SUPREME COURT OF NOVA SCOTIA
Citation: Innocente v. Canada (Attorney General), 2010 NSSC 111

Date: 20100325
Docket: Hfx. 311509
Registry: Halifax

Between:

Daniel Innocente

Plaintiff

v.

Attorney General of Canada

Defendant

Judge:	The Honourable Justice Justice Arthur J. LeBlanc.
Heard:	September 1 and 18, 2009, in Halifax, Nova Scotia
Final Written Submissions:	January 5, 2010
Counsel:	Daniel Innocente, Self-Represented Patricia C. MacPhee, for the Respondent

By the Court:

Introduction

[1] The defendant applies to dismiss the statement of claim on the basis that it does not disclose a cause of action, it constitutes a collateral attack on a warrant of seizure and a restraint order and it is barred by the *Limitations of Actions Act*.

Background: the Statement of Claim

[2] The plaintiff and respondent, Daniel Joseph Innocente, seeks damages and costs relating to the alleged improper withholding of his real and personal property by the defendant and applicant, the Attorney General of Canada. In a Notice of Action and Statement of Claim dated May 21, 2009 ("the Statement of Claim"), Mr. Innocente states that in June 1996, the Attorney General obtained from this court a warrant to search for, and seize, personal property. The Attorney General also obtained a restraint order pursuant to s. 462.33 of the *Criminal Code*, prohibiting Mr. Innocente from disposing of or otherwise dealing with any interest in his home at 47 Granite Drive, Five Island Lake, in Halifax ("the real property"). In obtaining these orders, the Attorney General undertook to comply with any orders by a court of competent jurisdiction as to damages and costs he sustained in

relation to the making and execution of the restraint order and the warrant. He says these undertakings arose under ss. 462.32 and 462.33 of the *Criminal Code*.

[3] Mr. Innocente claims that the Supreme Court renewed the restraint order and the warrant over time, and that, by an order dated February 4, 2000, the Court ordered that the real property be sold by the federal Seized Property Management Directorate, with a list price of $385,000.00. Mr. Innocente alleges that the property was "sold under threat of imminent foreclosure through a deed executed by Mr. Innocente and Elizabeth Ann Innocente in June, 2002 at a price of $290,000." He adds that ""[t]he personal property seized pursuant to the above named process was eventually returned to Mr. Innocente, but in a dilapidated state."

[4] According to the Statement of Claim, Mr. Innocente was convicted in May 1999 on a charge of conspiracy to traffic in a narcotic, which, he alleges, 'was not then a charge under which the restraint of the real property and the seizure of the personal property was authorized by the *Criminal Code*." Mr. Innocente states that "of all the charges initially levied against him which formed the basis for the restraint and the seizure, he was only convicted of that one charge in May 1999,

and the continuation of the restraint order and warrant must be said to have been ill-founded in law." He alleges that the Attorney General "never obtained an order [under s.] 462.37 of the *Criminal Code* forfeiting any of the property seized or restrained."

[5] Mr. Innocente claims that the Attorney General "withheld his property improperly ... causing him to sell his real property ... for a substantial loss and allowing his personal property to deteriorate and lose value." state. He repeats that the Attorney General "had undertaken to pay damages or costs and says that he has indeed suffered damages and costs in relation to the making and execution of the restraint order and the warrant." He seeks damages and costs "relating to the improper witholding [*sic*] of his real and personal property from him."

[6] The Attorney General has not filed a defence.

The application to dismiss

[7] The Attorney General seeks summary judgment on the pleadings on the basis that it is plain and obvious that the Statement of Claim cannot succeed. The Attorney General says the Statement of Claim does not specify a cause of action

and does not provide sufficient material facts for a determination of the nature of the claim and against whom it is advanced. The Attorney General relies on three grounds for dismissing the statement of claim:

> (1) The statement of claim does not comply with Rules 4.02(4) and 38.02 and 38.03, as it fails to adequately describe the parties or provide sufficient material facts to disclose the cause of action against the Attorney General;
>
> (2) The statement of claim is based on an attempted collateral attack on the warrant of seizure and the restraint order;
>
> (3) The action in damages is statute barred by section 2 of the *Scotia Limitation of Actions Act*, the cause of action having arisen in May 1999.

[8] The issue, in short, is whether it is plain and obvious that the Statement of Claim fails to disclose a reasonable cause of action. The answer to this question will require an assessment of each of the grounds advanced by the Attorney General.

[9] Rule 13.03 sets out the principles governing summary judgment on the pleadings. The rule provides, in part:

> (1) A judge must set aside a statement of claim, or a statement of defence, that is deficient in any of the following ways:

> (a) it discloses no cause of action or basis for a defence or contest;
>
> (b) it makes a claim based on a cause of action in the exclusive jurisdiction of another court;
>
> (c) it otherwise makes a claim, or sets up a defence or ground of contest, that is clearly unsustainable when the pleading is read on its own.
>
> (2) The judge must grant summary judgment of one of the following kinds, when a pleading is set aside in the following circumstances:
> ....
>
> (b) dismissal of the proceeding, when the statement of claim is set aside wholly;
> ....
> (d) dismissal of a claim, when all parts of the statement of claim that pertain to the claim are set aside.
>
> (3) A motion for summary judgment on the pleadings must be determined only on the pleadings, and no affidavit may be filed in support of or opposition to the motion....

[10] Hamilton, J.A. described the test on an application under the predecessor to Rule 13.03, Rule 14.25 of the *Civil Procedure Rules (1972)*, in *MacQueen v. Ispat Sidbec Inc.*, 2007 NSCA 33, 2007 CarswellNS 155 (C.A.). She said:

> 8 All parties agree that a pleading should only be struck if it is "plain and obvious" that the claim does not disclose a cause of action; that the action is "obviously unsustainable." This test was recently approved by this Court in *Mabey v. Mabey* (2005), 230 N.S.R. (2d) 272 (N.S. C.A.):
>
> > [13] It is well settled that the test pursuant to Rule 14.25(1)(a) is that the application will not be granted unless the action is "obviously unsustainable". In considering an application to strike out a pleading it is not the court's function to try the issues but rather to decide if there are issues to be tried. The power to strike out pleadings is to be used sparingly and where the action raises substantial issues it should not be struck out: *Vladi Private Islands Ltd. v. Haase et al.* (1990), 96 N.S.R. (2d) 323, 253 A.P.R. 323 (C.A.). An application for variation should not be struck out

> unless it is certain to fail, or it is plain and obvious that it will not succeed. Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the respondent to present a strong defence should prevent the applicant from proceeding with his or her case: *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, 117 N.R. 321.

[11] The analysis set out in *MacQueen* continues to be relevant to summary judgment on the pleadings as defined in the new rule.

[12] According to the Attorney General, Mr. Innocente has not specified the nature of the claim; the Attorney General submits that "it is impossible to discern who allegedly acted illegally or what tort was allegedly committed so that a proper Defence could be advanced. The Attorney General cites Rules 4.02, 38.02 and 38.03, which provide, in part:

> 4.02(4) The statement of claim must notify the defendant of all the claims to be raised by the plaintiff at trial, conform with Rule 38 - Pleading, and include each of the following:
>
> (a) a description of the parties;
>
> (b) a concise statement of the material facts relied on by the plaintiff, but not argument or the evidence by which the material facts are to be proved;
>
> (c) reference to legislation relied on by the plaintiff, if the material facts that make the legislation applicable have been stated;
>
> (d) a concise statement of the remedies claimed, except costs.
>
> ....
>
> 38.02 General principles of pleading

(1) A party must, by the pleading the party files, provide notice to the other party of all claims, defences, or grounds to be raised by the party signing the pleading.

(2) The pleading must be concise, but it must provide information sufficient to accomplish both of the following:

(a) the other party will know the case the party has to meet when preparing for, and participating in, the trial or hearing;

(b) the other party will not be surprised when the party signing the pleading seeks to prove a material fact.

(3) Material facts must be pleaded, but the evidence to prove a material fact must not be pleaded.

(4) A party may plead a point of law, if the material facts that make it applicable are also pleaded.

38.03 Pleading a claim or defence in an action

(1) A claim or defence in an action, and a claim or defence in a counterclaim, crossclaim, or third party claim, must be made by a statement of claim that conforms with Rules 4.02(4) and 4.03(5), of Rule 4 - Action, or a statement of defence that conforms with Rule 4.05(4) of Rule 4.

(2) The following additional rules of pleading apply to all pleadings in an action:

(a) a description of a person in pleadings must not contain more personal information than is necessary to identify the person and show the person’s relationship to a claim or defence;

(b) claims or defences may be pleaded in the alternative, but the facts supporting an alternative claim or defence must be pleaded distinctly;

(c) a pleading that refers to a material document, such as a contract, written communication, or deed must identify the document and concisely describe its effect without quoting the text, unless the exact words of the text are themselves material;

(d) a pleading that alleges notice is given must state when the notice was given, identify the person notified, and concisely describe its content without quoting the text, unless the exact words of the text are themselves material.

> (3) A pleading must provide full particulars of a claim alleging unconscionable conduct, such as fraud, fraudulent misrepresentation, misappropriation, or malice.

[13] Among the alleged deficiencies identified by the Attorney General in the pleading are the absence of "material facts to explain what relevance the restraint order had on [Mr. Innocente's] decision to sell his house or on the value of his house when he sold it in June 2002"; the lack of specifics on "what personal property was allegedly seized, or when it was returned," or, for that matter, "what exactly, if anything, he claims happened to his personal property" during the period it was seized, or whether the claim "is based solely on the alleged deterioration and loss of value" of the personal property."

[14] The Attorney General says there are no material facts alleged in the Statement of Claim that suggest that the Attorney General breached the terms of the warrant or the restraint order, and no indication of tortious conduct by the Attorney General in acting pursuant to the warrant or restraint order. As such, the Attorney General submits that the Statement of Claim should be dismissed for failing to disclose a reasonable cause of action. Mr. Innocente submits that these objections amount to an attempt "to bury a self-represented litigant in the minutiae of procedure," adding that he "will have to satisfy a court, for example, that the

warrant caused him to sell his real property at a loss. This will be done in evidence and the absence of material facts in the claim is not fatal to it."

The undertaking

[15] Mr. Innocente relies, in particular, upon the undertaking given by the Crown under s. 462.32(6) of the *Criminal Code*. Section 462.32 authorizes the issuance of a special search warrant in relation to property in respect of which there are reasonable grounds to believe an order of forfeiture may be made. Subsection 462.32(6) provides, "[b]efore issuing a warrant under this section, a judge shall require the Attorney General to give such undertakings as the judge considers appropriate with respect to the payment of damages or costs, or both, in relation to the issuance and execution of the warrant."

[16] These search and seizure provisions of Part XII.2 of the *Criminal Code* were considered by the Supreme Court of Canada in *Québec (Attorney General) v. Laroche*, [2002] S.C.J.No. 74, 2002 SCC 72, [2002] 3 S.C.R. 708. LeBel, J., for the majority, discussed the provisions' history and purpose:

> 23 The procedure governing restraint orders and special warrants of seizure is found in Part XII.2 of the *Criminal Code*. Parliament introduced those measures into Canadian criminal procedure as one of the components of a set of legislative reforms made for the purpose of combatting enterprise crime and drug trafficking. For that purpose, Bill C-61, which was enacted in September 1988 and was proclaimed in force on January 1, 1989, created new offences and gave the state and police forces expanded powers....
>
> 24 The enactment of Part XII.2, entitled "Proceeds of Crime", was a central element of those major reforms of the criminal law and criminal procedure. Part XII.2 provides for a new offence in relation to laundering proceeds of crime (s. 462.31 Cr. C.), interim measures that apply before conviction or even trial or charge, and provisions that facilitate the forfeiture of proceeds of crime once a finding of guilt has been made. That Part, at the relevant time, applied only to two new categories of offence: enterprise crime and designated drug offences (s. 462.3 Cr. C.). However, those two categories encompassed virtually all offences in the *Criminal Code*, other than minor offences, as well as crimes associated with drug trafficking, not including simple possession....
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> 25 The legislative objective of Part XII.2 plainly goes beyond mere punishment of crime: an analysis of the provisions of that Part shows that Parliament intended to neutralize criminal organizations by taking the proceeds of their illegal activities away from them. Part XII.2 intends to give effect to the old adage that crime does not pay.... As [P. M. German, *Proceeds of Crime: The Criminal Law, Related Statutes, Regulations and Agreements* (loose-leaf), at pp. 3-1 et seq.], has observed, Part XII.2 organizes the fight against organized crime around a strategy that focuses on the proceeds of crime, as opposed to the offender. As well, the effectiveness of that struggle depends largely on the speed with which proceeds of crime can be identified, located, seized and ultimately forfeited. For that reason, Part XII.2 provides for new enforcement techniques that enable the police to freeze or immobilize the property of criminal organizations regardless of whose possession it may be in, even before charges are laid.

[17] In *R v. Lavigne*, [2006] S.C.J. No. 10, 2006 SCC 10, [2006] 1 S.C.R. 392, Deschamps, J., writing for the court, wrote:

> 8 In 1989, Canada honoured the commitment it had made when it signed the *United Nations Convention against Illicit Traffic in Narcotic Drugs and*

> *Psychotropic Substances*, Can. T.S. 1990 No. 42, by amending the *Criminal Code* to add Part XII.2 (Proceeds of Crime), R.S.C. 1985, c. 42 (4th Supp.) (formerly S.C. 1988, c. 51), s. 2. The new provisions allowed the prosecution to use unprecedented investigative methods (s. 462.32), created new offences (s. 462.31(1)) and established special rules for sentencing (ss. 462.31(2) and 462.37). As P. M. German correctly writes, Parliament goes beyond the offender him or herself and targets the proceeds of crime (*Proceeds of Crime: The Criminal Law, Related Statues, Regulations and Agreements* (loose-leaf ed.), at p. 3-4:
>
> > Part XII.2 goes much further than other crime control initiatives, representing a paradigmatic shift from the traditional, single transaction, individual-oriented structure of criminal law with which Canadians are familiar, to one which is both property-driven and premised upon multiple transactions perpetrated by criminal organizations. It focuses upon the proceeds of crime, as opposed to the offender, individual or corporate; the avowed purpose being to neutralize criminal organizations rather than punish individual offenders. Its effectiveness in achieving these goals is inexorably tied to the speed by which criminal proceeds can be seized or frozen and as a result, it acts prospectively, in anticipation of a conviction in later proceedings. [Citations omitted.]
>
> 9 Great importance is thus attached to the proceeds of crime, and one of the stated goals is to neutralize criminal organizations by depriving them of the profits of their activities. The Honourable Ray Hnatyshyn, who was the Minister of Justice when the bill was introduced, said that traffickers had been insufficiently deterred by traditional sentencing methods. Canada therefore had to adopt methods by which it could deprive offenders of the profits of their crimes and take away any motivation to pursue their criminal activities. Of all the methods chosen, the primary one is forfeiture (House of Commons, *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-61*, Issue No. 1, November 5, 1987, at p. 1:8). The effectiveness of the adopted methods depends largely on the severity of the new provisions and on their deterrent effect *(Quebec (Attorney General) v. Laroche*, [2002] 3 S.C.R. 708, 2002 SCC 72, at para. 25).

[18] As German notes, there are three conditions precedent before a restraint order or a special search warrant (s. 462.32) will be issued: the application, “notice to persons with a valid interest” (in the case of special search warrants, “optional notice”) and “an undertaking by the Attorney General.” (pp. 7-6 and 8-4). In

addition, pursuant to sections 462.32(1) and 462.33(3) the Judge must be satisfied that there are reasonable grounds to believe that there exists property in respect to which an order of forfeiture may be made under ss. 462.27(1) or 462.38(2).

[19] Subsection 462.37(1) requires a direct link between the designated offence and the property. The terms “designated drug offence” and “designated enterprise offence” have been repealed and replaced with the single term, “designated offence.” The effect of this change is immaterial here. This differs from s. 462.37(2), which allows for forfeiture where there is no link between the property and the offence but it is established beyond a reasonable doubt that the property are from proceeds of crime. Mr. Innocente seems to suggest that because an order of forfeiture under s. 462.37(1) was not obtained with respect to his property, the original warrant to seize and restraint order were invalid.

[20] To answer to this claim by Mr. Innocente, I referred to German’s points on this: “it is, of course, impossible for the informant is where the overture will occur, as that is a eventuality must be determined by the courts or in the informant can, however, swear them in order of forfeiture may be made. This requirement was

apparently intended to serve as a protection from abuse of the search power. See also *Serrano v. Canada* (1992), 91 D. L. R. (4th) 747.

[21] Mr. Innocente bases his claim for damages on the undertaking provisions of the *Criminal Code*. Pursuant to sections 462.32(6) and 462.33(7), before issuing a warrant of seizure or restraint order, as the case may be, the Judge is required to obtain from the Attorney General such undertakings as the judge considers appropriate with respect to the payment of damages and/or costs in relation to the issuance and execution of the warrant and/or the making and execution of the restraint order.

[22] There are few reported cases on the consequences of the undertakings and whether an accused person can rely on them for recovery of damages over whether they are limited to situations where there is an attack on the special warrant or detention order. The Quebec Superior Court considered this issue in *R. c. Entreprises Michel Chouinard inc.*, [1992] J.Q. No. 926. Justice Galipeau said:

> (Translation) The judge can make such an order solely upon reviewing the Crown's affidavit and upon the Crown's undertaking to deposit a reasonably substantial amount as surety to assure those who had been in possession of the restricted property that the property will be there when the time comes to dispose

> of it, failing which, if those formerly in possession of it become entitled to have it returned to them, they will be compensated out of surety deposited by the Crown.
>
> In this way, the balance is maintained between the rights of society and the rights of the individual; on the one hand, the right to ensure that property derived from the commission of enterprise crime offence or illegal drug trafficking is eventually forfeited so as to make this trade less lucrative and hinder its future growth; on the other hand, the right of the individual, once he has been cleared of some drug or enterprise crime charge, after being deprived of the enjoyment and management of his property during the time required to clear himself of these charges, to have it returned to him in its entirety or else be compensated through the undertakings and sureties deposited with the court before a restraint order was issued pursuant to s. 462.34 et seq. of the *Criminal Code*.

[23] In *R v. Seman*, [1994] M. J. No. 212 (Man. Q.B.), the plaintiff sought to have a restraint order revoked, pursuant to s. 462.34(1)(a), and also sought an order for damages and costs against the Crown. Oliphant, A.C.J.Q.B. said:

> 25 Upon an application to revoke a restraint order, the onus, in my opinion, lies upon the applicant to satisfy the court, on a balance of probabilities, that the order should not have been made in respect of the property in question.
>
> 26 Before it can obtain a restraint order, the Crown must demonstrate there are reasonable grounds to believe that there exists property in respect of which an order of forfeiture may be made under either subsection 462.37(1) or subsection 462.38(2) of the *Criminal Code*. Subsection 462.38(2) is not applicable here.
>
> 27 Under subsection 462.37(1), the court must grant an order of forfeiture, following conviction or discharge under s. 736 of an enterprise crime offence, where it is satisfied, on a balance of probabilities, that any property is proceeds of crime and that the enterprise crime was committed in relation to that property.

> 28 The onus cast upon the applicant applying for an order to revoke a restraint order is met if the applicant demonstrates either of the following matters on a balance of probabilities, namely, that the property which is the subject of the restraint order is not the proceeds of crime or that the enterprise crime alleged was not committed in relation to that property.

[24] In *Seman* the court revoked the restraint order. Upon being provided with fuller information than had been before him on the original *ex parte* application, the Associate Chief Justice was not satisfied that the order should not have been granted in the first instance (paras. 31-44). As to damages and costs, he said:

> 45 When the restraint order was granted, the Attorney-General of Canada undertook to comply with any order made by the court as to damages and costs adjudged in favour of any person by reason of the making and execution of the restraint order.
>
> 46 In my view, it is within the jurisdiction of the court, upon the hearing of the application to revoke, to adjudge the damages sustained, if any, as against Mr. Seman by reason of the making and execution of the restraint order.
>
> 47 There is evidence before me which proves that Mr. Seman had to pay the credit union, which holds the mortgages on the property, legal fees totalling $2,018.04. The legal fees were incurred by the credit union in connection with an opinion it obtained as to whether or not the credit union could advance funds to Mr. Seman under the second mortgage in light of the restraint order. Once the credit union paid the legal fees in question, it charged the same to Mr. Seman's line of credit with the credit union.
>
> 48 In my view, Mr. Seman is entitled to be reimbursed by the Attorney-General of Canada in the sum of $2,018.04 by way of damages, and I so order and adjudge.

[25] The Associate Chief Justice also held that the applicant was entitled to costs:

> 50 An *ex parte* order is a strong remedy, especially when it involves an interference with the property of another. That is exactly what occurs when a restraint order is granted. Mr. Seman, and those claiming under him, were

> effectively prohibited from dealing with the property, except in a very limited manner as provided in the order.
>
> 51 As a result of the granting of the restraint order, which I have now found should not have been granted, it was necessary for Mr. Seman to retain the services of legal counsel for the purpose of applying for an order to revoke the restraint order.
>
> 52 In his submission before me, Mr. Pinx asserted that I ought to award costs on a lawyer and client basis. Briefly put, his argument was that the restraint order should never have been granted in the first place and that Mr. Seman ought not to be out of pocket as a result of the granting of the restraint order.
>
> 53 I asked for, and received, a copy of the account rendered by Mr. Pinx's law firm to Mr. Seman. The account totalled $6,699.31 including fees, disbursements and G.S.T.
>
> 54 Upon examination of the statement of account, I find it to be reasonable and, in the circumstances here, I agree with Mr. Pinx's contention that Mr. Seman should not be out of pocket. Accordingly, order the Attorney-General of Canada to pay Mr. Seman his costs in the sum of $6,699.31.

[26] In this case, Mr. Innocente is not seeking damages in respect of the making and execution of the restraint order. There is no indication in the statement of claim that he challenged the validity of the warrant of seizure or the restraint order at any point. The damages in *Seman* were awarded in respect of the making of, or the execution of, the orders. The attack was on the initial warrant and detention order. That is not the case here.

[27] The Attorney General suggests, in a supplementary submission, that the Supreme Court of Canada's decision in *Laroche* stands for the proposition that the

undertakings by the Attorney General are for the benefit of third parties who sustain damages as a result of the making of the orders. This view appears to lack support in the authorities. Both German's text and Hubbard suggest that undertakings provided by the Attorney General apply to any parties that may suffer damages as a result of the issuance and execution of special search warrants or the making and execution of a restraining order.

[28] The provisions dealing with the situation when the initial special warrant and the restraint order was first issued in 1996, and the provisions in effect in 1999, are not identical to the present form of the *Criminal Code* provisions. There has been change to various terminology. For example, the term "designated drug offence" was replaced with "designated substance offence," and the name of the statute governing drug offences has been changed from the *Narcotic Control Act* to the *Controlled Drugs and Substance Act*. In his statement of claim, Mr. Innocente alleges that the charge of conspiracy to traffic in a narcotic "was not then a charge under which the restraint of the report and the seizure of the personal property was also lies about the *Criminal Code*". I am assuming for the purposes of this decision that the time Mr. Innocente refers to is May 1999.

[29] On a review of the relevant provisions of the CDSA and the *Criminal Code*, it appears to me this claim is not substantiated by the provisions in effect as of May 1999. Conspiracy to traffic in a narcotic was an offence capable of forming an adequate basis for the issuance of a warrant of seizure and a restraint order in May 1999.

[30] In May 1999 traffic in the narcotic was an offence on the s. 5(1) of the CDSA which provided that "all persons traffic in a substance included in Schedule I, II, III and IV or any substance from or held by the person to be such a substance." Sections 4 through 10 of the CDSA were included in Part I of that Act, entitled *Offences and Punishment.* As mentioned above, offences under Part I of the CDSA , with the exception of simple possession under s. 4(1), were also considered "designated substance offenses" for the purpose of both the CDSA (see the definition in s. 2) and the *Criminal Code.*

[31] Having found that the charge of conspiracy to traffic in a narcotic was a proper basis upon which a special warrant and restraint order could be issued, I have some misgivings about the suggestion that continuation of the warrant and restraint order was ill-founded in law. I do not agree with the suggestion that the

warrant and detention order could only be effective so long as there were other substantive drug charges against Mr. Innocente that had yet to be disposed of.

[32] The applicant maintains that the statement of claim does not disclose a reasonable cause election. It appears to me that an undertaking to respond in damages and costs results from the making and the execution of a special warrant or detention order. It does not appear that the undertaking gives rise to a claim other than by way of an attack on the making or execution of the special warrant or restraint order. Mr. Innocente is not challenging the validity of the warrant or the restraint order, as was done in *Seman*.

[33] The thrust of Mr. Innocente's claim is that the Attorney General withheld his property, and continued to restrain him from dealing with it, after May 1999. Further, he alleges that he suffered substantial monetary loss as a result of the improper withholding of personal property and the continued detention or restraint of his real property. This is the basis of the claim. It appears to me, based on the contents of the statement of claim, that the action can only be maintained if there is an attack on the validity of the special warrant or the detention order.

[34] It is unclear whether Mr. Innocente's claim is meant to sound in negligence, breach of fiduciary duty, breach of an undertaking, or breach of a charter right entitling to damages. Given this lack of clarity, the plaintiff's assertion that he is entitled to damages, particularly where it is doubtful that there is any basis, is dubious.

Collateral attack

[35] The second ground for dismissal advanced by the Attorney General is that Mr. Innocente's claim constitutes a collateral attack on previous court orders. The Attorney General submits that there is no evidence that Mr. Innocente challenged the validity of the warrant or the restraint order pursuant to s. 462.34 of the *Criminal Code*. The Attorney General maintains that to permit the claimant to pursue damages in these circumstances would be to allow an attack on the special warrant and restraint order.

[36] I take from the statement of claim that Mr. Innocente's position is that once he was convicted of conspiracy to traffic in a narcotic in May 1999, the continuation of the warrant and restraint order after that date was ill-founded in law. There are no facts adduced to support this claim. It is agreed that Mr.

Innocente did not challenge the validity of the special warrants or detention orders, nor did he challenge the renewal of these orders. Mr. Innocente maintains that he was otherwise involved in the court proceedings and did not have any opportunity to do so. The court is left to speculate whether the warrant and restraint order shall cease to have effect on the date of conviction, or some other date which then gives rise to a claim for damages.

[37] The Supreme Court of Canada considered the doctrine of collateral attack in *Garland v. Consumers Gas Company*, [2004] S.C.J. No. 21, 2004 SCC 25, [2004] 1 S.C.R. 629, Iacobucci, J., stated, for the court:

> 71 ...The doctrine of collateral attack prevents a party from undermining previous orders issued by a court or administrative tribunal (see *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, 2003 SCC 63; D. J. Lange, *The Doctrine of Res Judicata in Canada* (2000), at pp. 369-70). Generally, it is invoked where the party is attempting to challenge the validity of a binding order in the wrong forum, in the sense that the validity of the order comes into question in separate proceedings when that party has not used the direct attack procedures that were open to it (i.e., appeal or judicial review). In *Wilson v. The Queen*, [1983] 2 S.C.R. 594, at p. 599, this Court described the rule against collateral attack as follows:
>
> > It has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally -- and a collateral attack may be described as an attack made in proceedings other than those whose specific

> object is the reversal, variation, or nullification of the order or judgment.
>
> Based on a plain reading of this rule, the doctrine of collateral attack does not apply in this case because here the specific object of the appellant's action is not to invalidate or render inoperative the Board's orders, but rather to recover money that was illegally collected by the respondent as a result of Board orders. Consequently, the collateral attack doctrine does not apply.
>
> 72 Moreover, the appellant's case lacks other hallmarks of collateral attack. As McMurtry C.J.O. points out at para. 30 of his reasons, the collateral attack cases all involve a party, bound by an order, seeking to avoid the effect of that order by challenging its validity in the wrong forum. In this case, the appellant is not bound by the Board's orders, therefore the rationale behind the rule is not invoked. The fundamental policy behind the rule against collateral attack is to "maintain the rule of law and to preserve the repute of the administration of justice" (*R. v. Litchfield*, [1993] 4 S.C.R. 333, at p. 349). The idea is that if a party could avoid the consequences of an order issued against it by going to another forum, this would undermine the integrity of the justice system. Consequently, the doctrine is intended to prevent a party from circumventing the effect of a decision rendered against it.
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> 73 In this case, the appellant is not the object of the orders and thus there can be no concern that he is seeking to avoid the orders by bringing this action. As a result, a threat to the integrity of the system does not exist because the appellant is not legally bound to follow the orders. Thus, this action does not appear, in fact, to be a collateral attack on the Board's orders.

[38] The applicant relies on *Durnford v. 2201336 Nova Scotia Ltd.*, [2003] N.S.J. No 303, 2003 NSSC 175, and *R v. Wilson*, [1983] 2 S.C.R 594, in support of the submission that Mr. Innocente is collaterally attacking the special warrant and restraint orders. In *Wilson*, *supra*, McIntyre, J. stated, for the majority, at pp. 599-600 (in a passage partly cited above in *Garland*):

> ... It has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment. Where appeals have been exhausted and other means of direct attack upon a judgment or order, such as proceedings by prerogative writs or proceedings for judicial review, have been unavailing, the only recourse open to one who seeks to set aside a court order is an action for review in the High Court where grounds for such a proceeding exist. Without attempting a complete list, such grounds would include fraud or the discovery of new evidence.

[39] On the basis of the principles governing the collateral attack doctrine, as set out in *Wilson* and *Garland*, it is necessary to consider what opportunity Mr. Innocente had available to him to challenge the legality or the validity of the special search warrant and restraint order.

[40] As of May 1999, s. 462.34 of the *Criminal Code* set out the procedure for challenging the validity of a special warrant or restraint order. I have previously set of the text of this provision. This provision has been amended over time as set out above. P.M. German states, in *Proceeds of Crime* at section 12.3 at p. 12-5:

> Section 462.34 (1) permits any person who has an interest in property seized under s. 462.32 or restrained under s. 462.33, to apply, at any time, for its full or partial return or to examine it. The application must be made to a superior court judge, as defined in section 462.3. To have any practical effect, the application

> must be made prior to forfeiture. Various remedies are available, including an order to examine the property, to return all or a part of it, to revoke or vary a restraint order, or to include reasonable conditions in a restraint order. By far, the most common reviews have been those seeking a partial return or release of property to pay legal expenses.

[41] Although not stated in his statement of claim, I am prepared to accept, for the purpose of this application, that Mr. Innocente during the period that the special warrant and restraint order were in effect portions of his personal and real property were released to him to assist him in the payment of legal expenses. It is apparent that Mr. Innocente is alleging that the special search warrant and restraint order continued after his conviction in May 1999.

[42] In *Proceeds of Crime,* German addresses the issue of improper awards or orders at section 12.7 at p. 12 – 16, in the context of a discussion of reviews of orders under s. 462.34(4)(b) and (6)(a). He writes:

> An order may be made to return property or revoke, vary or impose conditions on a restraint order in a situation where a warrant issued under s. 462.32 or a restraint order made under section 462.33, should not have been issued or made. This particular provision only applies where the applicant is a person charged with a designated offence, or any person who acquired title to or a right of possession of that property from such a person, under circumstances that give rise to a reasonable inference that the title or right was transferred from that person for the purpose of avoiding the forfeiture of the property.

[43] The term “designated offense” came into force as of February 1, 2002; previously, the *Criminal Code* used the terms “designated substance offence” and “enterprise crime offence.” The change in terminology is not material to this case.

[44] In *R v. Seman,* the court noted that the applicant bears the onus to satisfy the court, on a balance of probabilities, that either “the property which is the subject of the restraint order is not the proceeds of crime or that the enterprise crime alleged was not committed in relation to that property” (para. 28). Oliphant, A.C. J.Q.B. revoked his own restraint order, having the benefit of argument from counsel for the accused and information not disclosed in the original affidavit. As a restraint order can only be granted if there are grounds for believing that an order of forfeiture may be made under ss. 462.38 (2), it follows that one cannot be grounded in cases where the property and the predicate offence are not directly linked, those which fall within the ambit of s. 462.37(2).

[45] The authors of *Money Laundering & Proceeds of Crime* (Hubbard et al., 2004) comment on the ambit of review under s. 462.34 at p. 99, citing the following comments by Lebel, J. in *LaRoche, supra*:

> 42 Judicial review of the special warrant or restraint order is possible, but only in three specific cases. First, where the property is not useful for the purpose of an

> investigation or as evidence in another case, the lawful owner of the property may obtain the return of the property where that person appears innocent of any complicity in an offence under Part XII.2. If the applicant is a person charged with an offence under Part XII.2 or a person who acquired a right of possession of the property under circumstances that give rise to a reasonable inference that the right was transferred for the purpose of avoiding the forfeiture of the property, the scope of the review narrows down. The application may be granted only if it is shown that the special warrant of seizure should not have been issued or the restraint order should not have been made (s. 462.34(4) and (6) Cr. C.).
>
> 43 Second, the judge may authorize the person in possession of the property that has been seized or in respect of which a restraint order has been made or any other person holding a valid interest in that property to pay the reasonable living expenses of that person or of his or her dependants and that person's legal expenses, or to give security therefor, out of the property (s. 462.34(4)(c) and (5) Cr. C.). Finally, the application may be granted where the applicant offers the court sufficient security for the recovery of the seized property (s. 462.34(4)(a) and (8) Cr. C.).
>
> 44 In addition, the judge must revoke a restraint order, or order that the property be returned, where he or she is satisfied that the property will no longer be useful for the purpose of an investigation or as evidence. The judge may make that decision on his or her own motion or on application by the Attorney General or a person having an interest in the property (s. 462.43 Cr. C.).

[46] The applicant bears the burden on a balance of probabilities to establish that the warrant should not have been granted. The applicant can attack the granting of the warrant or restraint order, or offer additional evidence to rebut or undermine the justification for the granting of the warrant and restraint order. The reviewing judge must assess the whole of the evidence submitted in the application. If the judge concludes that the authorization should not have been granted, the Crown can still apply for the property to remain under restraint or seizure if it is required for a criminal investigation or as evidence in other proceedings.

[47] In this instance, it is abundantly clear that Mr. Innocente did not take any steps to challenge the validity of the authorization or to offer additional evidence as to why the authorizations were improper. He submits that his action is not an attack on the validity of the warrant or the restraint order, but rather is a civil proceeding for damages on the basis that the Crown, having obtained an order on the basis of a premise that later turned out to be unsustainable, may be liable for the harm it has caused him.

[48] There appears to be no judicial pronouncement or authority supporting Mr. Innocente's claim that he is entitled to damages. Given the extent of the statement of claim, there is no basis upon which the court can reasonably conclude that Mr. Innocente was charged with a number of offences which were valid offences and whether these charges continued after May 1999, or, for that matter, what the new charges were brought against him at that time.

[49] Even if Mr. Innocente claims that the original warrant and restraint order were valid, and that it was only subsequent conduct that gives rise to a claim for damages, the court has to be mindful of the statement in *Wilson* at p. 599 that "a

court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed.... [S]uch an order may not be attacked collaterally and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment." Mr. Innocente's position respecting the continuation of the special warrant and restraint order after May 1999 appears to be a collateral attack on those orders. Mr. Innocente maintains that in fact he is mounting a novel claim against the Attorney General, one that is not premised on the illegality of the warrant or restraint order. He argues that such a claim may be outside the rule against collateral attack.

Limitations

[50] The Attorney General's third argument is that the action is barred by section 2 of the Nova Scotia *Limitations of Actions Act*, if indeed the claim relates to the deterioration in value of Mr. Innocente's property. Paragraph 2(1)(e) provides:

> 2 (1) The actions mentioned in this Section shall be commenced within and not after the times respectively mentioned in such Section, that is to say:

> (e) all actions grounded upon any lending, or contract, expressed or implied, without specialty, or upon any award where the submission is not by specialty, or for money levied by execution, all actions for direct injuries to real or personal property, actions for the taking away or conversion of property, goods and chattels, actions for libel, malicious prosecution and arrest, seduction and criminal conversation and actions for all other causes which would formerly have been brought in the form of action called trespass on the case, except as herein excepted, within six years after the cause of any such action arose;

[51] The Attorney General argues that if the "illegal detention" of Mr. Innocente's property began in May 1999, any time period would start running from that date. The Statement of Claim was filed in May 2009, approximately ten years later, some four years after the limitation period expired. As such, the Attorney General submits, this would not be an appropriate case in which to disallow the limitation period pursuant to section 3. If the claim arose in February 2000, the statute would start running against Mr. Innocente as of that date.

[52] Since the Attorney General has not filed a defence, I do not believe that the court is in a position to consider this argument. A limitation defence must be pleaded by the defendant.

Amending the pleadings

[53] Although the statement of claim does not clearly specify the nature of the claim or cause of action, it appears that Mr. Innocente wishes to claim damages as a result of the undertaking that the Crown entered into upon execution of the restraint order. I am satisfied that the statement of claim, as presently framed, does not make out a cause of action. This leads to the question of whether Mr. Innocente may amend the pleading. The claim being advanced by Mr. Innocente appears to be a novel one, and one that is subject to some difficulty given that the charge of conspiracy to traffic in a narcotic was, at the relevant time, a charge upon which the restraint order could be issued. Without further pleadings, it may be that the claim is clearly unsustainable.

[54] Mr. Innocente is self-represented. There have been submissions by Mr. Warren Zimmer as to the effectiveness of the statement of claim, and a subsequent submission by Mr. Walter Thompson, Q.C., indicating that the statement of claim does not mirror the cause of action and, accordingly, an amendment to the statement of claim will be required. While Mr. Innocente filed the statement of claim claiming to be self-represented, it appears that he obtained legal advice. It is necessary to consider, given Mr. Innocente's submissions, and in view of the letter

of January 5, 2010, from Mr. Thompson, whether Mr. Innocente should be permitted to amend his pleading, and, if so, when this should be done.

[55] Mr. Innocente is self-represented, but has, at some points, sought assistance from counsel. They are not representing Mr. Innocente and are not solicitors of record. The Nova Scotia Court of Appeal has indicated that there are two competing interests to be balanced in cases involving self-represented parties: the self-represented litigant's interest in a fair and efficient trial, and the requirement of a fair and impartial judiciary. It appears to be permissible for the Judge to advise the self-represented party to amend her his or her pleadings in certain circumstances, particularly where the time limits for pleading have not closed. In *Family & Children's Services of Cumberland (County) v. M. (D.M.)*, 2006 NSCA 75, 247 N.S.R. (2d) 43, 2006 CarswellNS 376 (C.A.), the Court of Appeal said:

> 26 In Re F. [2001] FamCA 348, the Full Court of the Family Court of Australia established the following guidelines to assist judges in those courts when dealing with a self-represented litigant, particularly in the family law context:
>
> > 1. A judge should ensure as far as is possible that procedural fairness is afforded to all parties whether represented or appearing in person in order to ensure a fair trial;
> >
> > [...]
> >
> > 3. A judge should explain to the litigant in person any procedures relevant to the litigation;
> >
> > [...]

> 9. Where the interests of justice and the circumstances of the case require it, a judge may:
>
> * draw attention to the law applied by the Court in determining issues before it;
>
> * question witnesses;
>
> * identify applications or submissions which ought to be put to the Court;
>
> * suggest procedural steps that may be taken by a party;
>
> * clarify the particulars of the orders sought by a litigant in person or the bases for such orders.
>
> The above list is not intended to be exhaustive and there may well be other interventions that a judge may properly make without giving rise to an apprehension of bias.

> 27 This list of the methods by which a trial judge may assist an unrepresented party is a useful compilation and complies with the general thrust of Canadian case law on the subject...

[56] The Court of Appeal added the caution that "[i]n some cases a judge oversteps the boundary and intervenes too much in the trial" (para. 28).

[57] Amendments to pleadings are dealt with by Rule 83.02(1), which provides:

> 83.02 (1) A party to an action may amend the notice by which the action is started, a notice of defence, counterclaim, or crossclaim, or a third party notice.

> (2) The amendment must be made no later than ten days after the day pleadings close, unless the other parties agree or a judge permits otherwise.

[58] In this instance, pleadings have not closed.

[59] Rule 13.03 (4) provides that "[a] judge who hears a motion for summary judgment on pleadings may adjourn the motion until after the judge hears a motion for an amendment to the pleadings." It is not clear whether this section requires a motion to amend pleadings in all cases where a motion for summary judgment has been made, or only where pleadings have closed.

[60] In *Stacey v. Consolidated Foods Corp. of Canada* (1986), 76 N.S.R. (2d) 182, 1986 CarswellNS 86 (S.C.A.D.), the Appeal Division held that amendments to pleadings should not be refused unless "it was shown to the Judge that the applicant was acting in bad faith or that by allowing the amendment the other party would suffer serious prejudice that could not be compensated by costs" (para. 5).

[61] In *Lieb v. Smith* (1994), 120 Nfld. & P.E.I.R. 201, 1994 CarswellNfld 176 (Nfld. S.C.T.D.), Orsborn, J. (as he then was) held that "[t]he pleadings as a whole

are so defective and lacking in clarity that it would not be possible, even with extensive deletions, to be left with a coherent working document" (para. 30). The court struck the originating notice "without prejudice to any right the plaintiff may have to commence another proceeding by way of an appropriately drafted statement of claim" (para. 33).

Conclusion

[62] It is my view that the court has a duty to allow Mr. Innocente to amend the Statement of Claim in order to reflect that his claim for damages is based on the improper withholding of his property, as set out in his letter of September 8, 2009 and a letter from Mr. Thompson of January 5, 2010. It is evident that Mr. Innocente wishes to make a claim for compensation for damages caused by the restraint of his property, where the charges upon which the restraint are based were withdrawn, abandoned or dismissed.

[63] As a result, I am dismissing the Statement of Claim without prejudice to Mr. Innocente's right to file an Amended Statement of Claim.

J.