

CANADA / JUDGMENT

British Columbia (Attorney General) v. McDermid

2025 BCCA 455

COURT

British Columbia Court of Appeal

DECIDED

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2025 BCCA 455 British Columbia (Attorney General) v. McDermid

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

British Columbia (Attorney General) v. McDermid,

2025 BCCA 455

Date: 20251219

Dockets: CA50432; CA50448

Docket: CA50432

Between:

Attorney General of British Columbia

Appellant

(Pursuant to the Constitutional Question Act)

And

Scott McDermid and Leslie Ann McDermid

Respondents

(Defendants)

And

Director of Civil Forfeiture

Respondent

(Plaintiff)

- and -

Docket: CA50448

Between:

Director of Civil Forfeiture

Appellant

(Plaintiff)

And

Scott McDermid and Leslie Ann McDermid

Respondents

(Defendants)

And

Attorney General of British Columbia

Respondent

(Pursuant to the Constitutional Question Act)

Before:

The Honourable Madam Justice Fenlon

The Honourable Justice Dickson

The Honourable Justice Iyer

On appeal from: An order of the Supreme Court of British Columbia, dated

January 21, 2025 (British Columbia (Director of Civil Forfeiture) v. McDermid, Vancouver Docket S219491).

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Place and Date of Hearing:

Vancouver, British Columbia

November 3, 2025

Place and Date of Judgment:

Vancouver, British Columbia

December 19, 2025

Written Reasons by:

The Honourable Justice Iyer

Concurred in by:

The Honourable Madam Justice Fenlon

The Honourable Justice Dickson

Summary:

This appeal arises from a Charter challenge to a section of the Civil Forfeiture Act that allows the Director of Civil Forfeiture to apply for a court order compelling disclosure of records or information from third parties. The chambers judge held that s. 11.01 authorized an unreasonable search and seizure contrary to s. 8 of the Charter. HELD: Appeal allowed. The statutory requirement for prior judicial authorization before the Director can compel disclosure provides a sufficient safeguard against the violation of the privacy interests protected by s. 8.

Reasons for Judgment of the Honourable Justice Iyer:

Overview

- [1] The central issue in this appeal is whether s. 11.01 of the Civil Forfeiture Act, S.B.C. 2005, c. 29 [Act], which permits the Director of Civil Forfeiture ("Director") to obtain a court order compelling disclosure of records or information from third parties, infringes the respondents' constitutional right in s. 8 of the Canadian Charter of Rights and Freedoms [Charter] to be protected from unreasonable search and seizure.
- [2] In 2020 and 2021, the Director received information about a police investigation into three properties owned by the respondents, Scott McDermid and Leslie Ann McDermid, that uncovered an unlicensed cannabis operation. During his investigation, the Director exercised his power under s. 22.02 of the Act to request two financial institutions to disclose limited information about the respondents' accounts with them.

- [3] After obtaining that information, the Director commenced proceedings under s. 3 of the Act seeking forfeiture of the properties and any proceeds of the cannabis operation. The respondents were served with that application. Subsequently, the Director applied for a court order under s. 11.01 of the Act compelling the two financial institutions to disclose records and information about Mr. McDermid's accounts with them.
- [4] At the hearing of that application, the respondents challenged the constitutional validity of ss. 22.02 and 11.01. The chambers judge found that s. 22.02 does not infringe s. 8 of the Charter, but s. 11.01 does. By agreement, the parties did not address whether s. 1 of the Charter justified the infringement. In light of her conclusion, the judge did not grant the Director's s. 11.01 application.
- [5] On appeal, the Attorney General of British Columbia ("AGBC") and the Director say the judge erred in concluding that s. 11.01 infringes s. 8 of the Charter. The Director also asks us to grant the s. 11.01 order he sought in the court below.
- [6] For the reasons that follow, I would allow the appeal and remit the Director's s. 11.01 application to the court below.

Statutory Scheme

- [7] The Act was repealed and replaced in 2024: R.S.B.C. 2024, c. 1. While there was little change to the sections in issue, they were re-numbered. As did the chambers judge, I will refer to the section numbering in the Act as it existed at the time of the proceedings.
- [8] The Act allows the government to take possession of property and proceeds used in or acquired from criminal activity, regardless of whether there has been a criminal conviction. It has three purposes: (1) to take the profit out of criminal activity, (2) to prevent the use of property to unlawfully acquire wealth or cause bodily harm, and (3) to compensate victims of crime and fund crime prevention and remediation: *British Columbia (Director of Civil Forfeiture) v. Wolff*, 2012 BCCA 473 at paras. 16-17.
- [9] The Act accomplishes its purposes by creating a civil in rem right of action in the Director to seek forfeiture of property that is either proceeds or an instrument of unlawful activity. It also authorizes the Director to take various actions including applying for court orders to preserve property that may be subject to forfeiture and to compel production of records or information.
- [10] Sections 22(2) and (3) of the Act set out the Director's powers, duties and functions:
- 22 (2) The director may administer and dispose of property or the whole or a portion of an interest in property under this Act in accordance with the orders of the court, this Act and the regulations.
- (3) Without restricting section 21(2), the director's powers, duties and functions include

- (a) collecting and managing the use and disclosure of information and maintaining records for the purposes of this Act and, on the basis of information collected, determining if proceedings should be commenced under this Act,
- (b) commencing and conducting proceedings under this Act, and
- (c) managing the distribution of proceeds from property, an interest in property or a portion of an interest in property forfeited to the government under this Act.

[11] The provision in issue in this appeal is s. 11.01. It permits the Director to apply to court for an order compelling disclosure of information or records:

11.01 (1) On application of the director, a court may make an order requiring a person to disclose to the director information or records in the custody or control of the person if the court is satisfied that the information or records are reasonably required by the director in order to exercise the director's powers or perform the director's functions and duties under this Act.

(2) The director may apply for an order under subsection (1) before, at the time of or subsequent to

- (a) commencing proceedings under section 3, or
- (b) applying for
 - (i) an interim preservation order under section 8, or
 - (ii) an order under section 11.02.

(3) The director must pay to a person who is subject to an order under subsection (1) the reasonable costs of producing, reproducing or delivering the information or records.

[12] As provided in subsection (2), the Director may apply for a s. 11.01 order before applying for a forfeiture order, or a preliminary or interim preservation order. Section 11.03 provides that s. 11.01 applications may be made without notice and must be heard in private, unless the court orders otherwise.

Chambers Judgment (indexed at 2023 BCSC 2287)

[13] Before the chambers judge, the respondents argued both s. 22.02 and s. 11.01 infringed s. 7 and s. 8 of the Charter. The judge determined that it was not appropriate to consider s. 7 and found s. 22.02 did not infringe s. 8. As these conclusions are not challenged on appeal, I summarize only the judge's analysis of whether s. 11.01 infringes s. 8.

[14] The judge stated that the first step in a Charter challenge is to interpret the meaning of the impugned provision based on the modern principle of statutory interpretation: at paras. 62-63. She noted that s. 11.01 is broad: disclosure may be compelled from anyone, the term "information or records" extends beyond recorded material, and there are no temporal limitations: at paras. 66-69.

- [15] The judge found that "reasonably required" means objectively reasonable: at paras. 91-92. She expressed uncertainty about the meaning of the requirement that the hearing be "in private": at para. 99.
- [16] Turning to the Charter s. 8 analysis, the judge followed the analytical framework established by the Supreme Court of Canada in *R. v. Collins*, [1987] 1 S.C.R. 265, 1987 CanLII 84 (SCC) and *Goodwin v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 46. Collins established that a search is reasonable if (1) it is authorized by law, (2) the search is reasonable, and (3) the search was carried out in a reasonable manner: at para. 23. The judge identified the dispute before her was confined to the second factor, whether the search authorized by s. 11.01 was reasonable: at paras. 133-134.
- [17] Citing *R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627 at 643, 1990 CanLII 137 (SCC), the judge observed the reasonableness analysis is flexible and contextual, aimed at determining whether the law strikes a reasonable balance between the state's objective and the individual's privacy interest: at para. 136.
- [18] In *Goodwin*, the Supreme Court of Canada set out four factors to guide the reasonableness analysis, which the judge applied:
- (a) the purposes of the legislative scheme;
 - (b) the nature of the legislative scheme;
 - (c) the mechanism employed, having regard for the degree of its potential intrusiveness; and
 - (d) the availability of judicial supervision or other procedural safeguards.
- [19] The judge found the first *Goodwin* factor weighed in favour of reasonableness but the other three did not. With respect to the second factor, the nature of the legislation, she accepted that the proceedings are civil in nature but found they "raise the spectre of criminality" and therefore require a higher standard of reasonableness than the Act provides: at paras. 162-163.
- [20] On the third factor, the mechanism of the law and its intrusiveness, the judge found the search mechanism minimally intrusive because it simply involves a "confidential and discrete demand for information": at paras. 167-168. However, she found the search itself very privacy-intrusive because she considered the potentially compellable information to be overbroad:
- [183] The overall objective of the CFA is to obtain forfeiture of "proceeds of unlawful activity" or "instruments of unlawful activity", yet s. 11.01 fails to require any link between the compellable information and records and such property such as it does in ss. 8(5) and 11.02(4). In my view, linking the compellable information or records to the Director's broadly defined powers, functions and duties, rather than to specific property in dispute, has the potential effect of unnecessarily allowing the Director to receive private information about individuals that is not required, or possibly even relevant, to the specific

matter at hand. It is overly broad.

- [184] The concern with overbreadth applies in respect of other aspects of s. 11.01, including the "persons" from whom the disclosure can be ordered, the type of "information" and "records" that can be compelled under s. 11.01, and the timeframe for which the information and records can be sought. Those aspects of s. 11.01 are unlimited.
- [21] The fourth factor requires consideration of procedural safeguards. The judge adverted to her concern about the overbroad scope of potentially compellable information to find s. 11.01 did not provide adequate guidance for judges faced with deciding s. 11.01 applications: at para. 192. She stressed that court-authorized s. 11.01 searches are effectively immune from legal challenge because, if the Director never commences forfeiture proceedings, a person may never learn about the search: at paras. 204-206.
- [22] Weighing all the Goodwin factors, the judge concluded s. 11.01 infringes s. 8 of the Charter: at para. 217.

Issues

- [23] The issues on appeal are narrow. The parties agree the standard of review is correctness. There is no dispute that the Charter analysis requires the Court to first interpret the statute and then assess whether the search it authorizes is reasonable within the meaning of s. 8 of the Charter. The analytical framework governing the s. 8 reasonableness analysis is well-settled, and no issue is taken with it. The parties' principal disagreement is over whether s. 11.01 is reasonable within the meaning of s. 8. However, the analysis must begin with interpreting the statute.
- [24] With respect to remedy, if s. 11.01 is constitutionally valid, the Director asks us to grant his s. 11.01 application.
- [25] Therefore, the three questions are:
- What is the scope of s. 11.01?
 - Is the search authorized by s. 11.01 reasonable within the meaning of s. 8 of the Charter?
 - If so, should this Court grant the Director's s. 11.01 application?

What is the Scope of s. 11.01?

- [26] The guiding principle of statutory interpretation is well-settled. The words of an act "must be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para. 117.
- [27] Section 11.01(1) permits the Director to apply to a court for an order requiring "a person" to disclose to the Director "information or records" in their custody or control "if the court is satisfied" this material is "reasonably required" by the Director "to exercise the director's

powers or perform the director's functions and duties" under the Act. Section 11.01(2) empowers the Director to bring the application at any time, including before commencing any proceedings against the person. Section 11.03 permits the application to be made without notice and requires that the hearing be conducted "in private" unless the court orders otherwise.

- [28] The section confers a broad discretion on the Director. I agree with the judge that "person" includes corporations and representatives, as defined in s. 29 of the Interpretation Act, R.S.B.C. 1996, c. 238, that "information" broadens the section's reach beyond "records", and the section does not prescribe any time period for which information may be sought nor limit the time for which it may be retained. I also agree that "reasonably required" means "objectively reasonable". Respectfully, I disagree that the meaning of "in private" is unclear. In my view, it is simply the plain language equivalent of "in camera".
- [29] Section 11.01 limits the Director's broad discretion in two ways. First, the information or records sought must relate to the Director's powers, functions and duties under the Act. Although s. 22 does not exhaustively list them, the Director may only act to further the purposes of the Act: *Independent Investigations Office of British Columbia v. Vancouver (City) Police Department*, 2020 BCCA 4 at para. 17.
- [30] Second, the Director cannot obtain disclosure of information under s. 11.01 without first obtaining a court order. That means a judge, not the Director, decides whether the order sought is reasonably required to carry out the Director's powers, duties and functions. Prior judicial authorization has been described as the "gold standard" for determination of the reasonableness of the exercise of a state power that intrudes on individual privacy: *R. v. A.M.*, 2008 SCC 19 at para. 13.
- [31] While the potential scope of the information compellable through a s. 11.01 search is very broad and may include highly personal financial information, it is subject to the significant constraint of prior judicial authorization. That process will require the Director to satisfy a judge, applying an objective standard of reasonableness, that the state's legitimate interest in obtaining the information outweighs the individual's reasonable expectation of privacy in it.
- [32] It follows that I disagree with the chambers judge's interpretation of s. 11.01 as empowering the Director "to unreasonably capture an inordinate amount of information that may not even be tied to the purpose of the [Act]": at para. 186. In my view, the s. 11.01 search is firmly grounded in the text, context, and purposes of the Act.

Is the Search Authorized by s. 11.01 Reasonable Within the Meaning of s. 8 of the Charter?

- [33] The appellants do not take issue with the judge's conclusion on the first Goodwin factor, that the Act's purposes are compelling, and this factor weighs in favour of reasonableness. They disagree with the judge's conclusion that the other three factors militate against the reasonableness of the s. 11.01 search.

Nature of the Legislation

- [34] The second Goodwin factor directs the court to consider the nature of the legislation. While the judge accepted the Act is civil in nature, she relied on *Arkininstall v. City of Surrey*, 2010 BCCA 250, to support her conclusion that the allegations of unlawful activity advanced in the Director's s. 11.01 application carried the "stigma of criminal conduct", which weighs against a finding of reasonableness: at para. 162.
- [35] *Arkininstall* concerned a s. 8 Charter challenge to provisions of the Safety Standards Act, S.B.C. 2003, c. 39, that authorized the warrantless entry and inspection of residential premises for the regulatory purpose of inspecting electrical systems for safety risks that may be related to marijuana grow-operations. Referencing *Canada (Combines Investigation Acts, Director of Investigation and Research) v. Southam Inc.*, [1984] 2 S.C.R. 145, 1984 CanLII 33 (SCC) [Hunter], the Court found that a sliding scale of reasonableness applies to a s. 8 challenge to regulatory legislation because the search may be less intrusive and the expectation of privacy lower than in the criminal context. To resolve that question, a court must consider the specific regulatory regime in issue:
- [60] Thus, the greater the reasonable expectation of privacy and the more intrusive a search is into that expectation of privacy, the more likely the Hunter criteria will be required; the less intrusive a search and the lower the expectation of privacy, the less likely the Hunter criteria will be required. As Wilson J. stated, in the regulatory context a lesser standard of reasonableness may apply depending upon the legislative scheme under review. This means that in some regulatory circumstances the Hunter criteria may be required. Thus, there is a sliding scale of reasonableness within the regulatory context. The determination of where on the sliding scale a particular regulatory regime fits requires assessing a number of factors and circumstances specific to that regime.
- [36] It was appropriate for the judge to compare the similarities between the civil regime in issue here to the regulatory regime in *Arkininstall*. However, to determine whether the comparison was apt, I consider she should also have adverted to the significant dissimilarities between the two regimes. Notably s. 11.01 requires prior judicial authorization, whereas the regime in *Arkininstall* did not, and it was the absence of prior judicial authorization that drove the Court's conclusion that the regime infringed s. 8 of the Charter: *Arkininstall* at para. 93. In my view, this undermines the value of *Arkininstall* as a comparator.
- [37] The fact that a search authorized in a civil proceeding involves allegations of criminal activity carries weight in the reasonableness analysis. However, the concern about the stigma associated with such allegations is mitigated in this case by the fact that the s. 11.01 hearing is generally in private and s. 22.002 of the Act prohibits disclosure of information obtained as a result of the court order. The s. 11.01 search is not comparable to the comprehensive search of a person's home without judicial authorization and provision of information to the police that was in issue in *Arkininstall*.

- [38] In my view, consideration of the nature of the legislation supports the conclusion that the s. 11.01 search is reasonable.

Mechanism of the Search and its Intrusiveness

- [39] The third Goodwin factor requires consideration of the mechanism of the search and the degree of intrusion into the person's reasonable expectation of privacy. The judge principally relied on *T.L. v. British Columbia (Attorney General)*, 2023 BCCA 167, to conclude that the intrusiveness of the search authorized by s. 11.01 militates against its reasonableness. Respectfully, I consider that reliance misplaced.
- [40] T.L. concerned a s. 8 challenge to s. 96(1) of the Child, Family and Community Service Act, R.S.B.C. 1996, c. 46, that allowed the Director of Child Protection to obtain a parent's personal health information from a public body without prior judicial authorization. Justice DeWitt-Van Oosten found the regime very intrusive of privacy:
- [205] The interference with privacy interests authorized by s. 96(1) is significant. This provision allows the Director to reach into an intensely private sphere of an individual's personal existence and take hold of information that can reveal highly intimate details about them and, potentially, their family members. Among other things, personal health information might reveal the individual's medical history; when and how often they required assessment or treatment; the circumstances that led to the need for intervention, including childhood or adult trauma; what the treatment(s) consisted of; statements made to health care providers for the purpose of assessment and intervention; and information specific to the individual's mental health, including reported or observed symptoms, diagnoses, responses to treatment, and re-occurrence. Depending on the circumstances, some or all of this information may be highly relevant to the Director's assessment of risk and the potential for harm to children. Even so, the privacy intrusion is considerable.
- [41] In this case, the judge agreed with the respondents that the potentially compellable information under s. 11.01 extends well beyond financial records to encompass highly intimate information about them and perhaps even family members. She considered it could include:
- [173] written or oral responses from colleagues or friends about a variety of matters including an individual's day-to-day activities, their associates and habits. A "person" could include various professionals including lawyers, accountants, or physicians. Even non-privileged information in the custody or control of these professionals would almost certainly be significantly intrusive.
- [42] While s. 11.01 does not expressly limit from whom the Director may seek information, it does require the information sought to be for the purposes of carrying out the Director's role under the Act. I find it very hard to imagine what information a person's physician could have that would fall within the scope of a s. 11.01 search. As the judge acknowledged, it does not authorize a "standardless sweep": at para. 195. In my view, although there is a reasonable

expectation of privacy in the information s. 11.01 makes compellable and some of that information may be as private as some of a person's health information, a s. 11.01 search is generally not as privacy-intrusive as the search in issue in T.L.

- [43] The inquiry is not confined to intrusiveness. It also requires examination of the mechanism of the search. In T.L., Justice DeWitt-Van Oosten found the mechanism of the search problematic:
- [210] It is also readily apparent from the current formulation of s. 96(1) that its broad wording and the lack of a requirement for an objectively reasonable link between the information sought and the specific duty at hand, could result in the Director receiving intensely private information about individuals that is not "necessary" for (or useful to), the matter at hand. Or, for that matter, even relevant.
- [44] The mechanism in this case is markedly different: prior judicial authorization ensures that there is an "objectively reasonable link" between the specific information sought and its proposed use. The court must be satisfied based on the evidence put before it that disclosure of the information is reasonably required by the Director to fulfill his role under the Act. That is a significant constraint on the Director's search powers. If the Director has not put adequate information before the court, the application will not be granted.
- [45] Similarly, while I take the respondents' point that judges are not infallible, this kind of judicial oversight is the best mechanism available to limit the intrusiveness of state-sanctioned searches, short of entirely prohibiting them.
- [46] It follows that I would reject the judge's characterization of a s. 11.01 search as overbroad. In my view, the mechanism of the search and its intrusiveness suggests it is reasonable.

Procedural Safeguards

- [47] The fourth Goodwin factor requires an examination of the procedural safeguards the law provides to minimize its potential for abuse. The judge found this factor militated against reasonableness for two reasons: first, she considered the language of s. 11.01 insufficient "to provide adequate or meaningful guidance to the Court": at para. 192. Second, she found the absence of any requirement for after-the-fact notice means that, if the Director does not commence forfeiture proceedings, a person may never know the Director accessed their personal information and will have no way to challenge that decision: at para. 215.
- [48] *Baron v. Canada*, [1993] 1 S.C.R. 416, 1993 CanLII 154 (SCC), remains the leading case on the first point. Although a statute may stipulate criteria a court must consider in deciding whether to authorize a search, the court must retain discretion to consider all of the circumstances in balancing the competing interests of the individual and the state:

- [26] In order to take account of the various factors affecting the balancing of the two interests, the authorizing judge must be empowered to consider all the circumstances. No set of criteria will always be determinative or sufficient to override the right of the individual to privacy. It is imperative, therefore, that a sufficient degree of flexibility be accorded to the authorizing officer in order that justice be done to the respective interests involved.
- [49] As I have already explained, s. 11.01 requires the judge conducting the balancing exercise to consider, applying an objective standard, whether the information being sought is reasonably required for the purposes stated by the Director, which purposes must be consistent with the objects of the Act. In my view, no further statutory criteria are constitutionally required.
- [50] The feature of s. 11.01 that gives me the most concern is the absence of any requirement for after-the-fact notice. I agree with the judge that, if the Director does not commence forfeiture proceedings, the person may never know that third parties have been compelled to disclose information about them. That information may be very personal, attracting a high expectation of privacy. The fact that the information has been disclosed by a third party, for example, a financial institution, may affect the ongoing relationship between the third party and the person. When added to the fact that the Act does not impose any limit on how long the Director may retain the information, there is cause for concern.
- [51] As the appellants note, there is nothing in the Act that precludes the court from varying the order sought to provide for after-the-fact notice and/or requiring destruction of the information at an appropriate time. However, as the hearing may be without notice to the affected party and is likely to be conducted in private, there is no mechanism to alert the judge to these concerns. At the time the Director makes the application he is intending to commence forfeiture proceedings, and it is unlikely he will be in a position to advise the court when he will no longer require the information.
- [52] I conclude that the Act does not contain procedural safeguards to address this concern. In this respect, I consider the fourth Goodwin factor militates against reasonableness.

Conclusion on Reasonableness

- [53] As I have explained, except in one respect, I consider the Goodwin factors militate in favour of the reasonableness of the search authorized by s. 11.01 of the Act. I emphasize that the absence of any provision for after-the-fact notice -- or any explanation of why it cannot be given -- is a serious concern. However, the purposes of the Act are compelling, and its asset-tracing provisions, including s. 11.01, are essential to achieving those purposes. The legislation is civil and, although the search involves serious allegations of criminal conduct and the information carries a significant expectation of privacy, the search mechanism is minimally intrusive. Most importantly, in my view, the requirement of prior judicial authorization ensures the objective reasonableness of the search. I would conclude that s. 11.01 does not infringe s. 8 of the Charter.

Should this Court grant the Director's application?

[54] The Director asks us to grant its application compelling disclosure of Mr. McDermid's bank records from the two specified financial institutions. He says that he argued the merits of the application below, but the respondents did not address them. The AGBC takes no position on this issue. The respondents ask that the matter be remitted to the court below.

[55] The record does not contain information about how the merits were addressed in the court below. They were not addressed in oral argument on the appeal. In the circumstances, I would remit that issue to the Supreme Court of British Columbia.

Disposition

[56] The appeal is allowed. The Director's s. 11.01 application is remitted to the court below.

"The Honourable Justice Iyer"

I AGREE:

"The Honourable Madam Justice Fenlon"

I AGREE:

"The Honourable Justice Dickson"

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