
CANADA / JUDGMENT

R. v. Bui

2010 BCCA 279

COURT

British Columbia Court of Appeal

DECIDED

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2010 BCCA 279 R. v. Bui

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Bui,

2010 BCCA 279

Date: 20100604

Docket: CA033594

Between:

Regina

Respondent

And

Cuc Van Bui

Appellant

Before:

The Honourable Mr. Justice Low

The Honourable Madam Justice Levine

The Honourable Mr. Justice Frankel

On appeal from: the Supreme Court of British Columbia, November 24, 2005,

(R. v. Bui & Tran, Nanaimo Registry No. 55501-4)

Counsel for the Appellant:

N.L. Cobb

Counsel for the Respondent:

W.P. Riley

Place and Date of Hearing:

Vancouver, British Columbia

March 25, 2010

Place and Date of Judgment:

Vancouver, British Columbia

June 4, 2010

Written Reasons by:

The Honourable Mr. Justice Frankel

Concurred in by:

The Honourable Mr. Justice Low

The Honourable Madam Justice Levine

Reasons for Judgment of the Honourable Mr. Justice Frankel:

Introduction

- [1] The issue in this case is whether residential property that contained a marihuana grow-operation was properly ordered forfeited to the Crown. Cuc Van Bui is the registered owner of the property. As a result of the discovery of the grow-operation, Mr. Bui and his wife, Thu Thi Tran, were convicted of production of marihuana, possession of marihuana for the purpose of trafficking, and theft of electricity. The trial judge, Mr. Justice Lander of the Supreme Court of British Columbia, imposed 12-month conditional sentences on both Mr. Bui and Ms. Tran and granted the Crown's application for an order forfeiting Mr. Bui's entire interest in the property. Mr. Bui and Ms. Tran's conviction appeals were dismissed by this Court: 2007 BCCA 305, 157 C.R.R. (2d) 6.
- [2] Mr. Bui contends that forfeiture was disproportionate because of the impact it would have on two of his children. He submits that the trial judge erred in failing to take into consideration the fact that the property was their principal residence. He also submits that if forfeiture is appropriate, then it should only be for a portion of his interest in the property, i.e., partial forfeiture.
- [3] For the reasons that follow, I would affirm the trial judge's forfeiture order.

Factual Background

- [4] On September 3, 2003, members of the Royal Canadian Mounted Police executed a search warrant at a two-level single-family dwelling on Montgomery Way in Nanaimo, British Columbia. They found the upper and lower floors of the premises occupied as a residence by Mr. Bui, Ms. Tran, and their four children. Mr. Bui and Ms. Tran were located in the crawl space tending a 625-plant marihuana grow-operation. Access to the crawl space was through a trap door in a closet in the master bedroom. Mr. Bui and Ms. Tran were charged in an information sworn on September 9, 2003.
- [5] The crawl space was divided into three separate rooms, each devoted to a different stage in the cultivation of marihuana plants. A ventilation system with a series of fans and a number of filters was used to mask the odour of the plants. The air was vented through the fireplace on the main floor and then through a closet on the upper level. There was a bypass to facilitate the theft of electricity that had been in use for a least a year before the police discovered the grow-operation. Mr. Bui later paid B.C. Hydro \$14,000.00 for the electricity he had stolen.
- [6] The grow-operation was capable of operating on a continuous basis, and could produce three full crops a year. The potential annual revenue from those crops was between \$587,000.00 and \$991,000.00.
- [7] During the search of the residence, the police seized over \$6,000.00 in cash from various locations.
- [8] On February 11, 2005, the trial judge pronounced oral reasons for judgment convicting Mr. Bui and Ms. Tran. The proceedings were then adjourned to April 19 and 20, 2005, for sentencing, and for the hearing of an application by the Crown to have the Montgomery Way property forfeited pursuant to the provisions of the Controlled Drugs and Substances Act, S.C. 1996, c. 19 [CDSA]. The sentencing and forfeiture proceedings were later rescheduled for November 21 and 22, 2005.
- [9] The Crown tendered evidence at the sentencing/forfeiture hearing, including calling several witnesses. It also relied on evidence it had earlier tendered at the trial. Neither Mr. Bui nor Ms. Tran presented any evidence at either the trial or the sentencing/forfeiture hearing.
- [10] Mr. Bui purchased the property on April 30, 2001. The general contractor who built the residence for Mr. Bui testified that the crawl space would normally have been three feet high but that Mr. Bui and Ms. Tran requested that it be made five feet high, the maximum permitted under the building code. Mr. Bui instructed the contractor to insulate the walls, floor, and ceiling of the crawl space.
- [11] The building inspector who conducted the final inspection of the residence testified that the crawl space was "over-excavated", in the sense that it was two feet deeper than required. He had never before seen a crawl space insulated as this one was.

[12] The 2005 tax assessment valued the property at \$314,000.00. There was a mortgage which, at the time of the hearing, had an outstanding balance of \$147,000.00. The mortgage payments were initially \$1,900.00 per month, but had been reduced to \$976.00 per month after Mr. Bui and Ms. Tran sold their previous house. Other documents indicated current loan payments of approximately \$886.00 per month with respect to the purchase of two motor vehicles.

[13] Tax returns seized from the residence indicated that both Mr. Bui and Ms. Tran had reported relatively little income from 1996 to 2002, a significant proportion of which was from unemployment insurance. The information on those returns is summarized as follows:

Year

Bui Income

Tran Income

Total Income

1996

\$16,817.00

N/A

N/A

1997

\$17,619.00

\$15,536.00

\$32,215.00

1998

\$12,441.00

\$14,500.00

\$26,941.00

1999

\$9,373.00

\$6,591.00

\$15,964.00

2000

\$7,149.00

\$1,920.00

\$8,069.00

2001

\$17,023.00

\$7,807.00

\$24,830.00

2002

\$21,520.00

\$10,790.00

\$32,310.00

[14] A neighbour testified that there was little or no activity at the residence after it was searched by the police. For a time there was a sign on the door which the neighbour took to be an indication that no one was allowed to live in the residence because it was a toxic environment. The neighbour did not notice anyone at the residence for several weeks. He then saw a man there doing some work which he assumed was in connection with making the premises habitable. After that, he saw people there intermittently, i.e., people would be there for three or four days and then no one would be there for several weeks. During the periods when no one appeared to be at the residence, the lights were never on, newspapers would accumulate, there were no vehicles in the driveway, and the lawn was not cut. He said that once in a while "the owner" would come by to pick up the papers and cut the lawn. There was a period in which a boy appeared to be living in the house by himself. The neighbour said that after some time had passed activity at the house picked up and Mr. Bui and Ms. Tran appeared to be living there again.

[15] School records indicated that Mr. Bui's four children were attending school in Nanaimo at the time of the police search (i.e., in September 2003). They remained at their respective schools until the end of that school year (i.e., June 2004), at which time the oldest child graduated from high school. In September 2004, the three youngest children enrolled at schools in Maple Ridge, British Columbia. They attended school in Maple Ridge until the week of April 18, 2005, when they returned to the schools in Nanaimo they previously had been attending. The second oldest child graduated from high school in Nanaimo in June 2005.

[16] In his submissions, counsel for Mr. Bui and Ms. Tran stated that the two older children were away at university. The Crown accepted that as of mid-April 2005, Mr. Bui, Ms. Tran, and their two youngest children were living at the Montgomery Way residence.

Statutory Provisions

[17] The following provisions of the CDSA are relevant to this appeal:

- s. 2 (1) "offence-related property" means, with the exception of a controlled substance, any property, within or outside Canada,
 - (a) by means of or in respect of which a designated substance offence is committed,
 - (b) that is used in any manner in connection with the commission of a designated substance offence, or
 - (c) that is intended for use for the purpose of committing a designated substance offence;
- s. 16 (1) Subject to sections 18 to 19.1, where a person is convicted of a designated substance offence and, on application of the Attorney General, the court is satisfied, on a balance of probabilities, that any property is offence-related property and that the offence was committed in relation to that property, the court shall
 - ...
 - (b) in the case of any other offence-related property,
 - (i) where the prosecution of the offence was commenced at the instance of the government of a province and conducted by or on behalf of that government, order that the property be forfeited to Her Majesty in right of that province and disposed of by the Attorney General or Solicitor General of that province in accordance with the law, and
 - (ii) in any other case, order that the property be forfeited to Her Majesty in right of Canada and disposed of by such member of the Queen's Privy Council for Canada as may be designated for the purposes of this subparagraph in accordance with the law.
 - ...
- (3) A person who has been convicted of a designated substance offence or the Attorney General may appeal to the court of appeal from an order or a failure to make an order under subsection (1) as if the appeal were an appeal against the sentence imposed in respect of the offence.
- s. 19.1 (3) Subject to an order made under subsection 19(3), if a court is satisfied that the impact of an order of forfeiture made under subsection 16(1) or 17(2) in respect of real property would be disproportionate to the nature and gravity of the offence, the circumstances surrounding the commission of the offence and the criminal record, if any, of the person charged with or convicted of the offence, as the case may be, it may decide not to order the forfeiture of the property or part of the property and may revoke any restraint order made in respect of that property or part.
- (4) Where all or part of the property that would otherwise be forfeited under subsection 16(1) or 17(2) is a dwelling-house, when making a decision under subsection (3), the court shall also consider

- (a) the impact of an order of forfeiture on any member of the immediate family of the person charged with or convicted of the offence, if the dwelling-house was the member's principal residence at the time the charge was laid and continues to be the member's principal residence; and
- (b) whether the member referred to in paragraph (a) appears innocent of any complicity in the offence or of any collusion in relation to the offence.

Trial Judge's Reasons

- [18] The trial judge found that the crawl space had been constructed expressly for the purpose of operating a sophisticated, large-scale, grow-operation. Accordingly, he concluded that the Montgomery Way property was subject to forfeiture as "offence-related property".
- [19] In dealing with whether forfeiture would have an impact on Mr. Bui's children, the trial judge, after noting that the two oldest were attending university, said this about the two youngest ones:
- [15] ... However, I heard no evidence as to whether the defendants and these two which [sic] I will refer to as remaining children are residing in this home now, and I pose the question: Am I simply to imply this? I answer that question: No, I am not. I think not. I require evidence. And I repeat once again, the defence called no evidence on this sentencing hearing.
- [20] After reviewing the documentary evidence relating to Mr. Bui and Ms. Tran's financial circumstances, the trial judge concluded that they were supporting themselves and their family through drug-related activity:
- [20] From all the evidence relative to their incomes, their combined income, and their payments for the cars, mortgage, they could not exist on their income. There had to be another source, and this source, I could infer, is the unlawful trafficking and production of marihuana.
- [21] In holding that forfeiture was appropriate the trial judge stated:
- [25] Applying the law, and the lack of persuasive evidence to the contrary as to the impact of forfeiture, I have concluded that the property at ... Montgomery Way shall be forfeited to the Crown.

Analysis

- [22] Before dealing with Mr. Bui's grounds of appeal, I cannot help but comment on what appears to be the inordinate length of time it has taken this matter to come on for hearing. The trial judge pronounced his reasons for sentence and forfeiture on November 24, 2005. On December 14, 2005, Mr. Bui filed a notice appealing both his conviction and the forfeiture order, and Ms. Tran filed a notice appealing her conviction. The conviction appeals were heard on May 24, 2007, and dismissed for oral reasons delivered that day. Correspondence in this Court's file indicates that this appeal was initially set down to be heard on November 22,

2007, and then rescheduled for April 23, 2008. However, on April 8, 2008, Chief Justice Finch, over the objections of the Crown, granted Mr. Bui's application to adjourn the matter to await the outcome of several forfeiture appeals pending in the Supreme Court of Canada.

- [23] On May 17, 2009, counsel who had acted for Mr. Bui and Ms. Tran at trial and on their conviction appeals was appointed to the bench. Obviously, Mr. Bui then had to retain new counsel to represent him on the forfeiture appeal.
- [24] The Supreme Court of Canada rendered its decisions on May 29, 2009: *R. v. Craig*, 2009 SCC 23, [2009] 1 S.C.R. 762; *R. v. Ouellette*, 2009 SCC 24, [2009] 1 S.C.R. 818; *R. v. Nguyen*, 2009 SCC 25, [2009] 1 S.C.R. 826. On July 8, 2009, the Crown wrote to the partner of Mr. Bui's former counsel to determine if he was acting on the forfeiture appeal. He was acting, and arrangements were made on November 13, 2009, to have this appeal heard on March 25, 2010. It proceeded that day, approximately nine months after the Supreme Court decisions were handed down.
- [25] I have difficulty understanding why the Crown waited over a month after the Supreme Court decisions to enquire as to who might be acting for Mr. Bui, given that when those decisions were released the forfeiture appeal had been outstanding for three and one-half years already. The Crown should have made those enquires shortly after Mr. Bui's former counsel was appointed to the bench. I also have difficulty understanding why, after those enquiries were made, it took four months for counsel to agree on a hearing date, and why that date was four and one-half months after that. I have no doubt this Court could have heard this appeal much sooner.
- [26] There may be reasons why this appeal took as long as it did to come on for hearing. Be that as it may, it is my view that when an appeal to this Court is held in abeyance to await decisions from the Supreme Court of Canada, counsel for the respective parties have an obligation to act with promptness to have that appeal heard as soon as reasonably possible after those decisions are rendered.

Standard of Review

- [27] By virtue of s. 16(3) of the CDSA, appeals from decisions on forfeiture applications are dealt with in the same manner as sentence appeals. Accordingly, on such an appeal the appellant must demonstrate that the judge committed an error in principle, failed to consider or overemphasized relevant factors, or made an order that is demonstrably unfit: *R. v. Siek*, 2007 NSCA 23, 218 C.C.C. (3d) 353 at paras. 17-19.

Principal Residence of the Children

- [28] Mr. Bui's position is that forfeiture of the Montgomery Way property would have an adverse impact on his two youngest children and should have been considered by the trial judge under s. 19.1(4)(a) of the CDSA. In essence, he says that forfeiture would deprive those children of their "principal residence".
- [29] Mr. Bui submits that the trial judge was wrong in stating that there was no evidence that his two youngest children were residing at the Montgomery Way residence at the time of the forfeiture hearing because the Crown, in its submissions, accepted they had resumed living there in mid-April of 2005 when they re-enrolled in school in Nanaimo.
- [30] It is clear from the transcript that the Crown accepted that Mr. Bui, Ms. Tran, and their two youngest children were again "occupying" the Montgomery Way residence in mid-April 2005. However, it is also clear that the Crown took the position that Mr. Bui had not established that that premises had been the children's principal residence on a continuous basis from early September 2003, when charges were laid, until mid-November 2005, when the forfeiture hearing took place. The Crown takes the same position on this appeal.
- [31] Notwithstanding that the trial judge failed to appreciate that the two youngest children had returned to the Montgomery Way residence in mid-April 2005, I am of the view that he was correct in not considering s. 19.1(4). This is because the evidence as to the relationship between those children and that premises is not capable of supporting a finding that it was continuously their principal residence throughout the 28 1/2 months from when charges were laid until the forfeiture order was granted.
- [32] Mr. Bui submits that s. 19.1(4)(a) does not require principal residency to be continuous. Rather, he says that what is required is that a premises be the principal residence of an immediate family member at the time charges are laid and at the time of the forfeiture hearing. He says that the position taken by the Crown wrongly equates the word "continue" with the word "continuous".
- [33] I do not accept Mr. Bui's interpretation of s. 19.1(4)(a). In my view, it does require continuous (i.e., uninterrupted) principal residency. However, as I will discuss shortly, I agree with Mr. Bui that continuous principal residency does not require continuous occupancy.
- [34] The English and French versions of s. 19.1(4)(a) support the interpretation that principal residency must be continuous. Both versions have equal status and it is their shared, or common, meaning that governs: *R. v. Mac*, 2002 SCC 24, [2002] 1 S.C.R. 856 at para. 5; *Schreiber v. Canada (Attorney General)*, 2002 SCC 62, [2002] 3 S.C.R. 269, at paras. 54-56; *R. v. Abel*, 2008 BCCA 54, 229 C.C.C. (3d) 465 at para. 56.
- [35] Section 19.1(4)(a) states:

[T]he impact of an order of forfeiture on any member of the immediate family of the person charged with or convicted of the offence, if the dwelling-house was the member's principal residence at the time the charge was laid and continues to be the member's principal residence.

[L]'effet qu'aurait la confiscation à l'égard d'un membre de la famille immédiate de la personne accusée ou reconnue coupable de l'infraction, si la maison était la résidence principale de ce membre avant que l'accusation soit portée et elle continue de l'être par la suite;

[Emphasis added.]

[36] I would translate the French version as:

The impact of forfeiture against a member of the immediate family of the person accused or convicted of the offence, if the house was the principal residence of the member before the charge is brought and continues to be thereafter.

[Emphasis added.]

[37] Even if it could be said that there is some ambiguity in the English version of s. 19.1(4)(a), which I do not think is the case, then that ambiguity is resolved by the French version. Reading both versions together, it is clear that Parliament intended the impact of forfeiture on an immediate family member to be a consideration only when the dwelling-house in question was that person's principal residence at the time charges were laid and remained that person's principal residence through to and including the time of the decision on the forfeiture application.

[38] I do, however, agree with Mr. Bui that s. 19.1(4)(a) does not require continuous physical occupancy of the property sought to be forfeited. In other words, an immediate family member need not have actually lived there throughout the entire relevant period. While it is not necessary in this case to engage in a detailed discussion of the indicia of "principal residence"--a term not defined in the CDSA--I agree with the following from the judgment of Master McCallum in *Clark (Re)*, 2000 BCSC 77, 16 C.B.R. (4th) 66, a case concerning the exemption from forced seizure and sale provided for with respect to the "principal residence of a debtor" by s. 71.1 of the Court Order Enforcement Act, R.S.B.C. 1996, c. 78:

[18] ... [O]ne's principal residence must be determined by examining all the facts and not merely considering actual occupation.

[21] Principal residence cannot be determined simply by ascertaining where a person was actually living at the appropriate date. Physical presence in a place is a good indicator of principal residence but not the sole indicator. Context, including intention, must be considered.

[Emphasis added.]

See also: *Currie (Re)*, 2000 ABQB 71, 258 A.R. 303 at para. 24.

- [39] This brings me to the question of who bears the burden with respect to whether s. 19.1(4)(a) is engaged. Relying on the long-standing common-law principle now codified in s. 724(3)(e) of the Criminal Code, R.S.C. 1985, c. C-46, that at a sentencing hearing the Crown is required to prove disputed aggravating facts beyond a reasonable doubt, Mr. Bui contends that it was for the Crown to prove, beyond a reasonable doubt, that the property was not the principal residence of his two youngest children. The Crown, on the other hand, submits that it bears no such onus. That position is supported by the jurisprudence of this Court.
- [40] Although forfeiture appeals are dealt with as if they were sentence appeals, it is clear from *Craig* (S.C.C.) that forfeiture and sentencing proceedings are discrete aspects of the post-conviction trial process: paras. 48, 49. As there is no statutory provision making any of the sentencing provisions of the Criminal Code applicable at a CDSA forfeiture hearing, those provisions do not apply.
- [41] On a post-conviction forfeiture application brought under s. 16(1) of the CDSA, forfeiture is mandatory if "the court is satisfied, on a balance of probabilities, that any property is offence-related property and that the offence was committed in relation to that property". However, where the offence-related property is real property, a trial judge can grant relief against forfeiture if satisfied, having regard to the factors set out in s. 19.1(3), that forfeiture would be disproportionate. If the real property is a dwelling-house, then, by virtue of s. 19.1(4)(a), the disproportionality analysis must include a consideration of the impact of forfeiture on members of the offender's immediate family who meet the principal-residence criterion discussed in paragraph 38 above.
- [42] In my view, when an offender seeks relief against forfeiture of a dwelling-house on the basis that such an order would have an adverse impact on a member of his or her immediate family, that offender must persuade the trial judge as to the existence of such a person. Absent an agreement or admission, this will require evidence that satisfies the judge as to that fact on a balance of probabilities. If there is no evidence, or if the evidence falls short of proving that fact, then s. 19.1(4) is not engaged. Put somewhat differently, there is no onus on the Crown to establish that s. 19.1(4) does not apply and a disputed assertion of fact by the offender will not suffice.
- [43] This Court has discussed the burden of proof with respect to the disproportionality analysis and the impact of forfeiture on immediate family members. Apposite is *R. v. Craig*, 2007 BCCA 234, 218 C.C.C. (3d) 510. Although that judgment was reversed by the Supreme Court of Canada on other grounds (*Craig* (S.C.C.) above), there is nothing in the Supreme Court's reasons that calls into question the following statement by Madam Justice Ryan:

- [102] Again, the evidence of the impact on the family member will normally be within the knowledge of the offender, not the Crown. Therefore, if the offender wishes to contest forfeiture under s. 19.1(4), he or she will be obliged to call evidence on those matters and might include evidence that the dwelling-house is a principal residence. However, this does not require the offender to raise the matter; if the sentencing judge can rely on any evidence adduced by the Crown alone.
- [103] To summarize, the CDSA does not impose a two-step process as advocated by the Crown. Rather, with respect to forfeiture of real property pursuant to s.16(1), the onus is on the Crown to establish that a person has been convicted of a "designated substance offence", that the property in question is "offence-based property", and that the offence was committed in relation to that property. If the subject matter is real property, the court, pursuant to s. 19.1(3), is required to go on to consider whether the impact of such an order would be disproportionate, taking into account the nature and gravity of the offence, the circumstances surrounding it, and the criminal record of the offender. At this point the burden shifts to the offender to establish that the impact of forfeiture would be disproportionate. The offender may choose to rely on the Crown's case for proof, or may call evidence in support of his or her position. In addition, if the property is a dwelling-house, the court, pursuant to s. 19.1(4), must consider the "impact of forfeiture" on any member of the offender's family who uses the location as a principal residence.
- [Emphasis added.]
- [44] Although this aspect of *Craig* may be obiter dicta, as the impact of forfeiture on immediate family members was not in issue in that case, the same cannot be said of *R. v. Huynh*, 2007 BCCA 235, 218 C.C.C. (3d) 548, an appeal that was argued and decided in this Court along with *Craig*. In that case, the appellants, a married couple, argued that the trial judge, in ordering forfeiture, had erred in not finding that that the property was the principal residence of their children. The appellants did not testify, but tendered school records indicating that two of their children were registered at an elementary school approximately one-half mile from the property. In holding that the trial judge had not erred, Ryan J.A. stated:
- [48] Finally, the appellants say that the sentencing judge erred in holding that s. 19.1(4) was inapplicable. To apply, it was necessary for the sentencing judge to be satisfied that the St. Andrews Court house was the principal residence of the appellants' children. I have set out the evidence before the sentencing judge with respect to the issue of principal residence. Whether the residence was the principal residence of the appellants and their children is a fact that is primarily within the knowledge and ability of the appellants to prove. In my view it stands to reason that the appellants would be expected to furnish proof of that fact, although I acknowledge that the sentencing judge was still required to consider the issues and could rely on the evidence adduced by the Crown.

[49] In this case, the appellants offered little evidence to contradict the impression left by the photographs of the house, the evidence of electrical consumption, and the observations of the neighbours. I cannot say that it was unreasonable for the sentencing judge to find that the evidence did not satisfy her that the house was the principal residence of the family.

[Emphasis added.]

See also: *R. v. Luu*, 2007 BCCA 486, 247 B.C.A.C. 143 at para. 19, leave ref'd, [2009] 2 S.C.R. viii.

[45] I now turn to the evidence with respect to the relationship between Mr. Bui's two youngest children and the Montgomery Way premises from the time the charges were laid until the decision on the forfeiture application. I do so in the light most favourable to Mr. Bui. In this regard I accept, as does the Crown, that the Montgomery Way property was the principal residence of the entire Bui-Tran family on September 3, 2003, and that the two youngest children resumed living there in mid-April 2005. The direct evidence of what occurred after September 3, 2003, is that:

- (a) The family vacated the Montgomery Way premises following the search, likely because it was declared uninhabitable and remediation was required to render it fit for re-occupancy;
- (b) All four children attended school in Nanaimo from September of 2003 through June of 2004, when the oldest child graduated high school; and
- (c) The three youngest children attended school in Maple Ridge from September of 2004 until mid-April 2005, when they re-enrolled in school in Nanaimo.

[46] For the purposes of this appeal, I am prepared to accept Mr. Bui's submission that it is well known that residential premises used as grow-operations can be both unsafe to live in and a danger to the public, due to such things as toxic mould, structural damage, and increased risk of fire caused by faulty electrical wiring. It is, therefore, to be expected that when such a place is discovered, public officials will likely declare it to be uninhabitable. I am also prepared to accept Mr. Bui's submission that if a grow-operation is also a family's principal residence, then it does not cease to be its principal residence merely because the family has to reside elsewhere during the time needed to render the premises fit for re-occupation. On those facts, it would be clear that, from the outset, the family intended the premises to remain its principal residence and its absence to be temporary.

[47] What is missing in the case at bar is any evidence capable of supporting a finding that Mr. Bui and/or Ms. Tran intended to maintain the Montgomery Way property as the principal residence of their two youngest children or that they were only temporarily moving the children. The clear inference from the school records is that the children resided elsewhere in the Nanaimo area during the 2003-2004 school year and then moved to Maple Ridge sometime during the summer of 2004. It is also a clear inference that those children resided in the Maple Ridge area from September of 2004 until mid-April 2005. However, there is nothing in the record regarding where and how they lived during the time they were away from the Montgomery Way property, or why they returned when they did. It is entirely

possible, as the Crown argues, that Mr. Bui brought his children back to Nanaimo just prior to the original date set for the forfeiture hearing only for the purpose of being able to shield the property from forfeiture.

- [48] Given the absence of evidence with respect to what was happening during the time that the children were living elsewhere and the lack of an explanation as to why they returned to the Montgomery Way property when they did, it would be mere speculation to find that that property continued to be their principal residence during their absence. Apposite in this regard is Lord Wright's oft-quoted statement in *Caswell v. Powell Duffryn Associated Collieries Limited*, [1940] A.C. 152 at 169 (H.L.):

Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish.

- [49] I am accordingly of the view, albeit for reasons different from those given by the trial judge, that s. 19.1(4) of the CDSA was not engaged in this case.

Partial Forfeiture

- [50] At the time of the forfeiture hearing, partial forfeiture was not thought possible. Accordingly, both Mr. Bui and the Crown then approached the matter on an "all or nothing" basis. However, it is now clear from *Craig* (S.C.C.), that partial forfeiture can be ordered: para. 55.
- [51] Mr. Bui now submits that if any forfeiture is appropriate, then it should be for less than his entire interest in the property. He suggested something in the range of 50%. In support of his argument, Mr. Bui relies on *R. v. Baldasaro*, 2009 ONCA 676, leave ref'd, [2009] S.C.C.A. Nos. 536, 537. In that case, the two appellants were convicted of running what was described as a "marijuana convenience store for profit ... but disguised as a church" from a building that consisted of the Church of the Universe on the first floor and their living quarters on the second floor. On appeal, the full forfeiture order made at trial was set aside, and an order was made forfeiting one-half of their equity in that property.
- [52] In *Craig* (S.C.C.), Madam Justice Abella stated that s. 19.1(3) of the CDSA "constitutes a complete code for deciding whether, and to what extent, a forfeiture order should be made": para. 48. She went on in her reasons to discuss the factors to be taken into consideration in making that determination: paras. 56-58. Those factors are conveniently set out in this Court's recent judgment in *R. v. Ford*, 2010 BCCA 105, wherein Madam Justice Bennett stated:
- [48] In *Craig*, the majority held that a judge should consider the following when applying the proportionality test: the nature and gravity of the offence, which includes the character and quantity of the substance involved, the level of sophistication of the crime and the extent of the commercial production or distribution (at para. 56); the circumstances surrounding the

commission of the offence, which include the offender's role in the offence, the nature of the property and the manner in which it was used in the commission of the offence, risks to the community, whether the use detrimentally affected legitimate use of the property, whether the property was fortified or adapted to accommodate the offence, the extent of the involvement of the offender in organized crime (at para. 57); and, last, whether the offender has a criminal record (at para. 58).

- [53] That Mr. Bui has neither a criminal record nor ties to organized crime weighs in his favour. However, as Bennett J.A. pointed out in *Ford*, the mere fact that an offender does not have a criminal record does not create a presumption that forfeiture will be disproportionate; all factors have to be considered: para. 49. In this case, those factors are:
- (a) This was a substantial and sophisticated commercial grow-operation that had been in operation for some time, and which was capable of generating hundreds of thousands of dollars in annual revenue;
 - (b) During construction of the residence, the crawl space was enlarged and insulated specifically to house the grow-operation;
 - (c) Considerable post-occupancy work was done on the residence to set up the grow operation, including the installation of equipment, an electrical bypass, and a ventilation system;
 - (d) Mr. Bui knowingly exposed his young children to the risks associated with grow-operations (e.g., toxic mould, electrical fires, home invasions), while using them to conceal his illegal activities by making the residence outwardly appear to be nothing other than a family home;
 - (e) Mr. Bui knowingly exposed neighbouring residents to the risks associated with grow-operations; and
 - (f) Mr. Bui was one of the principal operators of the grow-operation and derived significant financial benefit from it.
- [54] Last, but by no means least, is the fact that although marihuana is considered less harmful than some other drugs, offences involving its commercial production and distribution are serious matters, as they have serious social consequences: *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59 at para. 57; *R. v. Tomlinson*, 2009 BCCA 196, 270 B.C.A.C. 134 at para. 80.
- [55] As noted by Bennett J.A. in *Ford* (at para. 50), the building at issue in *Baldasaro* was used merely as a place from which to sell illicit drugs. In contrast, the Montgomery Road property was specifically built to house a sophisticated, large-scale illicit drug-production facility that generated considerable revenue over several years. To use the words of Abella J. in *Nguyen*, it was "tainted from the outset by a criminal purpose": para. 12. In addition, the grow-operation put both Mr. Bui's children and his neighbours at risk.
- [56] While no two fact patterns will be identical, it is noteworthy that in *Nguyen* the Supreme Court of Canada upheld full forfeiture of residential property that Mr. Nguyen had purchased for the purpose of housing a sophisticated, but moderate-scale, grow-operation

(i.e., 96 plants) that he ran with his wife. Neither Mr. Nguyen nor his wife had a criminal record or ties to organized crime. They lived elsewhere in a rental accommodation with their two youngest children. Only their 18-year-old daughter lived at the grow-operation property.

[57] It my view, having regard to the factors in s. 19.1(3) of the CDSA, it cannot be said that full forfeiture of the Montgomery Way property is disproportionate to the nature and scope of the drug-related criminal activity engaged in by Mr. Bui and the means by which he did so. I would, therefore, affirm the trial judge's order.

Conclusion

[58] I would grant leave and dismiss this appeal.

"The Honourable Mr. Justice Frankel"

I agree:

"The Honourable Mr. Justice Low"

I agree:

"The Honourable Madam Justice Levine"

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