.M.M. 2006 SKQB 19** McMurtry, J. stated at para. 18 as follows with regard to the approach of the Court in such applications:

> "The *Act* anticipates that the Director will put forward evidence, through the investigator, that the investigator has gained from confidential sources. Given the serious consequences for the Respondent, **the Court must carefully consider the quality of the evidence received, particularly as the complainants cannot be subjected to cross examination."** (emphasis)

[26] In this case the Complaint of the Director was investigated by Keltie Jones. His affidavit contained information regarding complaints from confidential sources which, as previously noted, are protected under the *Act*. It is clear the *Act* does contemplate that the identity of the complainants will be kept confidential and further that they will not be compelled to give evidence.

THE AFFIDAVIT EVIDENCE

[27] I turn now to the evidence of the Director, the complaint in this matter, and the affidavit evidence submitted by the Director. The evidence consists of a number of affidavits filed by the Director of Public Safety and oral evidence Keltie Jones, Constable Fabian Kenny and Constable Shawn Cornelisse. All three affiants for the Director were cross examined by counsel for the Respondents, Mr. Tony Mozvik. A summary of the affidavits filed in respect of the application and hearing held on October 13 and 15th, 2010 is as follows:

The Director originally filed three affidavits in this matter. They are:

Affidavit of Keltie Jones	Sworn July 12, 2010
Affidavit of Cst. Fabian Kenny	Sworn July 13, 2010
Affidavit of Cst. Shawn Cornelisse	Sworn July 12, 2010

[28] In response, the Respondents provided five affidavits, one each from: Peter Sheldon MacKinnon, Delilah Delores Dixon, John Roy MacKinnon, Phillip MacKinnon and Crystal Wall. In response to these affidavits, the Director submitted rebuttal affidavits just prior to the hearing date of August 26, 2010. These affidavits being:

Supplementary Affidavit of Cst. Fabian Kenny	Sworn August 25, 2010
Supplementary Affidavit of Keltie Jones	Sworn August 25, 2010

[29] At the hearing on August 26, 2010, upon direction from the Honourable Justice C. Bourgeois, the Respondents submitted a further 10 affidavits signed by neighbours and community members who are not parties to the current proceedings. It is these affidavits which prompted the Director to produce and submit the following additional rebuttal affidavits:

Affidavit of Cst. Shawn Cornelisse	Sworn September 12, 2010
Supplementary Affidavit of Keltie Jones	Sworn September 20, 2010
Affidavit of Michael Somerton	October 6, 2010

THE COMPLAINT

[30] A summary of the complaint in this matter is contained in the affidavit of Keltie Jones in paras. 8 and 9 as follows:

> 8. On November 10th, 2009, I was requested by Roger Merrick, the Director of Public Safety, to investigate a complaint to him concerning the use of 1421 Bay St. Lawrence Road, Victoria County, Nova Scotia, ("the Property") for the use and trafficking of illegal drugs, namely, crack cocaine, and the adverse impact of that activity on the neighbourhood and the community.
>
> 9. I am advised by Roger Merrick, the Director of Public Safety ("the Director"), and believe that the complaint included:
>
> (A) the Property is being habitually used for the use and sale of illegal drugs, namely crack cocaine;
>
> (B) the use and sale of illegal drugs at the Property negatively affect the safety and security of the neighbors, surrounding communities and interferes with the peaceful enjoyment of their properties;
>
> (c) the complainant has concerns that the persons using the Property for the use and sale of illegal drugs may seek reprisal against person(s) who report the activity to the police or to the Director;
>
> (D) Peter Sheldon MacKinnon and Delilah Delores Dixon have owned, lived at the Property since 2004 and are involved in sale of illegal drugs, and are allowing other persons to use illegal drugs at the Property;
>
> (E) since 2006, the criminal activity at the Property has escalated and has habitually included the use and trafficking of crack cocaine, prescription pills and other associated criminal activities, such as assaults, possession

of weapons, arson, stolen goods and other gang-like activities;

(F) the use and trafficking of illegal drugs at the Property and associated criminal activities have caused fear in the community.

KELTIE JONES - INVESTIGATOR

[31] In oral evidence Mr. Jones confirmed that he investigated the complaint on behalf of the Director. He indicated that he did not conduct surveillance but that he did complete interviews with approximately 12 to 15 complainants. He stated that these complainants live in the community of the Property. All of the complainants allege that Ms. Dixon and Mr. MacKinnon are involved in the use and sale of illegal drugs, namely crack cocaine and that this was having an adverse impact on the community. (affidavit, para. 10). Further the complainants allege that since Ms. Dixon's release from prison in August of 2009, young people from the community have been congregating at her residence (the "Property" herein), and are hanging out at the Property, where she has been selling them crack cocaine.

[32] Mr. Jones also confirmed the address of the Respondents and submitted an aerial photograph of their residence at 1437 Bay St. Lawrence Road. He provided copies of the Deeds obtained from "Property On Line". The civic address shown for the house is 1437 Bay St. Lawrence Road and an additional property with civic number 1421. Mr. Jones also submitted a photograph of the school, North Highlands Elementary, which is located approximately 300 yards from the Property in a southerly direction.

[33] Mr. Jones stated his investigation commenced on November the 10th, 2009. He indicated he drove as far north as Meat Cove to get a sense of the community. He stated the people he spoke with were very nervous talking to him and that no names of the youths or children congregating at the residence were provided to him. He stated that it is a relatively small community with houses in close proximity to the Respondent's home. He further stated that the area in question extended from Ingonish to Meat Cove, all north of Cape Smokey. He did not go as far north as Cheticamp.

[34] In response to questions about what areas and which people were affected he indicated it's mostly people in the Bay St. Lawrence, Margaretville, Aspy Bay area but that one complainant indicated it affected people as far as Neil's Harbour. He indicated that evidence from one complainant stated that illegal drugs were being hidden in the house from time to time. He stated it was necessary to assure the majority of the complainants he spoke with that their identification would be protected.

[35] Finally, he estimated that approximately half of the people he spoke with came forward and made complaints while the other half would not. The complainants who came forward all expressed they were fearful and that they were a tightknit community at one time. He indicated that many people were related in the community and he didn't think many people wanted their names "out there".

[36] On cross examination, Mr. Mozvik, on behalf of the Respondents, asserted that these were "nameless allegations" and that Mr. Jones was conducting a "one sided investigation." Mr. Jones was asked if any names were provided of people that were purchasing drugs from the Respondents, to which Mr. Jones replied, "no". He admitted that in a number of instances in his affidavit the complainants were referred to "he or she" when it should have been plural, meaning multiple people. As to his belief that crimes and drug activity were "emanating from the Property" he stated that this was based on conversations with the complainants. He provided pictures of the home and the driveway of the Respondents.

[37] On cross examination Mr. Jones indicated he did not request that statements be provided nor did he question the affiants for the Respondents.

[38] Mr. Jones filed a supplementary affidavit dated September the 20th, 2010 regarding a further complaint received on September 16, 2010 prior to the hearing in this matter. Paragraph four of Mr. Jones' September 20, 2010 affidavit reads as follows:

> "On September 16th, 2010 I received a complaint from a complainant that a man named Sheldon and a woman named Delilah, who lived in Aspy Bay have been approaching residents of the Bay St. Lawrence area intimidating them into providing affidavits saying that

> they, the man named Sheldon and the woman named Delilah, are not drug dealers."

[39] While Mr. Jones was cross examined on this affidavit the contents therein were essentially unchallenged. Mr. Jones summarized his role in the investigating as follows: "My job is to investigate the complaints, I'm not investigating the people, I am investing the problems that emanate from that Property."

CONSTABLE MICHAEL SOMERTON - CBRPS

[40] Michael Somerton, a Constable with the CBRM Police, filed an affidavit concerning a meeting between Ms. Dixon and a known drug dealer named Matthew Cook. In his affidavit sworn to on October the 6th, 2010 Constable Somerton indicated the he had 22 years experience as a police officer. He has considerable experience in drug investigation having completed two terms, one from 2002 to 2004 and one from 2008 to the present in drug investigation work.

[41] In his brief affidavit he stated that Mr. Cook is 24 years old and known drug trafficker in Cape Breton. He listed a total of 16 offences, all drug related pending charges against Mr. Cook, which charges were laid in August of 2010. Mr. Cook has a total of eight drug related convictions since 2005, including two trafficking cocaine convictions in 2008.

[42] Constable Somerton summarized a meeting which was held on July 13th, 2010 at 8:15 p.m. in the Zellers parking lot (in Sydney) between Ms. Dixon and Mr. Cook. Referring to Mr. Cook he stated, "he stopped next to the Dixon vehicle and facing the same direction, Matthew Cook got out of his car and sat in the front passenger seat of Ms. Dixon's car for approximately ten minutes. Matthew Cook then got out of Ms. Dixon's car and got back into his car." Both parties drove immediately away and he did not see anything exchange hands.

[43] Constable Somerton's stated in evidence that Mr. Cook had in the previous charges conducted all of his "meets" at the Zellers parking lot. The evidence further indicated that this meeting was on a day prior to Ms. Dixon returning to Aspy Bay. Ms. Dixon was followed by Constable Somerton but was not stopped by him prior to her returning to her apartment at 124 Falmouth Street. It was Constable Somerton's belief that the meeting between Ms. Dixon and Mr. Cook on July 13th, 2010 was in relation to drug activity.

[44] On cross examination Constable Somerton summarized the three major “drug busts” which occurred in recent years. In those, well over 100 people were charged including people "North of Smokey," in the Bay St. Lawrence area. Constable Somerton identified some of those people and when questioned indicated that neither of the Respondents were charged in those "busts." He further admitted that he couldn’t see whether anything had been exchanged between Ms. Dixon and Mr. Cook and also that if he saw any drugs, somebody would have been charged. He further stated based on knowledge from previous investigations, that Mr. Cook would often disburse and reload dealers “at the rear of the Zellers parking lot”. He finally admitted in cross examination that he had no physical proof that drug activity had taken place during this meeting.

CONSTABLES FABIAN KENNY AND SHAWN CORNELISSE - RCMP

[45] Both R.C.M.P officers that testified received their first posting in the Ingonish area and remain there. Constable Kenny beginning in 2007, Constable Cornelisse in 2009. Among others, the Director filed two affidavits of each constable which are identical in nature. These were sworn on July 13th and July 12th respectively. Both constables informed the Court that people in the community of Aspy Bay, Bay St. Lawrence were fearful as a result of the activities occurring at the residence of Delilah Dixon and Peter Sheldon MacKinnon. In para.6 of their affidavit the officers state:

> “One of the principal properties in which crack cocaine and cocaine have been used and sold during the past few years is 1421 Bay St. Lawrence Road, Aspy Bay, Victoria County, Nova Scotia, the Property. Attached hereto and marked exhibit “I” is a copy of a photograph of the property.”

[46] The officers further list drug offences which have originated at the Property for each respondents. In para.10:

> “Mr. MacKinnon, date of birth March 16, 1969, is 41 years old. He has been convicted of several criminal offences, including assault causing bodily harm and being unlawfully in a dwelling house, for which he was

> sentenced on August 27, 2008, to 26 months incarceration and 10 months probation. He was released from prison on February 5, 2010. His other convictions include assault, careless use of firearm, possession of a prohibited weapon, breach of probation, refusal of breathalyzer, being at large (two offences), breach of undertaking, aggravated assault and the following drug offences:
>
> > (A) offence date: June 15, 2006: possession of cocaine on the Property contrary to *Controlled Drugs and Substances Act*, s. 4;
> >
> > (B) offence date: June 15, 2006: possession of methylphenidate at the Property contrary to *Controlled Drugs and Substances Act*, s. 4."

And in para.14:

> "Ms. Dixon, date of birth February 21, 1983, is 27 years old. She has been convicted of several criminal offences, including unlawfully in a dwelling house, assault causing bodily harm, assault with a weapon and aggravated assault for which she was sentenced on August 27, 2008, to 18 months incarceration and 1 year probation. She was released from prison on August 9, 2009. In the past 4 years, she has also been convicted for breach of probation (two offences), fail to comply with condition, assault, mischief, several *Motor Vehicle Act* offences and the following drug offences:
>
> > (A) offence date: June 15, 2006: possession of cocaine at the Property contrary to *Controlled Drugs and Substances Act*, s. 4;
> >
> > (B) offence date: June 15, 2006: possession of Methylphenidate at the Property contrary to *Controlled Drugs and Substances Act*, s.

> 4;
> (C) Offence Date: December 17 - 19, 2009: possession of cocaine at the Property contrary to *Controlled and Substances Act*, s. 4(1), at which time she was subject to probation conditions imposed on August 27, 2008.

[47] Further in paragraph 16 it states that Ms. Dixon lived at the Property for several years with the exception of the period of August 27th, 2008 to August 9th, 2009 during which she was incarcerated. Also she was absent from the Property from January, 2010 to early June, 2010 during which period she resided in an apartment at 124 Falmouth Street, Sydney, N.S. but was at the Property on most weekends.

[48] Both Constables were cross examined by Mr. Mozvik, solicitor for the Respondents on their affidavits.

CONSTABLE FABIAN KENNY - RCMP

[49] A typical exchange between Constable Kenny and Mr. Mozvik for the Respondents was as follows:

> "What proof do you have that my clients have been involved in selling drugs and or other criminal activities emanating from the property?"

[50] In response, Constable Kenny stated he was part of a December 18, 2009 search under warrant which resulted in Ms. Dixon being charged with possession for the purposes of trafficking. Mr. Mozvik pointed out that Ms. Dixon was not present on the Property during that time and when he asked what further evidence there was, the answer most often given by the officer was that it was "common knowledge in the community" and "both respondents have been charged in the past".

[51] Constable Kenny stated that people in the community were stopping him constantly and informing him of the activities occurring at the Property. On cross examination Constable Kenny indicated that crack cocaine was found in the baby's crib on December 18 of 2009 and that during that search he stated, "I had crack in my face". He further indicated that the Property was known as the "Sugarloaf Pharmacy".

[52] Mr. Mozvik pointed out correctly that Ms. Dixon plead guilty only to possession of cocaine. He asked Constable Kenny "Did you see anybody purchasing crack cocaine? Did you see anybody selling crack cocaine? Did you see anybody use crack cocaine? The answer given by Constable Kenny to these questions was "no".

[53] Both officers stated in their affidavits that they conducted surveillance and patrolled the Property on a regular basis. They also relied upon crime stoppers and police checks in assessing what activities were being conducted at the residence of Ms. Dixon and Mr. MacKinnon.

[54] They stated in their affidavits at para. 17 that they:

> "...frequently seen known drug traffickers and users going to and coming from the Property minutes later. I (we) caused to be laid

> criminal charges against persons for possessing and trafficking crack cocaine at the Property over the past year."

[55] Here they were referring to the 2009 conviction against Ms. Dixon and also against Donna Connors who was arrested and charged on December 18th, 2009 with possession for the purposes of trafficking. Her trial in that matter is still pending. Ms. Dixon was also charged with breaching conditions of her probation on that date to which she plead guilty in April of 2010.

[56] Included in the affidavits of both Constables (Paragraph 21, tab 3) is a picture of a group of adult and teenage persons who call themselves "Society Rejects". Ms. Dixon is shown in this photograph as are the other persons displaying tattoos on their arms entitled "Society Rejects." The photograph was obtained from the internet on December 7, 2009.

[57] It was shown in evidence by Constable Kenny that during the December 2009 search, the words "Society Rejects, "Don't fuck with us" was scrawled on the basement wall of the Property. (Paragraph 26, Tab 5) Ms. Dixon attempted to explain this as being "a joke" in respect of the picture. The inscription on the wall, she stated was done by her sister, Brittany Burton and a friend of hers on October 29, 2009 during a birthday party for another member of the Group. It was still there during the search on December 18, 2009.

[58] In paragraph 23 of the affidavits of the constables, both Donna Connors, age 27 and Jessica Bonnar, age 20 are both identified as members of Society Rejects. Ms. Connors is charged with trafficking on the Property on December 18, 2009. Jessica Bonnar was also at the Property at the time of the drug search and on that date was charged with failing to comply with conditions occurring on December 18, 2009. William Bonnar, another member of Society Rejects was in the vehicle with Ms. Dixon at the time she was arrested on December 18, 2009.

[59] Constable Kenny gave evidence of specific incidents regarding Tony Allan MacKinnon. Constable Kenny indicated he has seen Mr. MacKinnon hitch hike from Bay St. Lawrence to the Property of the Respondents. Mr. MacKinnon is known to have a criminal record for drug use. On these occasions he would ignore Constable Kenny as he drove past. He would get a ride and later Constable Kenny

saw him getting dropped off at the driveway of the Respondents. He would be in the house for a couple of minutes, three or four minutes at most, and come back out and hitch hike back to Bay St. Lawrence. The Director argues that short visits of this nature have been held to be consistent with drug activity.

CONSTABLE CORNELISSE - RCMP

[60] Constable Cornelisse was cross examined at length by Mr. Mozvik. In a typical exchange between the two, Mr. Mozvik would ask Constable Cornelisse what proof he had that his clients, Ms. Dixon and Mr. MacKinnon were associated with drug activity including the other criminal offences alleged in the affidavits. Constable Cornelisse answered on a number of occasions that he had no direct evidence but he had “knowledge”. This became a matter of some debate and even objection to the Court by Mr. Mozvik on behalf of the Respondents.

[61] Constable Cornelisse indicated that he does not have sufficient evidence to lay criminal charges against the Respondents because people are fearful and do not wish to provide a statement, fearing harm will come to them. He indicated he would have sufficient evidence if people were prepared to come forward. Further, Constable Kenny indicated “people are fearful. I get called all the time in my office.” Constable Kenny indicated the proof will not happen, stating numerous people told him to the effect, “We’d love to tell you but we would like to have a house to live in”.

[62] Both constables indicated that members of the community were not prepared to provide written statements or give evidence in Court as to the alleged drug activity at the property. They said it was "common knowledge" and that the home of the Respondents was known locally as “the Pharmacy”, as earlier indicated.

[63] Mr. Mozvik ably represented his clients. He took issue with the labelling of the persons in attendance at the residence of Mr. MacKinnon and Ms. Dixon as "known drug traffickers" or "known drug users" even though not all had been charged with trafficking and only some had charges for possession of a controlled substance. Further he argued on behalf of the Respondents that the evidence given by Constables Kenny and Cornelisse amounted to hearsay and was based in large measure on "community chatter". He submits that this is unreliable evidence that his clients are conducting the specified use. He argued that the possession, use, and

sale of drugs should not be made on the basis of impressions, innuendo and community chatter.

[64] The Court agrees this evidence standing alone, based on what other complainants and people in the community were telling the Constables would be insufficient to draw a nexis between the activity and the Respondents. However there is additional evidence which the court must consider and weigh. It must be considered, if relevant, together with the other more cogent evidence. For example Constable Cornelisse stated that during a “shots fired” complaint one month before the arrest in December 2009, on (November 26th) he attended the residence and distinctly detected the smell of burnt marijuana. He stated on other occasions while conducting investigations at the Property, he saw remnants of marijuana, namely roaches, spread over the ground on the Property of Ms. Dixon and Mrs. MacKinnon. For her part Ms. Dixon admitted in evidence that marijuana was being smoked on the Property by her sister, Brittany Burton and also Jake MacKinnon.

[65] Constable Kenny informed the Court repeatedly that the number of police files “went up dramatically”. It went from the odd simple complaint, minor traffic offence or speeding to members “steady”, very commonly dealing with calls in respect of the Property in question. He stated he expected every shift to be called to that area since Ms. Dixon was released from prison.

[66] On the issue of whether the persons attending the Property of Ms. Dixon and Mr. MacKinnon were "known drug users" or "known drug traffickers", the Court must be careful in it’s reliance on this “labelling” without further evidence to support this description.

[67] However Constable Kenny’s extensive surveillance and Constable Keltie Jones’ experience point to the frequency and duration of the visits as being consistent with drug activity. Constable Cornelisse stated in evidence, and this is accepted by the Court, that there is more to establishing a known drug user than the establishment of a criminal record. The officers, through their constant surveillance, attendances and investigations throughout the community result in them obtaining certain information as the whereabouts, habits, occurrences and goings on, of persons within the community. It is probable they would know or have a fair idea of those persons associated with the drug trade or who is associated with drug activity and travelling in those circles. Evidence of the frequent visitors

and the short length of their stay, are reliable indicators of drug activity occurring at the residence.

THE RESPONDENT'S EVIDENCE - DELILAH DIXON

[68] Delilah Dixon filed an affidavit where in paragraph 13 she denied selling or permitting her home to be used for selling or use of illegal drugs. In paragraph 22 she stated she was residing at 124 Falmouth Street with her three children when she was stopped near Englishtown, Nova Scotia and charged with possession for the purposes of trafficking on December 18, 2009. In paragraph 24 she indicated Donna Connors was residing in her home and was present when the search warrant was executed. She indicated in paragraph 27 that Donna Connors is on conditions not to enter Victoria County and in paragraph 31 that she never supplied drugs to anyone. Finally she said at no time since her release has she threatened violence or tried to intimidate anyone in the community.

PETER SHELDON MACKINNON

[69] Her common law husband, Peter Sheldon MacKinnon also filed an affidavit. In paragraph 14 of his affidavit he corrected the address of his Property to be 1437 Bay St. Lawrence Road. He denied any knowledge of or having any association with the criminal activities referred to in Constable Fabian Kenny's affidavit, which affidavit contains the dates and places and times of the seven arsons committed in the area between September 11, 2009 and December 2nd, 2009. In paragraph 19 he admitted to being charged with possession of cocaine and ritalin in 2006 and stated in paragraph 22 that at no time since 2006 has there been any illegal drug use on the Property , "since I have been living at my home". He further states in paragraph 33 and 34 that at no time did he ever threaten violence or try to intimidate anyone and that he has not used any person to commit criminal offences on his behalf.

ADDITIONAL AFFIDAVITS FILED OF RESPONDENTS

[70] In addition the Respondents, submitted 13 additional affidavits from the following persons: Flora Corrine MacKinnon, Clifton Miles Fraser, Bernard

MacKinnon, Patsy MacKinnon, Michael MacKinnon, Kenneth MacKinnon, Tony MacKinnon, Carlton Burton, William Francis MacKinnon, Amanda MacKinnon, Phillip MacKinnon, Crystal Wall and John Roy MacKinnon.

[71] Of these thirteen affidavits ten are from relatives of Sheldon MacKinnon and Delilah Dixon . The general theme of these affidavits is that all of the deponents know the Respondents, have visited their home, did not see any drug activities, state that the home is not a drug house and that Respondents are good parents to their children.

[72] Mr. Mozvik argues that there is no "proof" that his clients are committing drug and other criminal offences. He is, in effect, looking for statements that they were selling drugs, or pictures, or eye witness or DNA evidence to link them to these crimes. Without this, he says the Court cannot draw the necessary inference.

[73] The application before the Court is a civil matter requiring proof on the balance of probabilities. If the Court were required to be satisfied beyond a reasonable doubt in order to draw the inferences, then that is a different, more onerous burden. Proof beyond a reasonable doubt is not required by the Act.

ANALYSIS

[74] Mr. Mozvik in his oral submission on behalf of the Respondents focused on several of the elements which must be proven in order for Court to grant the order requested. These are:

1. That the property be "habitually used" for the specified use which in this case is drug activities. Mr. Mozvik acknowledges that there were two incidents in 2006 and 2009 where drug activity occurred but that two times is not "habitual". He states that one needs a constant flow of people to and from the Property in order for the use to be habitual. He indicates that the surveillance conducted by the officers does not disclose this.
2. Pursuant to Section 7(1)(b) that the community or neighbourhood must be "adversely affected" by these activities. The Respondents argued through their counsel, Mr. Mozvik, that there is no evidence of this. He argues it is not sufficient to say it's a drug house. It requires evidence that the community or neighbourhood be adversely affected by these activities.

> 3. The Respondents further argue that the activities have ceased since Mr. MacKinnon has been released and that there is after December of 09 no activity that would require an order to be issued.

[75] Mr. Mozvik's basic position in respect to these arguments is that the Director is relying on hearsay, innuendo, belief and impressions in order to "ground the order". Mr. Mozvik argues there must be (1) direct evidence from a person who witnessed a drug activity, (2) that witness should come to court and be available for cross examination and (3) the court must have an opportunity to assess their credibility.

REASONABLE INFERENCE - s. 7(1)(a)

[76] As to whether or not the evidence gives rise to a reasonable inference that the specified (drug) activities have been occurring on the Property, I refer to definition of "inference" as contained in the negligence case of **North British and Mercantile Insurance Co. v Henry Morgan and Co.**, 1938, 76 Quebec S.C. In that case the court commented on the difference between "inference and conjecture". It provides:

> "The dividing line between inference and conjecture is often a very difficult one to draw. A conjecture may be plausible but it is of no legal value for its essence in 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."** (emphasis added)

[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.

[78] In this case there is evidence that there were activities pertaining to the use, sale and possession of drugs at this residence. Ms. Dixon, in her testimony stated that she possessed cocaine for the benefit of others. A passage from the transcript of her evidence reads as follows:

> Q. So you bought cocaine, you weren't going to use it and Sheldon was in jail, was going to be in jail for a couple of more months. So it was for someone else's use wasn't it?

A. Obviously it must have been sir.
Q. Yeah, oh I would say it must have been. Look you're...
A. I'm not saying I'm a saint. I'm not saying that but I'm not going to take responsibility for using cocaine when I don't.
Q. So are you saying the cocaine that you had, it must have been for someone else's use and you haven't told us yet who that person is, have you?
A. That's right sir.
Q. And it may very well be for several person's use, right?
A. I'm not sure sir.
Q. You're not sure, so you bought cocaine, you don't know whether you were going to give it to one or more people is that what you're saying?
A. I guess so.

[79] Ms. Dixon stated in her evidence that the cocaine found in the 2006 search at the home belonged to her common law husband, Peter Sheldon MacKinnon. Ms. Dixon experienced difficulties with her evidence on cross examination. Clearly there were inconsistences. She first denied purchasing cocaine from drug dealers and then admitted the cocaine in the home was purchased from drug dealers. When asked to identify the scales found in the 2009 search she identified them for the court but then later stated she was unsure whether they were in fact scales.

[80] She indicated that a “bong” found in her kitchen cupboard was, in fact, a candle holder. Upon viewing a picture of same tendered in evidence, her statement in this regard lacks credibility. In her response, she said on more than one occasion "I'm not lying about that sir", when she was merely asked a question.

[81] In respect of the 2006 search she initially denied possessing the cocaine even though she later plead guilty to a possession charge. Again in 2009 she attempted to state that it was someone else's cocaine when in fact she plead guilty to possessing cocaine in 2009. 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. That meeting was very short and was described by the Director as “clandestine”.

[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. The evidence at every turn, points to her being directly involved with Society’s Rejects including:

- the photograph in her home displaying the group's name tattooed temporarily or otherwise on her arm.
- the inscription on her basement wall of the group's name stating"don't fuck with us".
- her words of encouragement in regard to Society's Rejects which on Facebook, stating "oh, yeah".

[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.

[84] I have carefully considered and taken into account all of the additional 13 affidavits filed by the Respondents. I have considered the evidence contained therein but the Court is not persuaded by the contents. All of them suggest that the Property in question is not a drug house. This is in contradiction to the ample evidence suggesting otherwise.

[85] I note that a number of the Respondent's affiants reside in St. Margaret's Village, a distance of nine kilometres from the Property. Phillip MacKinnon was himself convicted of possessing cocaine as recent as February 23rd, 2010. Another affiant, Bernard MacKinnon, resided at the residence of Delilah Dixon and Sheldon MacKinnon from 2006 to 2008. He was living there at the time of the drug search in June of 2006 but yet he says the Property was never used for drug activity. This may well explain why many of the affiants have not seen drugs at or near the Property as they were likely hidden as was the case with the cocaine found in the crib. Another affiant was a former neighbour, John Roy MacKinnon. He left the area approximately one year ago. This would exclude from his knowledge, the December 2009 drug search but not the June 2006 drug search. Without detailing all of the affidavits or their contents herein, I conclude that I am rejecting their evidence and accept the evidence of the Director in regard to the activities emanating from the Property.

[86] Clifton Miles Fraser provided an affidavit and was referred to in paragraph 13 of the affidavit of Shawn Cornelisse dated September the 12th, 2010. Para. 13 of Constable Cornelisse's affidavit stated as follows:

> "On May 20, 2010, Cst. Fabian Kenny and I arrested Clifton Myles Fraser for impaired operation of an all terrain vehicle on the Bay St. Lawrence Road, Aspy Bay, approximately 1 - 2 kilometers from the Property. At this time, Mr. Fraser began yelling at us "to do something about the fucking drugs around here" and that "the pricks up the road need to be stopped selling that shit". Mr. Fraser said that if they sold drugs to his son that there would be "big trouble". Cst. Kenny asked Mr. Fraser who was selling the drugs to which Mr. Fraser said you guys know just up the road. I asked Mr. Fraser if he was referring to Sheldon (MacKinnon) and Delilah (Dixon) to which Mr. Fraser answered in the affirmative."

[87] When giving evidence at the hearing Mr. Fraser denied the version of the events set out in the Constable's affidavit. Instead he stated that the police attempted to "bribe" him in exchange for him testifying or giving evidence against the Respondents in this matter.

[88] I have reviewed the affidavit of Clifton Miles Fraser, sworn to on the 26th day of August, 2010 and I have observed him during his testimony. It is apparent that Mr. Fraser changed his story from the original evidence given to the constables. He now says that his reference to Sheldon MacKinnon and Delilah Dixon was to the affect that the officer should leave them alone and go after the guilty parties. He also admitted, when questioned, to knowing who the guilty parties were but he would not say. I am not persuaded by the evidence given by Mr. Fraser on behalf of the Respondents that his new version is credible.

[89] I have also considered the affidavit and oral evidence of Corrine MacKinnon. I did find Corrine MacKinnon to be a credible witness with respect to what she could see from the livingroom of her property which is located a fair distance from that of the Respondent's on the opposite side of the road, but within viewing distance. There was a discrepancy between her evidence and that of Constable Cornelisse who has visited her property but he was never in her livingroom. She maintained that she could view from her livingroom window a sufficient portion of

the road to state whether or not an unusual amount of traffic was going and coming to the Property of Delilah Dixon and Sheldon MacKinnon. Pictures provided in evidence, however, show that the driveway of the Respondents is located at a turn at the far end of any view plain she would have. The Court also noted that she tended to minimize the extent of the drug problem in her evidence on cross examination when she said she believed there was "a little bit of a problem." The Court also notes that Peter Sheldon MacKinnon is the uncle of Corrine MacKinnon.

[90] The Director has asked that an adverse inference be drawn in respect of certain neighbours who did not provide affidavits in support of Ms. Dixon and Mr. MacKinnon. There is evidence, given by Keltie Jones, Constable Cornelisse, and adduced from William Francis MacKinnon in cross examination to suggest that several neighbours living nearby did not provide an affidavits. I was referred by the Director to the **Law of Evidence in Canada** where at para. 6.449 of it provides:

> "In civil cases, an unfavourable inference can be drawn when, in the absence of an explanation, a party litigant does not testify, or fails to provide affidavit evidence on an application, or fails to call a witness who would have knowledge of the facts and would be assumed to be willing to assist that party. In the same vein, an adverse inference may be drawn against a party who does not call a material witness over whom he or she has exclusive control and does not explain it away. Such failure amounts to an implied admission that the evidence of the absent witness would be contrary to the party's case, or at least would not support it."

[91] It is difficult to ascertain without further evidence what knowledge of the facts further witnesses would have. It was stated that the activities at the Property were within the "common knowledge" of the community. There could be many reasons why a person would not give an affidavit including that they simply wish not to become involved. Therefore the Court is not prepared to draw an adverse inference that there is evidence from "absent" witnesses that would be contrary to the Respondents' case or at least would not support it. This aspect of the Director's case is simply not clear and cogent enough for such an inference to be drawn.

THE RAT

[92] Much evidence was given concerning a plastic rat which hangs from a chain across the driveway of Ms. Dixon and Mr. MacKinnon. The Director argued that this is yet another sign of intimidation and threats by the Respondents. The Respondents submit that it was placed there for Halloween in 2009 and that their daughter asked that it be left there.

[93] The Court finds that this is a collateral issue. This evidence is in a vein similar to that of the "barricaded house" as alleged by the Director and the pitbull dogs owned by the Respondents, which were said in evidence, to be located at the corners of the Property. This aspect of the evidence is uncontroverted as is the fact that there was a pitbull running loose on the Property. One of the officers, Constable Cornelisse had to "pepper spray" this pitpull during one of the searches. Whether these animals are intended as threats to the community or forms of intimidation is nonetheless relevant. The existence of the rat hanging from the chain was likely intended to send a message that not everyone is welcome on the Property of the Respondents. It is likely that this message was intended for the police and authorities. As to whether the rat was hanging constantly from the chain or whether it's existence was intermittent, the weight of the evidence appears to favor that it was more prominent following Mr. MacKinnon's release from prison in February of 2010. While they are a factor for the court's consideration in drawing inferences, the rat and the pitbulls are not the main factors resulting in the Court's findings.

[94] Seized at the Property in 2006 were additional paraphernalia including baggies of cocaine and a scoresheet showing tallies of income earned and to be earned. In addition to baggies of crack cocaine being found there was a set of scales found as well as knives, swords and other weapons.

[95] It is significant that cocaine was found hidden in the baby's crib in the master bedroom of the home, in the most recent search in 2009.

[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)**

[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

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". It's meaning will depend on the facts of each case.

SOCIETY'S REJECTS

[98] Much of the evidence related to the group known as the "Society's Rejects" and Ms. Dixon's involvement with that group. I find on the basis of the evidence that Ms. Dixon was a member of Society's Rejects as evidenced by the inscription on her basement wall, the picture posted on Facebook including her with a tattoo on her arm, and the message posted by her. These were attached as exhibits to the affidavit evidence. I am satisfied that on the balance of probabilities that the members of that group did congregate at the residence of Ms. Dixon and were involved in drug activities. This has become known throughout the community and

this is what is referred to by the Officers as "common knowledge" within the community.

[99] In fairness, and having considered the evidence, I am not prepared nor is it necessary for me to conclude that this group is responsible for the fires listed in paragraph 24 of the affidavits of Constable Kenny and Constable Cornelisse. The evidence in this regard is circumstantial and falls short of the onus. While the Court can draw inferences from circumstantial evidence, certain evidence was excluded at the evidentiary hearing on October the 6th, 2010. Consequently the remaining evidence would not support a clear finding that the group were responsible for these fires. Such a finding would require clear and cogent evidence, especially given the serious of the offences. However, the specified use contained in the Director's complaint pertains only to drug activities. Therefore, I find it is not necessary for the Court to make the connection between the group and the fires in order to conclude that fear has been instilled in the community as a result of this Property being used for drug activities. In conclusion on this point I once again refer to the **Cochrane, supra** case wherein Justice Warner stated at paras. 49 and 50:

> 49 This Court cannot see how Source A information can be used to support or to buttress a request that the Court find a reasonable inference that there was, in this case, more than a needle exchange. I am not prepared to consider, and do not consider, anonymous Source A information to be evidence upon which this Court can grant an Order.
>
> 50 However, the following evidence is, in my view, admissible and relevant evidence, and clearly, to a standard even higher than a balance of probabilities, satisfies the burden on the applicant to establish that the use of the property was for a "specified use".
>
> **51 First is the evidence of Mark McNeil. In paragraph 7 of his affidavit he says that he received complaints from four individuals who had concerns about young teenagers being at 42 Douglas Drive, and that the neighbours were fearful for the teenagers' exposure to drugs, and for the disturbances, and**

> **trespassing associated with the drug-related activity at the property."**

[100] Relying on the investigator's affidavit the Court finds that Mr. Jones sets out clearly the basis of the complaints he received from 12 to 15 individuals. These persons had concerns about young teenagers being at 1437 Bay St. Lawrence Road and were fearful about their community's exposure to drugs and related criminal activities. In paragraph 18 he states his belief based on these complaints that the illegal drug activity taking place at the Property negatively affects the safety and security of the neighbours and interferes with the peaceful enjoyment of their properties.

[101] In the Saskatchewan case of **Director of Community Service v S.M.M. and M.L.N., supra** the facts were that drugs were being provided to teenagers. In that case the very people who were "accused" (the teenagers) of using drugs provided letters (seventeen in total) in which they denied the use of drugs. They alleged harassment by the neighbours. In that case the very ones attending the parties provided evidence that they were not participating in the alleged drug activities. No such evidence has been provided by Ms. Dixon or Mr. MacKinnon in the case before this court, except for the affidavits of the Respondents.

[102] The Director argues that no explanation has been provided for the meeting between Ms. Dixon and Matthew Cook at the Zellers parking lot. It is acknowledged that the onus is on the Director not the Respondents. However, other than a denial there has been no explanation given by the Respondents.

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 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 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 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 began leaving the Property more often.
9. That crack cocaine was secretive in the baby's crib. Persons having 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.

[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.

[107] I further find that on the balance of probabilities that to 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.

[108] As was noted by Constable Cornelisse when surveillance was "stepped up" the frequency of the visitors declined. However Mr. MacKinnon then began leaving the Property more often.

[109] When one weighs the facts and evidence in their totality it this Property has in all probability been used as a drug house between the years 2006 and 2009 with the exception of a period of time when both Respondents were incarcerated.

COMMUNITY ADVERSELY AFFECT - s 7 (1)(b)

[110] I turn now to whether or not the activities adversely affected the community or neighbourhood as required by 7(1)(b). Section 2(2) defines how a community or neighbourhood is adversely affected by specified activities. It states that it is affected by the activities if those 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.

[111] Keltie Jones provided affidavit and oral evidence that the Property in question is located very close to the North Highlands Elementary School. Mr. Jones provided a picture of the school as an exhibit to his affidavit. It is located approximately 300 meters from the school. From his evidence he interviewed 12 to 15 people some of whom were neighbours in close proximity to the Property. They were not identified. He was reluctant to state full particulars but he indicated that he had spoken with school officials. Constable Cornelisse also indicated that concerns had been expressed by school officials.

[112] The affiants submitted by the Respondents state that they are good parents. Whether they are good parents is not the issue in this case. Good parents would normally not have their children in any way associated with drugs or have drugs hidden in the house. Donna Dixon herself acknowledged this in her evidence. In fact she agreed that drugs were "dangerous". Included as part of the community are the 3 children of the Respondents and the teenagers that were gathering at their home.

[113] Investigator Jones and both R.C.M.P. officers indicated that the communication received from the community was "constant" and that the community was "in fear".

[114] No one person testified from the community to state that they were in fear but the surrounding evidence favors a conclusion that the community is in fear as a result of the activities emanating from this Property. Gunshots were apparently fired from this Property on November the 26th, 2009 and that incident was investigated by the officers in question.

[115] It is a known fact that crack cocaine was secreted in the baby's crib. Persons have been seen driving to and from the Property in an irate manner.

[116] Similar reported cases have concluded that drug activities "by their very nature" are activities which negatively affect the health, safety and security of

others and interfere with the peaceful enjoyment of their Property. (DPP v Cochrane, DPP v Lawrence, supra) Drug paraphernalia was found on the Property during both searches.

PRESENT NEED

[117] In terms of whether or not there exists a present need the Respondents have relied in their brief on Justice Gerein's decision in **The Director of Public Operations v Carroll** (2006 SKQB 360). They argue that an order should be refused if there is no present need. They state that any activities have ceased.

[118] In the above case the basis of the Court's conclusion, that there wasn't a present need was dictated by the facts that in that case. The respondent was the owner of the Property but the person alleged to be involved in the drug activity was a tenant in the Property. In that case the court was satisfied that there was a reasonable inference that Ms. Vermet (the tenant) purchased marijuana on four occasions over a period of ten days. The court was also satisfied she purchased it with a view to selling it. However, he could not say she actually sold any marijuana or that any marijuana was sold at the residence. The court stated:

> "However, simple possession and possession for the purpose of trafficking are activities which fall within the purview of the Act."

In that case Ms. Vermet was on an undertaking with conditions. The court concluded:

> "A reading of the condition makes it clear that Ms. Vermet is very constrained with respect to what she can and cannot do. For the next while the court expects she will not be involved with illicit drugs. That is why she was released from custody. Should it turn out otherwise, she will be apprehended quickly and removed from the community with little likelihood of any return."

[119] The Respondent's argue that Delilah Dixon's involvement in the 2009 search was only through ownership of the Property as she was not residing in the home at the time of the search. They also state that Donna Connors, who was the tenant at the Property at the time of the search, has been placed on release conditions removing her from the home and the County. Finally they state that Delilah

Dixon's release conditions are sufficiently onerous to prevent any drug activity from occurring at or near the Property in the future.

[120] In regard to whether Ms. Dixon was residing in the home, there was evidence that she was returning to the Property on weekends. In fact when stopped by the police on December 18, 2009, she was returning to the Bay St. Lawrence, Aspy Bay area. The Respondents' argument for not closing the Property is that you "cannot separate the Property from the people", arguing that it is the home of the Respondents stating, it's "where they live". However, it is the Respondents who are seeking to separate the home from the Property in their submission that she was not present when Donna Connors was arrested. Although Donna Connors has been placed on release conditions she was not the only one charged with an offence at the Property on that date. Others were charged as well including Ms. Dixon.

[121] Unlike the **Carroll** case, Ms. Dixon or Mr. MacKinnon are not tenants in the Property but the owners of the Property. Ms. Dixon was on conditions at the time she was charged with the December 18, 2009 drug offence. At that time Ms. Dixon was subject to probation conditions imposed on August 27, 2008 which she breached. Ms. Dixon has demonstrated in the past her willingness not to abide by conditions.

[122] In addition paragraph 12 of Constable Kenny's supplementary affidavit sworn to on August 25, 2010 stated that over the past several months he saw several persons coming to and from the Property and listed a total of seven persons. Of the seven persons named, one was in the residence on the night of the December search, a second is a person with a drug possession record and a third was known to have been smoking marijuana at the residence of the Respondents.

[123] The Director, states that the Property has been used for a long time for drug activity and that relief in the form of a clear statement, a Community Safety Order would provide the needed remedy.

[124] It has taken the Director some months to complete the investigation and bring the matter before the Court. There has been an Interim Order granted in respect of this matter since August of 2010.

[125] Considering the entire circumstances in respect of this application and the fear which exists in the community, the Court finds there is a present need to deal

with the situation which has occurred over the past year. As Justice MacDonald stated in the his written decision of June 2, 2008 of **Director of Public Services v MacDonald and Donovan,** unreported:

> "The community should not have to tolerate or put up with this type of activity which has occurred in this case."

[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 it's safety and protection and to prevent the adverse affects 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.

[127] I find that operative time in respect of whether there is a present need is at the time of bringing the application which was, in this case, June 22, 2010. This is supported by the case law. Justice Warner indicated in the **Cochrane, supra** decision that the relevant time was "at the time of the application". It was acknowledged in evidence by the Respondent that the order is "prospective" meaning that it is intended to prevent activities from occurring in the future. Therefore the Order requested has an element to it which to some extent must address the future use of the Property.

[128] Further and with respect to the issue raised by the Respondents that there was not presently a need for the order, Section 7(5) of the *Act*, this states:

> " The Court may set aside the order if it is satisfied that the activities have ceased and are not likely to resume."

[129] This section would only be applicable for the order to be discontinued after it was originally issued. Section 7(1)(a) contemplates activities which "have been occurring on the Property". This suggests a past tense. On the other hand it also states "gives rise to a reasonable inference that it <u>is</u> being habitually used". This suggest a present tense.

[130] There is always a need to protect a community from fear and from activities which will have an adverse affect on the community. Indeed the Act exists for that

very purpose. No pronouncement or order has yet been made on a final basis in regard to the complaint in question.

[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.

CLOSURE OF PROPERTY

[132] Section 9(2) of the *Act* states that a Court may order the Director to close a Property on a specified date and keep it closed for 90 days. On the basis of finding similar to Section 7. Section 10(b) of the *Act* states:

> When deciding the length of a period of closure the court shall consider
>
> (a) the extent to which the respondents failure, if any, to exercise due diligence in supervising and controlling the use and occupation of the property contributed to the activities; and
>
> (b) the impact of the activities of the activities on the community of neighbourhood.

[133] Section 7(3) states the provisions which a Community Safety Order must contain. Those are mandatory and the order requested will contain items 7(3)(a),(b),(c) and (d).

[134] In terms of section 10(2)(a) I find that neither Ms. Dixon or MacKinnon exercised due diligence in controlling the use and occupation of the Property including the time it was occupied by Ms. Connors. Furthermore although they were arrested and charged in 2006, it appears they were not deterred in ridding the Property of drugs given the charges which resulted and the exhibits found on the Property in December of 2009.

[135] In terms of Section (10)(2)(b) and the impact on the community, I would refer to the case of **Manitoba v Manaigre**, 2009, NBQB, 113. In deciding whether to close the Property the Court considered several factors including whether the activities have stopped or are continuing, whether the owners have been able to stop the activities, whether the person causing or contributing to the activities are still present at the Property, whether the residents at the Property suffer undue hardship if the order was granted, whether the closure is the only available remedy to break the pattern of specified use and what, if any, is the ongoing adverse affect on the community. In that case the Court stated:

> " While I balance these factors in their totality, I recognize any one factor may be enough concern or weight to determine the issue in a given situation."

[136] In this case it has been the owners who are contributing to the activities and whom with their family will suffer hardship if the Property is closed. On the other hand the adverse impact on the community will continue unless something is done to break the pattern of the specified use.

[137] The factor which the Court looks to here is the "fear" resulting from the activities which have been occurring at this Property and the adverse impact this has had on the community. It has also been stated in the **Manitoba v Manaigre**, supra that a "crack house" is the opposite of a safe and peaceful community. Paragraph 17 of the affidavits of Constables Kenny and Cornelisse speak of people seen "frequently" going to and from the Property and leaving "minutes later". Based on the evidence, I find that these visits were more that "family visits" given the frequency and duration.

[138] Subsection 7(2) states:

> the court "may" include in a community safety order
> (a) a provision requiring any and all persons to vacate the property on or before the specified date and enjoining all of them from entering or occupying it.
>
> (b) a provision terminating the tenancy agreement or lease of any tenant and

> (c) a provision requiring the director to close the property from use and occupation on a specified date and keep it closed for up to 90 days and
>
> (d) any other provision that it considers necessary to make the order effective including but not limited to any order of possession in favour of the respondent.

[139] In this case the Court is mindful that the respondents have three young children and that the Property in question is their home. It is further mindful that two of the children attend the elementary school, one of whom is autistic. The third child is an infant, one year old. The Court also considers as stated by the Respondents that there is a large family network of both the MacKinnons and Ms. Dixon living in this neighbourhood. Their absence from the residence during their periods of incarceration was not long ago. The Court acknowledges the gravity that such an order will have on the lives of their children.

[140] There is a difficult and delicate balance to be achieved here between the granting of the Order which is required to provide relief to the community, and the personal lives of the Respondents, in particular their young children. Attempting to be fair and using the discretion which the Act permits, I believe it would be fair and prudent to order that the Property be vacated and closed as of February 4th , 2011 and I so Order. Thereafter it will be closed for a period of 70 days following which the order will terminate and the Property may be returned to the Respondents. I believe this will have the desired affect.

[141] This will also allow the Respondents to return to their home in mid-April, 2011 and in time for them to prepare for the fishing season. This normally takes at least two weeks and begins on May the 15, 2011. The Director is hereby directed to provide an Order for Court's approval with a copy of the proposed order to be sent the Respondents' Solicitor, Mr. Mozvik.

[142] The Director shall be awarded costs in the amount of $750.00.

J.