
CANADA / JUDGMENT

R. v. Van Kessel

2010 BCSC 257

COURT

Supreme Court of British Columbia

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2010 BCSC 257 R. v. Van Kessel

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Van Kessel,

2010 BCSC 257

Date: 20100301

Docket: 25029

Registry: Williams Lake

Regina

v.

Henry John Van Kessel

Corrected Judgment: Counsel's name on the front page was corrected on March 19, 2010

Before: The Honourable Mr. Justice McKinnon

Reasons for Judgment

Counsel for the Crown, Respondent:

J. Whiting

Counsel for Henry John Van Kessel, Applicant:

M.B. Rankin and

C.M. Joseph

Place and Date of Hearing:

Vancouver, B.C.

November 27, 2009

Place and Date of Judgment:

Williams Lake, B.C.

March 1, 2010

Introduction

- [1] The applicant, Henry John Van Kessel, challenges the constitutional validity of sections 16 and 19.1 of the Controlled Drugs and Substances Act, R.S.C. 1996, c. 19 ("the CDSA"), which permit courts to order forfeiture of "offence related property".
- [2] On February 4, 2009 at Williams Lake, British Columbia, I found the applicant guilty of the unlawful possession of marijuana for the purpose of trafficking. Sentencing was delayed for some time as courts were awaiting a decision from the Supreme Court of Canada that considered these forfeiture provisions. *R. v. Craig*, 2009 SCC 23 [Craig], was ultimately decided on the basis of statutory interpretation, leaving open the constitutional validity issue which is now before me.
- [3] On November 4, 2009 I heard submissions in Williams Lake in respect to the appropriate sentence for the applicant and in respect to the "discrete" inquiry directed by the Supreme Court of Canada in *Craig* on the forfeiture issue pursuant to sections 16 and 19.1 of the CDSA.
- [4] Sentence was imposed and a forfeiture order made on a "but for" basis. That is, but for a successful application challenging the constitutionality of sections 16 and 19.1 of the CDSA, 50 percent of the applicant's property was ordered forfeited to the Crown.
- [5] This judgment reflects the constitutional issues raised at a hearing in Vancouver, British Columbia on November 27, 2009.

The Issue

- [6] The applicant alleges that this Court is without jurisdiction to make a forfeiture order for two reasons:
 - 1. The provisions of the CDSA respecting forfeiture, though purportedly enacted pursuant to the federal Parliament's criminal law making power is, in pith and substance, legislation dealing with property and civil rights, a provincial head of power under section 92(13) of the Constitution Act, 1867; and

2. The legislation is contrary to section 96 of the Constitution Act, 1867, because it bestows upon provincial court judges a jurisdiction related to interests and title to real property. Section 96 of the Constitution Act, 1867 prohibits inferior tribunals from exercising a jurisdiction that superior courts alone enjoyed at the time of Canada's confederation.

[7] The applicant submits that those contentions raise these issues:

1. Are sections 2, 16, and 19.1 of the CDSA ultra vires the federal Parliament as being legislation pertaining to property and civil rights in the province under ss. 19(13) of the Constitution Act, 1867?

2 Are sections 2, 16 and 19.1 of the CDSA ultra vires the federal Parliament as being legislation that confers upon an inferior tribunal, namely, the Provincial Court of British Columbia, a jurisdiction exclusively held by superior courts at the time of confederation contrary to section 96 of the Constitution Act, 1867?

[8] The Crown submits that while there may be some infringement on provincial jurisdiction, the primary focus in the impugned legislation is directed to criminal activity and thus its true feature or character, often referred to as its "pith and substance", is criminal law.

Analysis and Findings

The Provisions

[9] The relevant sections of the CDSA are as follows:

2(1) In this Act,

[...]

"justice" has the same meaning as in section 2 of the Criminal Code;

[...]

"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;

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

- (a) in the case of a substance included in Schedule VI, order that the substance be forfeited to Her Majesty in right of Canada and disposed of by the Minister as the Minister thinks fit; and
- (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.
- (2) Subject to sections 18 to 19.1, where the evidence does not establish to the satisfaction of the court that the designated substance offence of which a person has been convicted was committed in relation to property in respect of which an order of forfeiture would otherwise be made under subsection (1) but the court is satisfied, beyond a reasonable doubt, that that property is offence-related property, the court may make an order of forfeiture under subsection (1) in relation to that property.
- (2.1) An order may be issued under this section in respect of property situated outside Canada, with any modifications that the circumstances require.
- (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 on the person in respect of the offence.

19.1(1) Where all or part of offence-related property that would otherwise be forfeited under subsection 16(1) or 17(2) is a dwelling-house, before making an order of forfeiture, a court shall require notice in accordance with subsection (2) to be given to, and may hear, any person who resides in the dwelling-house and is a member of the immediate family of the person charged with or convicted of the indictable offence under this Act in relation to which the property would be forfeited.

- (2) A notice shall
 - (a) be given or served in the manner that the court directs or that may be specified in the rules of the court;
 - (b) be of any duration that the court considers reasonable or that may be specified in the rules of the court; and
 - (c) set out the offence charged and a description of the property.

- (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.

Issue 1 - Division of Powers

- [10] Counsel for the applicant submits that sections 16 and 19.1 of the CDSA are ultra vires the federal Parliament of Canada in that they are in pith and substance laws concerning property and civil rights, which are a provincial head of power under the Constitution Act, 1867. This argument is based largely on the interpretation of the forfeiture provisions made by the Supreme Court of Canada in *Craig*.
- [11] The applicant submits that *Craig* effectively severed the connection between sentencing and forfeiture necessary for the forfeiture provisions to be validly enacted under the criminal law power of the federal Parliament.

The Decision in *Craig*

- [12] *Craig* was concerned with the proper application of the forfeiture provisions of the CDSA, which are under challenge in this application. The two potential approaches, as described by Abella J. at paras. 2-3, are one which views forfeiture orders as an aspect of an interdependent global punishment and one that sees the need for a separate inquiry into whether forfeiture is justified based on a discrete statutory proportionality test. *Craig* also considered whether partial forfeiture of property was permitted, though that issue has no bearing in the case at bar.
- [13] There were four separate reasons in *Craig*: Abella J. wrote for herself, with Binnie and Deschamps JJ. concurring; McLachlin C.J. and Rothstein J. wrote partially concurring joint reasons; LeBel J. wrote partially concurring reasons; and Fish J. wrote reasons dissenting in

part. On the issue of which interpretive approach was correct, Abella J. and the concurring reasons of McLachlin C.J. and Rothstein J. held that there was a need for a separate inquiry into whether forfeiture is justified, rather than a global approach. Lebel and Fish JJ. held that the forfeiture order should be part of a global sentencing approach.

[14] The main concern identified by Abella J., at para. 12, in the use of a global approach was that "those who have no property available for forfeiture will likely attract longer jail sentences than those with property". It was this concern that led her to find that the forfeiture provisions of the CDSA must be considered separately from the general sentencing provisions.

[15] Abella J. describes the separation of the forfeiture provisions from the sentencing of the offender in several different ways throughout the judgment:

In para. 3, Abella J. states that her preferred approach "sees the need for a separate inquiry into whether forfeiture is justified based on a discrete statutory proportionality test"; In para. 13, Abella J. finds that the words of the statute and policy underlying the CDSA lead her "to conclude that Parliament intended that the forfeiture of offence-related property be a discrete inquiry"; In para. 22, Abella J. states that "while a forfeiture order may have a punitive impact on an offender, it is also aimed at taking offence-related property out of circulation and rendering it unavailable for future designated substance offences"; In para. 30, Abella J. describes the approach she eventually adopts as "an independent inquiry resting on an application of the specific test set out in s. 19.1(3) and (4) to a forfeiture order"; In para. 32, Abella J. states that this approach "treats a forfeiture order under the Controlled Drugs and Substances Act as a distinct and independent consequence tailored to serious drug offences"; and In para. 48, when considering the proportionality test in s. 19.1, Abella J. finds that "the forfeiture factors found in s. 19.1(3), therefore, should similarly be seen to constitute a complete code for deciding whether, and to what extent, a forfeiture order should be made".

[Emphasis added.]

[16] These descriptions all demonstrate the disconnection of the forfeiture provisions of the CDSA from the general sentencing provisions. This conclusion was summarized by Abella J. at para. 40, as follows:

I see the purpose and statutory language underlying the forfeiture scheme as a reflection of Parliament's intention that forfeiture orders be treated independently, pursuant to a separate rationale and as a distinct response to distinct circumstances. The sentencing inquiry focuses on the individualized circumstances of the offender; the main focus of forfeiture orders, on the other hand, is on the property itself and its role in past and future crime.

[Emphasis added.]

- [17] With that interpretation of the forfeiture provisions in mind, it is necessary to look at the law with regard to the division of powers between the federal and provincial governments under the Constitution Act, 1867.

The Division of Powers

- [18] The approach to be taken when conducting a division of powers analysis has been discussed by the Supreme Court of Canada in numerous cases. In *Reference re Firearms Act (Can.)*, 2000 SCC 31 [Firearms Reference], the unanimous Court held, at para 15:

There are two stages to this analysis. The first step is to determine the "pith and substance" or essential character of the law. The second step is to classify that essential character by reference to the heads of power under the Constitution Act, 1867 in order to determine whether the law comes within the jurisdiction of the enacting government. If it does, then the law is valid.

Pith and Substance

- [19] To determine the pith and substance of a law, the Court is required to examine both the purpose of the legislation and the effect of the law. When considering the purpose of the legislation, the Court may look to both the statutory language and to intrinsic evidence, such as purpose clauses, or extrinsic evidence, such as Hansard or minutes of parliamentary debates. This analysis must focus on the true purpose of the legislation, rather than its stated or apparent purpose: *Canadian Western Bank v. Alberta*, 2007 SCC 22 at para. 27.
- [20] When conducting the pith and substance analysis, the Court should endeavour to determine the pith and substance of legislation without regard to the potential head(s) of legislative competence, which should only be considered once the pith and substance of the law has been determined, as "unless those two steps are kept distinct there is a danger that the whole exercise will become blurred and overly oriented towards results": *Chatterjee v. Ontario (Attorney General)*, 2009 SCC 19 at para. 16 [Chatterjee].

1. The Purpose of the Legislation

- [21] The first step in considering the purpose of the impugned provisions is the wording of the provisions themselves. Section 16 is clearly written with the purpose of allowing the Court to order forfeiture of offence-related property. The definition of offence-related property is extremely broad, as it includes any property by means of or in respect of which a designated substance offence is committed; property that is used in any manner in connection with the commission of a designated substance offence; or even property that is intended for use for the purpose of committing a designated substance offence. These broad provisions clearly indicate that the removal of this property is of utmost importance in this scheme.
- [22] That the purpose of these provisions is the forfeiture of offence-related property is strengthened in particular by subsection (2) of section 16 of the CDSA. Subsection (2) allows the Court to order forfeiture of any property that it is satisfied, beyond a reasonable doubt, is

offence-related property, even if the evidence does not establish that the offence for which a person has been convicted was committed in relation to that property. This subsection is clearly intended to remove offence-related property from circulation, regardless of its connection to any specific criminal offence.

- [23] The statements of the Honourable Anne McLellan, then Minister of Justice and Attorney General of Canada, as cited in para. 20 of Craig, demonstrate that the government's purpose in introducing this legislation was largely to combat organized crime:

I am pleased today to lead off the debate on an issue of major concern to all Canadians: the problem of organized crime and the legislative tools available to our police, prosecutors and courts to address that problem.

[...]

Not all provisions of the bill specifically target organized crime groups. Several elements in the proposed legislation are meant to improve criminal law generally. These improvements to the law will nonetheless be extremely useful in combating organized crime.

[...]

The last element deals with offence related property. The bill contains amendments to make the offence related property forfeiture regime in the code apply to all indictable offences. As well, the present exemption from forfeiture for most real property would be eliminated.

- [24] An important extrinsic source that discusses the purpose of this legislation is the judgment of Abella J. in Craig. It is worth restating Abella J.'s discussion of Parliament's intent, at para. 40:

I see the purpose and statutory language underlying the forfeiture scheme as a reflection of Parliament's intention that forfeiture orders be treated independently, pursuant to a separate rationale and as a distinct response to distinct circumstances. The sentencing inquiry focuses on the individualized circumstances of the offender; the main focus of forfeiture orders, on the other hand, is on the property itself and its role in past and future crime.

- [25] This description of the purpose of the forfeiture scheme clearly supports the view that the law in pith and substance is about removing offence related property from private parties and putting it in the hands of the government.

2. The Effect of the Legislation

- [26] When considering the effect of the law, it is important to consider both the practical and legal effect of that law. This entails first examining what effect flows directly from the provisions of the statute itself and then, second, what "side effects" flow from the application of the statute which are direct effects of the provisions of the statute itself: *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31 at para. 54.

- [27] The effects of the law and how it impacts on the legal rights of Canadians also support the conclusion that the forfeiture scheme is in pith and substance about removing offence-related property from private hands. There are a significant number of cases that have resulted in forfeiture orders for properties not at all related to organized crime; see for example: *R. v. Wyatt*, [2009] O.J. No. 5608 (S.C.J.); *R. v. Sportun*, 2009 ONCJ 500; *R. v. Tran*, 2009 ONCJ 122; *R. v. Nguyen*, 2008 BCSC 1730; and *R. v. La*, 2008 ABPC 217.
- [28] It is my view that the impugned provisions of the CDSA are, in pith and substance, concerned with the forfeiture of offence-related property from private hands.

Heads of Power

- [29] Having assessed the pith and substance of the impugned provisions, the second step is to determine whether the matter comes within the jurisdiction of the enacting legislature, the federal Parliament. As discussed by the Supreme Court of Canada in *Firearms Reference* at para. 26, the "determination of which head of power a particular law falls under is not an exact science. In a federal system, each level of government can expect to have its jurisdiction affected by the other to a certain degree".
- [30] In this case, the question is whether the law falls under federal jurisdiction over criminal law or its peace, order and good government power; or under provincial jurisdiction over property and civil rights. The presumption of constitutionality means that the applicant, as the party challenging the legislation, is required to show that the impugned provisions do not fall within the jurisdiction of Parliament: *Nova Scotia Board of Censors v. McNeil*, [1978] 2 S.C.R. 662.
- [31] In *Firearms Reference*, at para. 27, the Supreme Court of Canada held that "[a]s a general rule, legislation may be classified as criminal law if it possesses three prerequisites: a valid criminal law purpose backed by a prohibition and a penalty".
- [32] Forfeiture provisions related to criminal activities and similar provisions in the Criminal Code, R.S.C. 1985, c. C-46, have been the subject of constitutional challenges in the past, and have been found to have a criminal purpose.
- [33] In *Industrial Acceptance Corporation Limited v. Her Majesty the Queen*, [1953] 2 S.C.R. 273 [Industrial Acceptance], the Supreme Court of Canada considered the constitutionality of section 21 of the Opium and Narcotic Drug Act, 1929, c. 49, which stated as follows:

When any person is convicted of an offence against this Act, the opium pipe or other article or the drug in respect of which the offence was committed and all receptacles of any kind whatsoever found containing the same, and any vehicle, motor car, automobile, boat, canoe, aeroplane or conveyance of any description, proved to have contained such opium pipe or other article or drug or to have been used in any manner in connection with the offence for which such person has been so convicted, and any moneys used for the purchase of such drug, shall be forfeited to His Majesty, and shall be delivered to the Minister for disposition.

[34] The majority of the Court in *Industrial Acceptance* found that this provision was intra vires the federal Parliament. Kerwin J. held, at 275, as follows:

The mere fact that section 21 of the Opium and Narcotic Drug Act affects property and civil rights is of no concern since in pith and substance it does not attempt to invade the provincial legislative field. It provides for the forfeiture of property used in the commission of a criminal offence and is, therefore, legislation in relation to criminal law.

[35] Rand J., with reasons that were adopted by Kellock, Cartwright and Estey JJ., came to the same conclusion and heavily emphasized the connection between forfeiture and punishment at 278:

The absolute forfeiture is an inseparable accompaniment of punitive action, and the administration of the law would be seriously impeded were any obstacles to prompt and conclusive action placed in the way of its enforcement.

[Emphasis added.]

[36] In *R. v. Zelensky*, [1978] 2 S.C.R. 940, the Supreme Court considered the constitutionality of compensation provisions in the Criminal Code that allowed for a court who has convicted an accused of an indictable offence to order that accused to pay to an aggrieved person an amount by way of satisfaction or compensation for loss or damage to property suffered by the applicant.

[37] When discussing the constitutionality of these provisions, Laskin C.J., for the majority, discussed the necessity of these provisions being linked to the sentence imposed to remain constitutionally valid at 960:

The constitutional basis of s. 653 must, in my opinion, be held in constant view by a judge called upon to apply its terms. It would be wrong, therefore, to relax in any way the requirement that the application for compensation be directly associated with the sentence imposed as the public reprobation of the offence.

[38] Laskin C.J. went on, at 963, to note that it was crucial to keep that section within the criminal law, specifically mentioning the potential infringement of similar provisions into the provincial power:

What is important is to contain s. 653 within its valid character as part of the sentencing process and thus avoid the allegation of intrusion into provincial legislative authority in relation to property and civil rights in the Province. Although, as I have already noted, the Courts have recognized the wide scope of the federal power in relation to criminal law and criminal procedure, and although there is now a broad range of powers in a sentencing court to deal with offenders, it nonetheless remains true that the criminal law cannot be used to disguise an encroachment upon provincial legislative authority [Authorities omitted].

- [39] In *R. v. Houle*, [2003] J.Q. No. 339 (C.A.), the Quebec Court of Appeal considered the constitutional validity of the same provisions of the CDSA that are at issue in this case. However, at that time the definition of offence-related property was different, as it did not include "a controlled substance or real property, other than real property built or significantly modified for the purpose of facilitating the commission of a designated substance offence". In addition, *Craig* had not been decided, definitively stating that the forfeiture provisions of the CDSA had to be considered separately from the sentencing provisions.
- [40] Biron J.A., for the Court, held that the provisions of the CDSA were intra vires the federal Parliament, but based this decision largely on the fact that forfeiture orders were part of sentencing, finding, at para. 86, that "the forfeiture order made under subsection 16(1) of the Act represents a sentence within the meaning of the criminal law".
- [41] It is clear, given the decision in *Craig*, that this reasoning is no longer valid. However, it does underscore the importance that courts have put on the connection between forfeiture and sentencing in upholding their constitutional validity.
- [42] The Crown submits that the decisions in *Industrial Acceptance*, *Zelensky*, and *Houle* are on point and continue to be good authority for the proposition that forfeiture of offence-related property following a conviction for a designated substance offence has traditionally been, and continues to be, within the jurisdiction of the federal Parliament.
- [43] The applicant, on the other hand, while acknowledging that forfeiture provisions in those cases have been upheld, submits that the requisite connection to the sentencing process identified in those cases has been lost as a result of the reasons in *Craig*.
- [44] It is clear from the law in these cases that for forfeiture to be a valid aspect of the criminal law, it must be sufficiently connected to the sentencing aspect of the penalty. This connection was further elaborated upon in *R. v. Lavigne*, 2006 SCC 10, where the Supreme Court of Canada was not concerned with the constitutional validity of provisions in the Criminal Code that allowed for the forfeiture of property that is the proceeds of crime, but discussed the connection between forfeiture and sentencing at para. 16:

Parliament's intention in enacting the forfeiture provisions was to give teeth to the general sentencing provisions. While the purpose of the latter provisions is to punish an offender for committing a particular offence, the objective of forfeiture is rather to deprive the offender and the criminal organization of the proceeds of their crime and to deter them from committing crimes in the future.

- [45] The decision of the Supreme Court of Canada in *Chatterjee* is also relevant to the case at bar. *Chatterjee* considered the constitutionality of the Ontario Remedies for Organized Crime and Other Unlawful Activities Act, 2001, S.O. 2001, ("CRA"). The CRA authorizes the forfeiture of property that is found to be proceeds of unlawful activity. Binnie J., for a unanimous Court, held that the CRA was intra vires the provincial government, as, at para. 4:

the CRA method of attack on crime is to authorize in rem forfeiture of its proceeds and differs from both the traditional criminal law which ordinarily couples a prohibition with a penalty.

[46] A number of the rationales applied by the Court in Chatterjee to find that the forfeiture provisions in the CRA were a valid provincial concern under property and civil rights are worth noting in the context of the case at bar. At paras. 46-47, Binnie J. commented on the connection to a sentencing process:

[I]t is clear that its provisions are not part of any "sentencing process". The CRA does not require an allegation or proof that a particular person committed a particular crime.... Even when the owner has gained the property by means of crime, the CRA forfeiture proceeding does not require, and may not involve, identifying the owner with a particular offence.

[47] The CRA does not require any offence to be committed, which is not the case under the CDSA, where someone must first be convicted of a designated substance offence for the forfeiture sections to become engaged. I appreciate that section 16(2) of the CDSA allows for property to be forfeited even where the evidence does not establish that the designated substance offence was committed in relation to that property. However, the important point, in my respectful view, is that forfeiture under the CDSA must have, as a condition precedent, a conviction for a designated substance offence and then when assessing whether forfeiture is appropriate, the court must be satisfied that it is "offence related property".

[48] I am unable to accept the applicant's proposition that Craig stands for a complete separation between sentencing and forfeiture so as to conclude that the pith and substance of the CDSA legislation respecting forfeiture is properly placed under the head of property and civil rights.

[49] In my view, all Craig does is oblige judges to consider and sentence an offender regardless of real property interests. Once that sentence has been imposed then the Court considers the forfeiture provisions, having regard to the factors described in section 19.1 of the CDSA, including "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".

[50] This conclusion is strengthened by the wording in section 19.1(3), which continues to tie the analysis of forfeiture to the offender. That the gravity of the offence, the circumstances surrounding the offence, and the criminal record of the accused must be considered when determining whether forfeiture is appropriate clearly demonstrate that the forfeiture provisions are still adequately tied to the sentencing process, in the manner described by the Supreme Court of Canada in the previous forfeiture cases.

[51] I reiterate the comments of Abella J. at para. 40 in Craig where she stated:

The sentencing inquiry focuses on the individualized circumstances of the offender; the main focus of forfeiture orders, on the other hand, is on the property itself and its role in past and future crime.

[52] It seems clear from references to parliamentary intention and case law that the focus or purpose of forfeiture of offence related property is to deter future crime and to ensure property is not again utilized for a criminal purpose. Separating the forfeiture enquiry from sentencing, does not, in my respectful view, convert the process to one of property and civil rights. In the result, I find that the impugned provisions are properly placed under the federal criminal power and are intra vires the federal Parliament.

Issue 2 - Jurisdiction of Inferior Courts

[53] Counsel for the applicant argues that sections 2, 16 and 19.1 of the CDSA are ultra vires the federal Parliament because they purport to confer an inferior tribunal, specifically the British Columbia Provincial Court, with the ability to alter or affect existing interests in real property and create a sui generis interest known as "partial forfeiture", a jurisdiction exclusively held by superior courts at the time of Confederation.

[54] The CDSA directs forfeiture orders be made by a "justice", which is defined to have the same meaning as "justice" in the Criminal Code. Section 2 of the Criminal Code defines "justice" as including a justice of the peace or a provincial court judge. Thus, the CDSA empowers a provincial court to make forfeiture orders.

[55] While the forfeiture order in this case was not made by a provincial court, the applicant relies on s. 52 of the Constitution Act, 1982 and the holding of the Supreme Court of Canada in *R. v. Big M Drug Mart Ltd.* (1985), 18 D.L.R. (4th) 321 at 326, where Dickson C.J. held:

Section 52 sets out the fundamental principle of constitutional law that the Constitution is supreme. The undoubted corollary to be drawn from this principle is that no one can be convicted of an offence under an unconstitutional law.

[56] As a result, the applicant contends that even though the forfeiture in this case was ordered by a superior court, if the law is unconstitutional, he cannot be subject to its sanctions.

[57] In *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725 [MacMillan Bloedel], the Supreme Court of Canada adopted the three step analysis from *Re Residential Tenancies Act*, [1981] 1 S.C.R. 714, as the appropriate test to determine the validity of an inferior court's jurisdiction in a particular area. The steps are as follows:

1. determine whether that jurisdiction or power conforms to that exercised by superior, district or county courts in 1867;
2. ascertain whether the function is "judicial" rather than "policy making" in its institutional setting; and

3. determine the decision-maker's function as a whole, to appraise the impugned function in its entire institutional context, e.g. to determine if the powers are "merely subsidiary or ancillary" to general administrative functions assigned to the decision maker.
- [58] The first two steps of the test are easily dealt with in the case at bar. The applicant provided a line of cases that demonstrate the proposition that forfeiture of real property was historically solely within the jurisdiction of superior courts, prior to, and after confederation: *Re McLean Gold Mines Limited and The Attorney-General for Ontario* (1923), 54 O.L.R. 573; *Eastwood et al v. McKenzie* (1839), 5 U.C.Q.B. (O.S.) 708; and *Stevens v. Clement* (1852), 9 U.C.R. 650. I accept the applicant's submissions in this regard.
- [59] With regard to the second step of the test, the applicant contends that forfeiture under the CDSA is clearly "judicial", having no aspects or relationship to a broader administrative or policy making function. The scheme is "adversarial", not ministerial and is governed by formal rules of evidence, onuses and burdens, all of which are the hallmarks of a judicial function. I agree that a forfeiture proceeding in provincial court must be characterized as "judicial".
- [60] It is the third step of the test upon which the analysis in the case at bar rests. The applicant submits that there is nothing "ancillary" or "subsidiary" to an administrative function, nor is it "necessarily incidental" to the achievement of a broader policy goal of the legislature. Rather, says the applicant, forfeiture is the core, substantive directive of Parliament under the CDSA and, as a result, should be held to be ultra vires the federal Parliament.
- [61] In response, the Crown cited *R. v. Rosenblum* (1998), 167 D.L.R. (4th) 639 (B.C.C.A.) [Rosenblum], as a complete answer to the applicant's claim.
- [62] In *Rosenblum*, a provincial court judge accepting a guilty plea under the Narcotic Control Act, R.S.C. 1985, c. N-1, declined to order forfeiture of goods seized pursuant to relevant sections of the Criminal Code on the basis that he lacked authority to forfeit property. The British Columbia Court of Appeal, at para. 31, stated:
- In my view, and with great respect to the trial judge's concern, the statute is clear: the trial judge, who may be a provincial court judge where the necessary election has been made and plea taken, is expressly directed in s-s. 462.37(1), if satisfied on a balance of probabilities that any property is proceeds of crime and that the enterprise crime offence was committed in relation to that property, to order the property be forfeited to Her Majesty, See: *Wilson v. Canada* (1993), 86 C.C.C. (3d) 464.
- [63] However, *Rosenblum* did not consider section 96 of the Constitution Act, 1867 and thus I fail to see how that case could be considered a "complete" answer to the applicant's assertions. Nonetheless, *Rosenblum* does offer some support for the respondent's position at bar, as *Goldie J.A.* held, at paras. 39-40:

The contention advanced is that the provision for a fine in lieu of forfeiture must be read as though Parliament, mindful of the division of legislative powers, intended to avoid authorizing an adjudication of proprietary interests under the guise of the criminal law which would intrude upon a head of power exclusively conferred on the provinces.

With respect, I am of the view there is no support for this contention in either principle or authority. The criminal law power under head 27 of s. 91 of the 1867 Act has been repeatedly held by the courts to be in its widest sense reserved to the exclusive authority of Parliament. See *Attorney General of Ontario v. Hamilton Street Railway* [1903] A.C. 524 (J.C.P.C.). In a more particular sense, the judgement of the late Chief Justice Laskin in *R v. Zelensky*, 1978 CanLII 8 (S.C.C.), [1978] 2 S.C.R.940 demonstrates that the prevention and punishment of crime is not limited to the traditional forms of punishment.

[64] In my respectful view, forfeiture of real property is not the primary aspect of the CDSA, but rather is ancillary to the primary purpose, which is the prohibition of the offences from which forfeiture can flow. Rosenblum stipulates that provincial courts can order forfeiture under the proceeds of crime legislation on a plain reading of the statute.

[65] MacMillan Bloedel was concerned with the ability of Parliament to confer upon provincial courts exclusive powers of contempt in respect to youths being tried under the federal Young Offenders Act, R.S.C. 1985, c. Y-1. The Supreme Court of Canada determined that Parliament could not deprive a superior court of its historical ability to punish for contempt, but that this power could also be exercised by a provincial court in respect to youths.

[66] Lamer C.J., speaking for the majority, stated at para. 26:

[W]hen considering the institutional function of the youth courts, a transfer of this power (contempt) is permissible. As we elaborated in *Reference re Young Offenders Act*, the policy objectives of the youth court system are clear and laudable. Our society wishes to establish different treatment for youths accused of criminal offences than for adults. Youth courts have an expertise in providing procedural protections appropriate for youths and in deciding punishments for convicted young offenders. The power to punish youths for ex facie contempt of superior courts is indeed a mere ancillary to these primary functions. Accordingly, granting jurisdiction to punish youth for ex facie contempt of superior courts does not infringe s. 96.

[67] Given my conclusion that Craig does not sever sentencing from forfeiture in any meaningful way, but rather mandates how to consider the objectives for each, it seems to me that forfeiture is ancillary to the primary purpose of the provincial courts, which is to have the ability to adjudicate all aspects of the CDSA. Expediency and effectiveness in disposing of issues in one court, particularly the right to be tried within a reasonable time, reinforces the ancillary aspect of forfeiture.

[68] In the result, I hold that sections 2, 16 and 19.1 of the CDSA are intra vires the federal Parliament.

Conclusion

[69] I find that the applicant is unsuccessful in both aspects of his challenge to the constitutionality of the CDSA. The "but-for" order made with respect to his property remains in force, and 50 percent of his property is forfeited to the Crown.

"The Honourable Mr. Justice McKinnon"

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