SUPREME COURT OF NOVA SCOTIA
Citation: Nova Scotia (Civil Forfeiture) v. Allen, 2013 NSSC 109

Date: 20130319
Docket: Tru No. 366302
Registry: Truro

Between:

Manager of Civil Forfeiture

Plaintiff

v.

Matthew Patrick Allen and Jennifer MacBurnie

Defendants

Judge:	The Honourable Justice Michael J. Wood
Heard:	January 10, 2013 (in Chambers), in Halifax, Nova Scotia
Final Written Submissions:	February 25, 2013
Written Decision:	March 19, 2013
Counsel:	Terry D. Potter, for the Applicant No one appeared for the Defendants

By the Court:

[1] This proceeding was commenced by the Manager of Civil Forfeiture against Matthew Patrick Allen and Jennifer MacBurnie, seeking a forfeiture order pursuant to the provisions of the *Civil Forfeiture Act*, S.N.S. 2007, c. 27. The order is sought with respect to cash in the amount of $7,750.00 which was seized by the Royal Canadian Mounted Police on August 21, 2011. The matter proceeded as an action and the notice of action was served on the defendants; however, no defence was filed.

[2] The Manager brought a motion for default judgment and the issuance of a forfeiture order. This motion was made on an *ex parte* basis due to the absence of a filed defence. The motion was initially heard by me on January 10, 2013, along with similar motions in three other proceedings. At that time, I raised a number of concerns with counsel for the Manager relating to the sufficiency of the evidence which had been filed in light of the proceeding being designated to be *in rem* by virtue of s. 28(1) of the *Civil Forfeiture Act*. To the knowledge of the Court and counsel, there are no reported decisions in Nova Scotia dealing with claims under this legislation.

[3] Counsel for the Manager requested additional time to review the issues which I had raised and subsequently filed a supplemental brief and additional affidavit evidence in all four proceedings.

[4] I have considered the submissions and evidence provided to me and am now in a position to provide my decision on the Manager's motion. Counsel for the Manager advised that there were a number of other proceedings currently underway and, for this reason, I will address some general principles relating to civil forfeiture in Nova Scotia as part of this decision.

THE STATUTORY REGIME

[5] The purpose of the *Civil Forfeiture Act* is set out in s. 2, which states as follows:

Purpose of Act

2 The purpose of this Act is to provide civil remedies that will assist in

(a) preventing persons who engage in unlawful activities and others from keeping property that was acquired as a result of unlawful activity; and

(b) preventing property from being used to engage in unlawful activity.

[6] It permits the Manager to seek forfeiture of "instruments of unlawful activity" or "proceeds of unlawful activity", both of which are defined terms in the legislation. Unlawful activity is defined to include activities which constitute offences under an Act of Parliament or of the Province. In order to obtain forfeiture, it is not necessary that anyone be convicted of an offence, although such a conviction is proof that a person was engaged in unlawful activity (s. 18). The burden of proof in proceedings under the *Act* is on the balance of probabilities, rather than the criminal burden of beyond a reasonable doubt (s. 17).

[7] The provisions of the *Civil Forfeiture Act* setting out the authority of the court to issue forfeiture orders are ss. 7 and 8, which provide as follows:

Orders respecting proceeds or instruments of unlawful activity

7 (1) Subject to Section 8, where proceedings are commenced under subsection 5(1), the court shall make an order forfeiting to Her Majesty in right of the Province the whole or the portion of an interest in property that the court finds is proceeds of unlawful activity.

(2) Subject to Section 8 and subsection 15(1), where proceedings are commenced under subsection 5(2), the court shall make an order forfeiting to Her Majesty in right of the Province property that the court finds is an instrument of unlawful activity.

Powers of court respecting orders

8. Where the court determines that the forfeiture of property or the whole or a portion of an interest in property under this Act is not in the interests of justice, the court may

(a) refuse to issue a forfeiture order;

(b) limit the application of a forfeiture order; or

(c) put conditions on a forfeiture order.

[8] Section 6 of the *Act* identifies who is to be named as parties to forfeiture proceedings. These include any person who the Manager has reason to believe is an owner of all or part of the property that was the subject of the proposed forfeiture or any person required to be notified by the court.

NATURE OF THE FORFEITURE PROCEEDING

[9] The difference between proceedings *in rem* and *in personam* was described by the Supreme Court of Canada in *Law and Hansen* (1895), 25 S.C.R. 69 at p. 4:

> Next, as to the extent to which the judgment concludes. Judgments in rem are conclusive against all the world, not only as to the rem itself but also as to the ground on which the tribunal professes to decide, or may be presumed to have decided. As to what constitutes proceedings in rem see Castrique v. Imrie, L.R. 4 H.L., per Blackburn J. p. 429. Judgments in personam bind parties and privies, and, generally speaking, are conclusive at least upon the material issues tendered by the plaintiff's complaint.

[10] The Saskatchewan Court of Appeal referred to this distinction between judgments *in rem* and judgments *in personam* in *BWV Investments Ltd. v. Saskferco Products Inc.,* [1999] S.J. No. 71 (C.A.) (leave to appeal dismissed [1999] S.C.C.A. No. 198). The Court went on to note that where a proceeding is *in rem*, default judgment was not available (para. 24):

> **24** One of the consequences of a proceeding in rem is that default judgment cannot be obtained for failure to plead or failure to appear since the judgment will bind more than the parties to it. It is therefore essential that there be a determination of the matter by the Court. To facilitate this, s. 88 of the Act ensures, as far as possible, that all necessary parties are before the Court.

[11] The issue of default judgments in forfeiture proceedings has been considered by the courts in British Columbia. The *Civil Forfeiture Act* in that jurisdiction is very similar to the Nova Scotia legislation. In s. 15(2), it indicates

that proceedings are *in rem* and not *in personam*. In *British Columbia (Director of Civil Forfeiture) v. Ngo*, [2012] B.C.J. No. 1405, the Court concluded that a claim for a forfeiture order when the defendant has defaulted is not available as a "desk order" and must be considered by a judge in Chambers. The rationale for that decision is found in para. 34, which provides:

> **34** Yet, according to s. 6 of the *CFA*, this court must be able to determine the Director's legal right to forfeiture and any equities modifying it before granting the order sought:
>
> > Relief from forfeiture
> >
> > 6(1) If a court determines that the forfeiture of property of the whole or a portion of an interest in property under this Act is clearly not in the interests of justice, the court may do any of the following:
>
> (a) refuse to issue a forfeiture order,
>
> (b) limit the application of the forfeiture order;
>
> (c) put conditions on the forfeiture order.
>
> For this court to make that determination in the context of a default judgment, the court must be able to probe the facts and procedure underpinning the claim. As the application is in effect *ex parte*, the court has an arguably heightened need for this opportunity. As Davies J. pointed out in *Kingdon*, various points for examination include the nature of the alleged "unlawful activity" giving rise to the claim (para. 52), the interests of others not connected to the activity (para. 51), etc. By contrast, a claim for default judgment by desk order requisition does not require even affidavit evidence as to substance.

[12] Similar sentiments were expressed in *British Columbia (Director of Civil Forfeiture) v. Kingdon*, 2011 BCSC 150 where the Court concluded that it would normally be necessary to have some evidence in order to consider whether to grant relief from forfeiture even on a default motion (see para. 78).

[13] Although not a default situation, the British Columbia Court of Appeal in *British Columbia (Director of Civil Forfeiture) v. Wolff,* 2012 BCCA 473 considered the scope of judicial discretion to provide some relief from forfeiture

under s. 6 of the *Civil Forfeiture Act*. The Court of Appeal's discussion of the principles and considerations at play is found at paras. 39 to 40:

> **39** Obviously, the purposes of the legislation will be relevant to the interests of justice. As the Court stated in *Saskatchewan (Seizure of Criminal Property Act, 2009 Director) v. Mihalyko*, 2012 SKCA 44 at para. 34, the "interplay between the purposes of the legislation and the exercise of the interests of justice discretion" must be considered. But so must several other factors. In *Rai*, the Court provided a "non-exhaustive list":
>
> 1. proportionality;
> 2. fairness;
> 3. the degree of culpability, complicity, knowledge, acquiescence, or negligence;
> 4. the extent of the problem in the community of the sort of unlawful activity in question;
> 5. the need to remove profit motive;
> 6. the need for disgorgement of wrongfully obtained profits;
> 7. the need for compensation;
> 8. prevention of future harm;
> 9. general deterrence. [At para. 111.]
>
> To this list one might add the offender's personal or family circumstances and the effect of forfeiture on them, the relationship between the property sought to be forfeited and the unlawful conduct in question, and the reputation of the administration of justice.
>
> **40** *Rai* rightly suggests that the principles of proportionality and fairness will be the "dominant considerations" in most cases. As Silverman J. observed, these principles often involve:
>
> 1. A balancing of the impact of a forfeiture order on, and a balancing of the interests of, the state, the defendant, and

> other affected parties, such as innocent victims, and/or innocent spouses or children of the defendant.
>
> 2. Where the extent of forfeiture of real property is under consideration, the following questions become relevant:
>
> (a) how much equity is there in the property?
>
> (b) how much was the defendant's legitimate investment in the property before criminal activity commenced?
>
> (c) how much equity has built up as a result of market conditions?
>
> (d) how much equity has built up since an interim preservation order was granted under the *Act*?
>
> 3. Would forfeiture require a drastic lifestyle change for the defendant and/or for innocent family members?
>
> 4. Would forfeiture affect employment opportunities?
>
> 5. The magnitude of the unlawful activity and/or of its profits, or potential profits. [At para. 113.]

[14] Section 6 of the British Columbia legislation is virtually identical to s. 8 of the Nova Scotia *Civil Forfeiture Act*. As a result, I believe that the considerations set out in the *Wolff* decision are relevant in Nova Scotia even where no defence has been filed.

[15] The very recent decision of the British Columbia Court of Appeal in *British Columbia (Director of Civil Forfeiture) v. Crowley*, 2013 BCCA 89 is also instructive because it specifically deals with how the court should address the interests of justice when the forfeiture hearing proceeds by default. The Court concluded that even in such a situation, the court must consider whether to exercise their discretion under s. 6(1) of the legislation (s. 8 of the Nova Scotia *Act*). After concluding that there was no onus on a defendant to prove that forfeiture was not in the interests of justice, the Court went on to say:

> [58] That is not to say that in any given case there is not an evidentiary or practical burden on the defendant to present evidence with respect to the interests of justice. I read the comments about onus in *Wolff* to refer to this kind of onus, at least to the extent those comments apply to s. 6(1). Much of the relevant evidence that the court might be asked to consider on the question of the interests of justice is likely to be solely in the knowledge or control of the defendant. Failure to adduce such evidence may be at his or her peril.
>
> [59] This does not mean s. 6 can be ignored on an application for forfeiture under s. 5 where a defendant does not participate. A judge must consider whether it is clearly not in the interests of justice before making an order of forfeiture. Section 5 is "[s]ubject to s. 6".

[16] I am satisfied that a proceeding in which a forfeiture order is claimed requires an evidentiary hearing even if the defendant has not filed a defence. I come to this conclusion primarily because it is an *in rem* proceeding which requires the court to adjudicate on the state's entitlement to the asset in question. In some ways it is analogous to a foreclosure action, which is also an *in rem* proceeding against land. In those cases, the plaintiff is required to prove the debt and the validity of the mortgage before obtaining an order of foreclosure and sale, even though no defence has been filed.

[17] In addition, I believe that a judge will need evidence to make the findings required in ss. 7(1) and (2) in order to grant a forfeiture order or to engage in the assessment of the interests of justice required by s. 8. Any facts relied upon in support of the forfeiture request must be proven on a balance of probabilities.

NATURE OF THE EVIDENTIARY HEARINGS

[18] *Civil Procedure Rule 22.15* sets out the rules of evidence applicable to a motion. It provides as follows:

> **22.15** (1) The rules of evidence apply to the hearing of a motion, including the affidavits, unless these Rules or legislation provides otherwise.
>
> (2) Hearsay not excepted from the rule of evidence excluding hearsay may be offered on any of the following motions:
>
> (a) an *ex parte* motion, if the judge permits;

> (b) a motion on which representations of fact, instead of affidavits, are permitted, if the hearsay is restricted to facts that cannot reasonably be contested;
>
> (c) a motion to determine a procedural right;
>
> (d) a motion for an order that affects only the interests of a party who is disentitled to notice or files only a demand of notice, if the judge or the prothonotary hearing the motion permits;
>
> (e) a motion on which a Rule or legislation allows hearsay.
>
> (3) A party presenting hearsay must establish the source, and the witness' belief, of the information.
>
> (4) A judge, prothonotary, commissioner, or referee may act on representations of fact that cannot reasonably be contested.

[19] In this case, no defence has been filed which means that the motion for the forfeiture order is being made on an *ex parte* basis, although I note that counsel for the Manager has, in fact, provided notice to the defendants. *Rule 22.15(2)(a)* gives the court discretion to permit hearsay evidence on an *ex parte* motion provided the source and the witness' belief in that source is established. I am prepared to permit such evidence to be used on this motion provided those requirements of the source identification and belief are established. I would note that hearsay evidence is usually considered to be less reliable than direct evidence and, as a result, may be given reduced weight. That is a factor which I will take into account in deciding whether the Manager has met the necessary burden of proof.

[20] In order to establish the unlawful activity and its connection to the asset which is subject to potential forfeiture, the motion will almost always be supported by evidence from one or more police officers. That is the case in this particular proceeding. Those police officers may give evidence in the nature of opinion. For example, in this case there is police evidence to the effect that the amount of cash involved and the manner in which it was packaged was indicative of drug trafficking activities.

[21] As a general rule, opinion evidence may only be offered by persons who are accepted as experts by the court based upon their training and experience. In my view, those requirements should apply equally in civil forfeiture cases. I do not suggest that a formal expert report must be prepared pursuant to *Rule 55* in a situation where the defendants have not filed a defence. I believe that any police opinion evidence must be supported by sufficient information in order to allow the court to determine whether the opinion should be admitted and, if so, how much weight it should be given. This information should include the following:

- the police officer's specific training and experience and whether they have previously been qualified to give opinion evidence in the subject area;

- any assumed facts relied upon;

- a clear description of the reasons for the opinion;

- the officer's connection, if any, to the investigation which resulted in the initial seizure.

[22] I would note that there is a distinction between an officer providing testimony in the context of a criminal proceeding, concerning the existence of reasonable and probable grounds for a seizure, and providing an opinion with respect to whether the requirements of the *Civil Forfeiture Act* have been met.

[23] Assessment of reasonable and probable grounds includes subjective consideration of the officer's state of knowledge and requires the court to consider what he or she believed at the time. This distinction was discussed by the Saskatchewan Court of Appeal in *R. v. Nolet*, 2009 SKCA 8. In that case, the trial judge had refused to allow a police officer to testify about currency which was seized and bundled in a fashion that he felt was indicative of drug proceeds. The trial judge excluded the testimony on the basis that the officer was not qualified as an expert. The Court of Appeal disagreed with the trial judge's decision for the following reasons:

> [141] The officer stated he had had past experience with seizures of cash, and his testimony regarding the small denominations and distinct bundling of the cash should have been admitted and considered by the trial judge in relation to the

> question whether of the officer's belief that a crime had probably been committed was objectively reasonable. While the officer's lack of expertise may have precluded him from giving opinion evidence on the ultimate issue whether the money was, in fact, proceeds of crime, the evidence was nonetheless admissible for the limited purpose of explaining and justifying the officer's decision to effect an arrest.

[24] I would make the same distinction in forfeiture cases. A police officer's opinion about why the property was initially seized is admissible to provide background and may be directly relevant if a defendant raises a question of unlawful seizure. Such evidence may not support the issuance of forfeiture order if the judge is not satisfied with respect to the officer's expertise or feels that the opinion should be given limited weight. That is an assessment which will have to be made on a case by case basis.

[25] In cases where there is no conviction relating to the asset to be forfeited, the Manager may still choose to provide evidence concerning the criminal record of the person from whom the seizure was made. Such evidence is circumstantial in nature and, as such, it is only admissible to prove a factual matter on the basis of reasonable inference. This will require the court to consider the degree of connection between the events giving rise to the prior convictions and the alleged unlawful activity. For example, a conviction for activities which took place five years prior to the seizure is probably of little value in determining whether the property in question is proceeds from unlawful activity. On the other hand, a conviction for drug trafficking a few months prior to a seizure of a large amount of cash, may well assist the court in determining whether the requirements for forfeiture have been established.

[26] Another matter to consider is what effect, if any, to give to the failure of the defendant to file a defence. *Civil Procedure Rule 8.05* provides as follows:

> **8.05** The terms of a default judgment may be determined on the basis that all pleadings in support of the claim have been admitted.

[27] This means that the court has a discretion to assess the terms of the default on the basis that all pleadings have been admitted. For the reasons outlined above with respect to whether an evidentiary hearing is required on default, I do not think that any deemed admission of the facts set out in the statement of claim

should be applied if the effect is to allow the Manager to obtain forfeiture without evidence. I would adopt the following comments from the British Columbia Court of Appeal decision in *Crowley*:

> [31] These salutary objectives must be placed into the context of civil proceedings that are somewhat unusual: the exercise of state power to confiscate the property of a citizen in a civil action based on unlawful activity that is an offence under legislation. Protection from the arbitrary exercise of state power is rooted in our legal tradition. Its exercise, albeit for good policy reasons, must recognize the procedural rights of the citizen. This case illustrates the point.

[28] I am satisfied that when the state seeks forfeiture of assets from an individual, they ought to prove that claim by evidence on a balance of probabilities whether the matter is defended or not. There may be a variety of reasons why an individual chooses not to engage the government in litigation over a few thousand dollars seized from them by police. I am not prepared to conclude that their failure to defend should be taken as any admission against their interest in the circumstances.

EVIDENCE ON THE MOTION

[29] As noted above, this motion initially came before me on January 10, 2013. At that time, the only evidence filed in support was the affidavit of Henry Sample, the Manager of Civil Forfeiture. That affidavit simply confirmed service on the defendants. At that time, counsel for the Manager advised that he was relying on the potential admission resulting from *Rule 8.05* and that no further evidence was required. In response to my initial comments concerning the nature of the hearing, counsel reviewed the matter further and filed additional affidavit evidence from Mr. Sample, as well as Constable Kevin Harrington. The Sample affidavit simply confirmed service and included some correspondence with a lawyer who had previously acted for Mr. Allen.

[30] The affidavit of Constable Harrington is the only substantive evidence filed in support of the motion. The essential elements of that affidavit are as follows:

- Constable Harrington is employed by the R.C.M.P. and throughout his career his duties have included major crime investigations and

proceeds of crime investigations. This includes numerous proceeds of crime investigations involving drug traffickers.

- His experience has helped him identify currency which was found to be obtained through the proceeds of crime, such as drug trafficking.

- He has knowledge concerning techniques used by drug dealers, the habits of drug users and how they acquire and use funds in their illegal activities.

- On the evening of August 21, 2011, he stopped a vehicle for speeding on Highway No. 2, which was driven by the defendant, MacBurnie. The defendant, Allen, was a passenger in the vehicle. Ms. MacBurnie provided a false name and Mr. Allen corroborated that name.

- He was familiar with Mr. Allen from previous investigations and attached as an exhibit a copy of a summary of Mr. Allen's previous convictions.

- He arrested Mr. Allen for obstructing a police officer and seized a tote bag from the back seat of the car. The bag contained $7,750.00 bundled with elastic bands.

- Mr. Allen gave a statement advising that he owned the cash and that it was the proceeds from the sale of two cars. Mr. Allen could not provide the particulars of the sales and did not provide supporting documentation.

[31] Constable Harrington's affidavit sets out his opinion with respect to the monies seized from Mr. Allen in paras. 6 and 7, which provide as follows:

> 6. I believe that the $7,750 in cash was directly or indirectly acquired by selling illicit drugs. This belief is based on several factors, including: the large amount of cash found, Mr. Allen's previous involvement with *Controlled Drugs and Substances Act* matters, bundled $1,000 lots wrapped with elastic bands contained in a tote bag, most of the notes seized were $20 bills (which is the most commonly used currency by persons involved in drug trafficking), Mr. Allen's recent release from jail

> and his unbelievable explanation about the source of the cash. It is also noted that the drug detector dog indicated the presence of drugs with the cash.
>
> 7. I believe that if the $7,750.00 in cash is returned to Matthew Allen it would likely be used to buy illicit drugs to sell for the purpose of making more money.

[32] Although Constable Harrington expresses his believe that the money was directly or indirectly acquired by selling illicit drugs and would be used to purchase such drugs if returned to Mr. Allen, those are the very issues which have to be determined by the Court on this motion. While I will receive his opinion in light of his apparent training and experience in the area, I must consider the underlying facts and see if I come to the same conclusion. I would note that Constable Harrington's affidavit is very vague concerning the particulars of his experience and whether he has ever provided expert evidence on these issues and, therefore, it is difficult to determine what weight ought to be given to his opinion.

[33] In considering the factors set out in para. 6 of Constable Harrington's affidavit, I must assess whether these have been proven on a balance of probabilities. Once the facts have been established I need to decide if they give rise to the inference that the money was acquired by selling drugs, or would be used for that purpose if returned to Mr. Allen.

[34] The reference to the drug detector dog is clearly inadmissible. Such evidence requires an opinion from a qualified expert. It is necessary to quality both the dog and the handler before the court receives such evidence. That was not done in this case. There is also the issue that Constable Harrington's knowledge comes from the dog or the handler, which makes it hearsay. Hearsay opinion evidence cannot be admitted.

[35] Constable Harrington relies on Mr. Allen's previous convictions under the *Controlled Drugs and Substances Act*. These convictions are for simple possession and arise out of events which took place in August, 2008, April, 2010 and November, 2010. Mr. Allen has no convictions for trafficking and the possession convictions do not provide much assistance in determining whether he was engaged in trafficking in the summer of 2011.

[36] Constable Harrington had the opportunity to interact with Mr. Allen and concluded that he did not believe his explanation about the source of the cash. The Court does not have any ability to assess Mr. Allen's credibility on this motion; however, there is nothing inherently unbelievable about the suggestion that the money came from the sale of motor vehicles.

[37] According to Constable Harrington, the money was bundled in $1,000 lots, wrapped with elastic bands and most of the notes were $20 bills. This alone does not seem particularly unusual; however, Constable Harrington expresses the opinion that $20 are the most commonly used currency by persons involved in drug trafficking. While this may be so, I suspect that $20 bills are commonly used in many legal transactions as well.

CONCLUSION AND DISPOSITION

[38] The Manager has provided no direct evidence that Mr. Allen was involved in the sale of illegal drugs or that the cash in question was generated by such activities. It is a circumstantial evidence case and the Manager says that all of the circumstances support the inference that the money seized is proceeds of unlawful activity or an instrument of unlawful activity as those terms are defined in the *Civil Forfeiture Act*. The only facts which might support such an inference are Constable Harrington's opinion and the amount and nature of the cash seized.

[39] I put limited weight on Constable Harrington's opinion, particularly since it is based, in part, on inadmissible and irrelevant considerations. The amount of money and the fact that it was primarily $20 bills does not provide much support for the Manager's position without other indicia of illegal activities.

[40] I am not satisfied that the Manager has proven his entitlement to a forfeiture order on a balance of probabilities and, therefore, I would dismiss the motion.

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Wood, J.