

CANADA / JUDGMENT

United States v. Bandfield

2024 BCSC 866

COURT

Supreme Court of British Columbia

DECIDED

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2024 BCSC 866 United States v. Bandfield

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

United States v. Bandfield,

2024 BCSC 866

Date: 20240521

Docket: OTR2019026

Registry: Vancouver

IN THE MATTER OF

an application pursuant to s. 9.4 of the

Mutual Legal Assistance in Criminal Matters Act

AND IN THE MATTER OF

The Attorney General of Canada on behalf of

The United States of America

and

Robert Bandfield

Before: The Honourable Madam Justice Watchuk

Reasons for Judgment - Disclosure Application

Counsel for the Respondent:

D. Strachan, KC

M. Zemojtel

Counsel for the Applicants Delia Mulholland, Vision Crest Consulting Group Ltd., and High Point Drive Whistler Holdings Ltd.:

J. Narwal, KC

Place and Dates of Hearing:

Vancouver, B.C.

September 27, 2023

February 22, 2024

March 5, 2024

Place and Date of Judgment:

Vancouver, B.C.

May 21, 2024

I. INTRODUCTION

- [1] This is an application for disclosure in proceedings under ss. 462.41(3) and 462.42(4) of the Criminal Code, R.S.C., 1985, c. C-46, which are incorporated by reference in s. 9.4 of the Mutual Legal Assistance in Criminal Matters Act, R.S.C., 1985, c. 30 (4th Supp.) [Act]. Section 9.4 allows for the registration, without prior notice to the affected parties, of an order for forfeiture of property made in a criminal proceeding with a state or entity that is party to an agreement with Canada.
- [2] The factual background arises from a guilty plea entered on May 9, 2016 by Gregg Mulholland in the US District Court for the Eastern District of New York to the offence of conspiracy to commit money laundering. As part of his plea agreement, Mr. Mulholland consented to forfeiture of his interest in certain assets, including two British Columbia properties: one in Whistler and one in West Vancouver (the "BC Properties"). In the ensuing judgment, these properties in which the applicants claim an interest were listed together with properties in which the co-accused, Robert Bandfield, held an interest.
- [3] On March 24, 2017, a final order of forfeiture (the "US Forfeiture Order") was made by a United States District Judge in the Eastern District of New York with the style of cause in the prosecution of United States of America against Robert Bandfield. The BC Properties were included in that order. The applicants, Vision Crest Consulting Group Ltd. ("Vision Crest") and High Point Drive Whistler Holdings Ltd. ("High Point"), respectively, are the registered owners of the BC Properties. The third applicant, Delia Mulholland, Mr. Mulholland's wife, is the sole shareholder and director of both Vision Crest and High Point.

- [4] On September 17, 2018, pursuant to the Treaty between the Government of Canada and the Government of the United States of America on Mutual Legal Assistance in Criminal Matters ("the MLA Treaty"), the United States Government requested of the Minister of Justice that the US Forfeiture Order be enforced in Canada. On November 8, 2018, the Minister, through her authorised official, approved the request. On July 18, 2019, in an ex parte, in camera hearing, Associate Chief Justice Holmes ordered that the Forfeiture Order be entered as a judgment of this Court (the "BCSC Forfeiture Order"), pursuant to s. 9.4(3) of the Act.
- [5] On August 13, 2019, the Attorney General of Canada ("AGC") served the BCSC Forfeiture Order upon parties appearing to have an interest in the BC Properties, including the applicants. The AGC also informed the parties claiming an interest of their ability to apply for relief from forfeiture, pursuant to s. 462.42 of the Criminal Code, prior to the execution of the BCSC Forfeiture Order, and that it would not hold them to the 30-day application period.
- [6] The applicants on March 23, 2023 filed an application for relief from forfeiture pursuant to this Criminal Code provision. Prior to proceeding with that application, the applicants seek disclosure of materials necessary in order for Ms. Mulholland to understand what jeopardy she faces if she chooses to testify.
- [7] In this application, the disclosure sought is:

An order directing the AGC to provide the Applicants with disclosure of all relevant information in its possession or control concerning the proceeding initiated by the Applicants under sections 462.41(3) and 462.(4) of the Criminal Code (the "Proceedings"), regardless of whether it is inculpatory or exculpatory, and regardless of whether Canada Intends to use it, and in the event that no such material exists, to confirm so in writing.

- [8] The respondent, the AGC, submits that the applicants have been provided with the disclosure to which they are entitled. The disclosure order now sought, it submits, is very broad and in essence replicates the first disclosure application which was dismissed by Justice Williams in *United States v. Bandfield*, 2020 BCSC 1868 [Bandfield 2020]. Further, it says this application is also premised on the proposition that the standard for production in this context is *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, 1991 CanLII 45, for which there is no authority.

II. HISTORY

- [9] This matter has a rather long history which I will restate and set out in point form:
- May 9, 2016: Gregg Mulholland entered a guilty plea in the United States.
 - March 24, 2017: US Forfeiture Order made in the United States.
 - September 17, 2018: Pursuant to MLA Treaty, the United States requested that the US Forfeiture Order be enforced in Canada.

- November 8, 2018: The Minister of Justice approved the United States' request.
- July 18, 2019: The AGC applied for and was granted the BCSC Forfeiture Order.
- August 13, 2019: The AGC served the BCSC Forfeiture Order on counsel for the Securities Exchange Commission and the applicants, and advised that they would not be held to the 30-day application period.
- December 4, 2020: The first application for disclosure was dismissed by Williams J. in *Bandfield 2020*. In *Bandfield 2020*, the procedural history and relationship between Mr. Mulholland and Mr. Bandfield is also set out.
- October 12, 2021: The applicants filed a notice of application with a constitutional challenge to s. 9.4 of the Act.
- September 20, 2022: The application to strike down s. 9.4 of the Act was dismissed in a decision indexed as *United States v. Bandfield*, 2022 BCSC 1643 [*Bandfield 2022*].
- March 3, 2023: The applicants filed a notice of application for relief from forfeiture pursuant to ss. 462.41(3) and 462.42 of the Criminal Code.
- September 20, 2023: The applicants filed a notice of application for disclosure in the relief from forfeiture proceedings.
- September 27, 2023: On one of the three days that had been set for the hearing of the application for relief from forfeiture, the disclosure application was heard.

[10] Following that hearing, a further case management conference ("CMC") was to be set by the parties for the week of October 30, 2023, in order to determine how best to proceed with the disclosure application after the AGC's reply to the relief from forfeiture application was filed on October 20, 2023. The CMC was held on February 22, 2024.

[11] At that hearing, I enquired of the AGC if the change in policy regarding disclosure in extradition proceedings was applicable in MLA matters. In supplemental submissions, the AGC advised the Court that:

1. The Court has asked the AGC to advise whether the policy of the Department of Justice has changed regarding the disclosure of exculpatory evidence in its possession following on recommendation no. 11 of the House Standing Committee's report entitled *Reform of Canada's Extradition System*. In the Minister's Response of October 5, 2023, he noted that all but one of the 14 recommendations had been implemented which "includes the practice of disclosing any exculpatory evidence in the possession of the government to the person sought for extradition".

2. This approach does not extend to MLA cases because in that context Canada is not necessarily dealing with persons who have been charged with anything. We have confidentiality requirements under the treaty by virtue of the fact that these cases are often at the investigative stage. Accordingly, there is no policy with respect to exculpatory evidence in the MLA context and none is contemplated.
3. In the present case, neither Ms. Mulholland nor her companies are charged with any criminal offence. The onus is upon her to establish the basis for her claim that she is the owner of the properties at issue.

III. Statutory framework

[12] The relevant provisions of the Act state:

Foreign Orders for Restraint, Seizure and Forfeiture of Property in Canada

Orders of forfeiture

9.4 (1) When a written request is presented to the Minister by a state or entity, other than the International Criminal Court referred to in section 9.1, for the enforcement of an order of forfeiture of property situated in Canada issued by a court of criminal jurisdiction of the state or entity, the Minister may authorize the Attorney General of Canada or an attorney general of a province to make arrangements for the enforcement of the order.

Grounds for refusal of request

- (2) The Minister shall refuse the request if he or she
 - (a) has reasonable grounds to believe that the request has been made for the purpose of punishing a person by reason of their race, sex, sexual orientation, religion, nationality, ethnic origin, language, colour, age, mental or physical disability or political opinion;
 - (b) is of the opinion that enforcement of the order would prejudice an ongoing proceeding or investigation;
 - (c) is of the opinion that enforcement of the order would impose an excessive burden on the resources of federal, provincial or territorial authorities;
 - (d) is of the opinion that enforcement of the order might prejudice Canada's security, national interest or sovereignty; or
 - (e) is of the opinion that refusal of the request is in the public interest.

Filing of order

- (3) On receipt of an authorization, the Attorney General of Canada or an attorney general of a province may file a copy of the order with the superior court of criminal jurisdiction of the province in which all or part of the property that is the subject of the order is believed to be located. On being filed, the order shall be entered as a judgment of that court and may be executed anywhere in Canada.

Deemed filing

- (4) An order that is filed under subsection (3) by an attorney general of a province is deemed to be filed by the Attorney General of Canada.

Conditions

- (5) Before filing an order, the Attorney General of Canada or an attorney general of a province must be satisfied that
- (a) the person has been convicted of an offence within the jurisdiction of the state or entity;
 - (b) the offence would be an indictable offence if it were committed in Canada; and
 - (c) the conviction and the order are not subject to further appeal.

Effect of registered order

- (6) From the date it is filed under subsection (3), subject to subsection (4),
- (a) an order of forfeiture of proceeds of crime has the same effect as if it were an order under subsection 462.37(1) or 462.38(2) of the Criminal Code; and
 - (b) an order for the forfeiture of offence-related property has the same effect as if it were an order under subsection 490.1(1) or 490.2(2) of the Criminal Code, subsection 16(1) or 17(2) of the Controlled Drugs and Substances Act or subsection 94(1) or 95(2) of the Cannabis Act, as the case may be.

Filing of amendments

- (7) When an order is filed under subsection (3), a copy of any amendments made to the order may be filed in the same way as the order, and the amendments do not, for the purpose of this Act, have effect until they are registered.

Notice

- (8) When an order has been filed under subsection (3),
- (a) an order of forfeiture of proceeds of crime shall not be executed before notice in accordance with subsection 462.41(2) of the Criminal Code has been given to any person who, in the opinion of the court, appears to have a valid interest in the property; and

- (b) an order of forfeiture of offence-related property shall not be executed before
- (i) notice in accordance with subsection 490.41(2) of the Criminal Code, subsection 19.1(2) of the Controlled Drugs and Substances Act or subsection 98(2) of the Cannabis Act has been given to any person who resides in a dwelling-house that is offence-related property and who is a member of the immediate family of the person charged with or convicted of the offence in relation to which property would be forfeited, and
- (ii) notice in accordance with subsection 490.4(2) of the Criminal Code, subsection 19(2) of the Controlled Drugs and Substances Act or subsection 97(2) of the Cannabis Act has been given to any person who, in the opinion of the court, appears to have a valid interest in the property.

Application of Criminal Code

- (9) Subsection 462.41(3) and section 462.42 of the Criminal Code apply, with any modifications that the circumstances require, to a person who claims an interest in proceeds of crime, and subsections 490.4(3) and 490.41(3) and section 490.5 of the Criminal Code, subsections 19(3) and 20(4) of the Controlled Drugs and Substances Act and subsections 97(3) and 99(4) of the Cannabis Act apply, with any modifications that the circumstances require, to a person who claims an interest in offence-related property.

Presumption

- (10) A person who is convicted of an offence in relation to which an order of forfeiture is issued by a court of criminal jurisdiction of a state or entity is deemed to be a person referred to in paragraph 462.41(3)(a) or 462.42(1)(a) of the Criminal Code.

Seized Property Management Act applies

- (11) The provisions of the Seized Property Management Act apply in respect of all property forfeited under this section.

[Emphasis added.]

- [13] The provision allows for the registration of foreign forfeiture orders without prior notice to any potentially affected parties. Subsection 9.4(8)(a) provides for notice to affected parties prior to execution of the judgment. Subsection 9.4(9) incorporates ss. 462.41(3) and 462.42 of the Criminal Code, the former of which reads as follows:

Order of restoration of property

- (3) Where a court is satisfied that any person, other than
 - (a) a person who is charged with, or was convicted of, a designated offence, or

- (b) a person who acquired title to or a right of possession of that property from a person referred to in paragraph (a) under circumstances that give rise to a reasonable inference that the title or right was transferred for the purpose of avoiding the forfeiture of the property,

is the lawful owner or is lawfully entitled to possession of any property or any part thereof that would otherwise be forfeited pursuant to subsection 462.37(1) or (2.01) or 462.38(2) and that the person appears innocent of any complicity in an offence referred to in paragraph (a) or of any collusion in relation to such an offence, the court may order that the property or part thereof be returned to that person.

- [14] As noted above, s. 462.42 allows a person claiming an interest in forfeited property to make an application for its return or payment of its value within 30 days of the forfeiture. It states:

Application by person claiming interest for relief from forfeiture

462.42 (1) Any person who claims an interest in property that is forfeited to Her Majesty under subsection 462.37(1) or (2.01) or 462.38(2) may, within thirty days after the forfeiture, apply by notice in writing to a judge for an order under subsection (4) unless the person is

- (a) a person who is charged with, or was convicted of, a designated offence that resulted in the forfeiture; or
- (b) a person who acquired title to or a right of possession of the property from a person referred to in paragraph (a) under circumstances that give rise to a reasonable inference that the title or right was transferred from that person for the purpose of avoiding the forfeiture of the property.

Fixing day for hearing

- (2) The judge to whom an application is made under subsection (1) shall fix a day not less than thirty days after the date of filing of the application for the hearing thereof.

Notice

- (3) An applicant shall serve a notice of the application made under subsection (1) and of the hearing thereof on the Attorney General at least fifteen days before the day fixed for the hearing.

Order declaring interest not subject to forfeiture

- (4) Where, on the hearing of an application made under subsection (1), the judge is satisfied that the applicant is not a person referred to in paragraph (1)(a) or (b) and appears innocent of any complicity in any designated offence that resulted in the forfeiture or of any collusion in relation to any such offence, the judge may make an order declaring that the interest of the applicant is not affected by the forfeiture and declaring the nature and extent of the interest.

Appeal from order under subsection (4)

- (5) An applicant or the Attorney General may appeal to the court of appeal from an order under subsection (4) and the provisions of Part XXI with respect to procedure on appeals apply, with such modifications as the circumstances require, to appeals under this subsection.

Return of property

- (6) The Attorney General shall, on application made to the Attorney General by any person who has obtained an order under subsection (4) and where the periods with respect to the taking of appeals from that order have expired and any appeal from that order taken under subsection (5) has been determined,
- (a) direct that the property or the part thereof to which the interest of the applicant relates be returned to the applicant; or
 - (b) direct that an amount equal to the value of the interest of the applicant, as declared in the order, be paid to the applicant.

[Emphasis added]

IV. discussion

[15] This application engages both the law of disclosure in MLA Treaty proceedings, as well as the application of criminal law disclosure principles to the relief from forfeiture proceedings.

[16] It is not necessary to repeat at length the discussion of the operation and effect of s. 9.4, as set out in both Bandfield 2020 and Bandfield 2022.

A. Disclosure in MLA Treaty Proceedings

[17] The following brief quote from Bandfield 2020 provides the context of the Act.

[23] In my view, a proper understanding of the legislative underpinning of the Mutual Legal Assistance Treaty ("MLAT") regime and the relevant legal principles is essential to an analysis of the issues that this application presents. I have taken the liberty of quite substantially adopting the description of the law as set out in the submissions of the Attorney General. To my mind, it is sound and comprehensive, and I do not understand the applicants to contest it:

A. Mutual Legal Assistance in Criminal Matters

29. The Act is a complete code that is to be given a broad and purposeful interpretation in order to ensure that Canada meets its international treaty obligations.¹⁹ [Footnote: Section 3 of the Act provides that in the event of an inconsistency between the Act and another Act of Parliament, the provisions of the Act will prevail to the extent of the inconsistency.] The Act provides various methods for Canada to cooperate with its treaty partners in the fight against transnational crime. One of the overarching objectives in both extradition and MLAT is to prevent international borders from being a means to criminals to escape justice or to escape the consequences of criminal activities.
30. The Act implements Canada's international obligations in the area of mutual legal assistance.²⁰ [Footnote: *Russian Federation v. Pokidyshev* (1999), 138 C.C.C. (3d) 321 (Ont. C.A.) at paras. 15-16; and *Belgium v. Suthanthiran*, 2017 ONCA 343 ("Suthanthiran") at para. 48, application for leave to appeal dismissed, [2017] S.C.C.A. No. 256).] The legislative objective of the Act is to "provide the widest measure of mutual legal assistance in criminal matters in a prompt and efficient manner."²¹ [Footnote: Ramsden at p. 304, para. 40; Suthanthiran at para. 46.]
31. When the Act was amended to add ss. 9.3 (restraint) and 9.4 (forfeiture) in 2001, the then Minister and Attorney General of Canada described the purpose of these amendments as follows: "Canada must be in a position to offer the necessary assistance to foreign countries whose courts have ordered confiscation of tainted property located in Canada."²² [Footnote: House of Commons Debates, vol. 137, no. 046 (23 April 2001) at p. 2955 (Hon. Anne McLellan).]
- [18] There is no provision regarding disclosure in the Act.
- [19] Disclosure for proceedings under the Act was discussed in *In the Matter of an Application Pursuant to s. 17(2) of the Mutual Legal Assistance in Criminal Matters Act and Rafal Kurek*, 2005 BCSC 516 [Curtis]. The case concerned an application for disclosure of materials and evidence which were the basis of the ex parte order for and examination order under the Act. In dismissing the application, the Court stated:

- [24] The Act does not provide a right of statutory disclosure. Stinchcombe disclosure principles are not engaged as the applicants liberty is not at risk. [U.S.A. v. El-Jabsheh, (June 12, 2001, Vancouver Registry Docket No BL0177, BCSC, ¶27]. Disclosure requirements applicable to domestic criminal proceedings are not necessarily applicable to proceedings under the Act. [A.L.T. Navigation Ltd. v. U.S.A. (2002), 215 Nfld. & P.E.I.R. 1, [2002] N.J. No. 166 (S.C.T.D.), at ¶31].
- [20] Disclosure was also sought in Attorney General of Canada v. Suthanthiran, 2015 ONSC 3573, where the applicants challenged a sending order under the Act. They sought disclosure of the request to send and evidence in support. In dismissing the application, the Ontario Court stated:
- [10] The disclosure rights and obligations under the Act are analogous to those in the context of extradition cases. The right to make full answer and defence is not engaged in proceedings under this legislation, with the result being that disclosure is limited to the material relied upon in seeking the judicial authorization at issue (See: Canada v. Curtis, 2005 BCSC 516, 65 W.C.B. (2d) 246).
- [21] I note that both Suthanthiran and Bandfield 2020 discussed the operation of the test in R. v. Larosa, 166 C.C.C. (3d) 449, 2002 CanLII 45027 (Ont. C.A.). In the present case, since there is no allegation of state misconduct, the parties agree that this test has no application.
- [22] As stated in Suthanthiran at para. 10, the disclosure rights and obligations under the Act have been found to be analogous to those in the context of extradition cases. Disclosure in extradition cases was the subject of the decision in United States of America v. Kwok, 2001 SCC 18. In that case, the Court stated:

97 Throughout the process of his extradition, the appellant has sought disclosure of additional materials with a view to establishing unjustified violations of his Charter rights. More specifically, the appellant demanded disclosure of (i) all of the Canadian investigation into his alleged involvement in the trafficking of narcotics; (ii) all discussions between Canadian police and American investigative authorities; and (iii) all discussions between Canadian police and both Canadian and American prosecuting authorities concerning the decision to proceed in the United States rather than in Canada. The appellant argues that the rationale in R. v. Stinchcombe, [1991] 3 S.C.R. 326, imposes on both the Requesting and Requested States an obligation to disclose all relevant information as early as during the judicial extradition hearing. He submits that the refusal by the extradition judge to order disclosure of such material effectively denied him an opportunity to assess whether his s. 6 rights were infringed, thus precluding any court from determining that issue.

98 In my view, the decision of this Court in Dynar, supra, is dispositive of the appellant's claim for disclosure in this case.

99 Stinchcombe, *supra*, dealt with disclosure in a criminal trial context where the right to make full answer and defence is directly engaged on issues of guilt or innocence. Extradition proceedings are not concerned with issues of guilt or innocence. Rather, they are in some ways akin to preliminary inquiries.

- [23] In this case the applicants are not facing extradition or a loss of liberty. There is no assertion of Charter rights. Rather, they say that disclosure is necessary to ensure a fair hearing on the application for relief from forfeiture of the properties, and to allow an informed decision regarding the evidence to call in the hearing of that application which is a Criminal Code proceeding.
- [24] I find that the Act does not impose an obligation for disclosure on the AGC either through explicit language in the statute or through a reasonable interpretation of the intention and purpose of the Act. I will next consider the question of disclosure obligations, if any, arising from the importation into the Act of the Criminal Code provisions regarding relief from forfeiture.

B. Disclosure in Relief from Forfeiture Proceedings

- [25] The AGC submits that the importation of the Criminal Code provisions is meant to supplement the provisions for forfeiture under the Act only insofar as providing the mechanism to be applied to proceedings for relief from forfeiture under the Act. It does not permit the application of other sections, principles, or standards from the Criminal Code writ large.
- [26] The applicants submit that the state's disclosure obligations in criminal forfeiture proceedings arise from the law of disclosure anchored in the common law, which is rooted in the principles of trial fairness and natural justice.
- [27] They rely on *Quebec (Attorney General) v. Laroche*, 2002 SCC 72 at paras. 51-55 in support of the proposition that one of the purposes of Part XII.2 of the Criminal Code is to punish crimes, which is Canada's objective in bringing its underlying application to enforce the US Forfeiture Order. They say that given that the current proceedings serve a criminal law purpose, due process is required to ensure compliance with the Charter and adequate protection of parties' civil rights.
- [28] Although *Laroche* involved a restraint order and special orders of seizure rather than enforcement of a foreign forfeiture order, it is not in dispute that the Act has a criminal purpose. As stated in *Bandfield* 2022:
- [59] The fact that the order at issue is criminal, as opposed to civil, is buttressed by the context in which the Act and the specific provisions at issue came to be. Justice Doherty discussed the genesis of the Act, and its essential nature as a tool to fight transnational crime, in *Mutual Legal Assistance in Criminal Matters Act (Re)* (1999), 178 D.L.R. (4th) 91 (Ont. C.A.):

- [15] The purpose of this Act is clear. By 1988, when the Act was proclaimed, international crime had become a major problem. Criminals, especially sophisticated ones, used the limits imposed on police and prosecutors by national borders to facilitate their criminal schemes and avoid detection: *United Kingdom v. Ramsden* (1996), 108 C.C.C. (3d) 289 at 294-95 (Ont. C.A.), leave to appeal to S.C.C. refused May 1, 1997. In 1988, Canada had international obligations under various treaties and conventions to assist other states in the investigation and detection of crime, but had no domestic legislation in place to provide the necessary assistance and co-operation. The Act filled that void and must be read with that purpose in mind.
- [29] However, s. 9.4 of the Act is not focused on the tests of obtaining a forfeiture order under the Criminal Code, but rather upon the enforcement and execution of the foreign forfeiture order in Canada.
- [30] A party claiming an interest has an opportunity to assert that interest by way of ss. 462.41(3) and 462.42 as they apply to domestic forfeiture orders. The operation of and distinction between the two Criminal Code sections was explained in *R. v. 170888 Canada Ltée*, 174 D.L.R. (4th) 340, 1999 CanLII 13794 at 347-48 (Que. C.A.):

This, of course, does not mean that third party claims can only be heard after the forfeiture. Section 462.41 plainly stipulates the contrary.

But it does indicate that third party claims which, for whatever reason, were not addressed during the forfeiture hearing under s. 462.41, can and should be addressed on the hearing of an application under s. 462.42, which is not a hearing on sentence.

By its very terms, s. 462.42 provides a mechanism by which third parties who claim an interest in property forfeited under s. 462.37 may apply to a judge for relief from the forfeiture order made at the sentencing stage of the trial.

It is important to underline in this context that s. 462.42 applications, unlike orders contemplated by s. 462.41(3), are not considered by the sentencing court, but rather by "a judge". In virtue of s. 462.3, "judge", under Part XII.2, means "a judge as defined in section 552 or a judge of a superior court of criminal jurisdiction". Section 552, in turn, provides that "judge" means, in all jurisdictions except Quebec, a judge of the superior court of criminal jurisdiction. In Quebec alone it means a provincial court judge or, more precisely, a judge of the Court of Quebec.

Except in Quebec, applications for relief under s. 462.42 will thus be dealt with by a high court judge even where the trial and sentencing -- including forfeiture -- have taken place in a criminal court of inferior jurisdiction.

This underlines to me the different character and purpose of a forfeiture hearing under s. 462.41, on one hand, and the hearing of an application for relief from that order under s. 462.42, on the other.

The former, concerned with a component of the sentence, focuses primarily on the confiscation, or forfeiture to Her Majesty, of the proceeds of the offender's crimes against society. In fixing an appropriate sanction, the trial judge may take into account representations by innocent third parties who have an evident interest in the property subject to forfeiture. And, in imposing the sentence, the judge may substitute a fine of equivalent value where the property cannot be forfeited. But the principal object of the hearing is to determine whether the targeted property can be forfeited, pursuant to s. 462.37, as proceeds of crime.

A hearing under s. 462.42, on the other hand, focuses on the effect, as against innocent third parties, of the forfeiture to Her Majesty of property in which they have a legitimate interest. The dispute is no longer, at that stage, between the offender and the Crown, but rather between the Crown and the third-party applicant.

And there is nothing in the language of s. 462.42 to exclude from its ambit third parties whose claimed interest in the forfeited property is possessory or proprietary in nature. On the contrary, it is a recourse afforded "any person who claims an interest in the property" and is not excluded by reason of collusion or because the interest arose in an attempt to avoid forfeiture of the property.

The very purpose of s. 462.42 is to provide relief from an order of forfeiture which has already been made by the trial judge under s. 462.37(1) (or 462.38(2)). Where the applicant, on the hearing required by s. 462.42, establishes a valid claim with respect to all or part of the property forfeited, the order of forfeiture is not retroactively rescinded. Rather, the Attorney General is required, pursuant to s. 462.42(6), to either return to the applicant property to which a valid claim has been established, or to remit to the applicant "an amount equal to the value of the interest of the applicant, as declared in the order [under s. 462.42 (4)]".

In short, the property forfeited under s. 462.37(1) as proceeds of crime remains confiscated from the viewpoint of the offender, but the adverse effect of the forfeiture on innocent third parties is attenuated. This objective of s. 462.42 is accomplished by declaring that the legitimate interests of the applicant are not affected by the forfeiture. In the result, the Crown may be required, for example, to respect the applicant's rights in the property, to turn it over to the applicant, or to remit to the applicant an amount equal to the value of the interest recognized by the judge.

[Emphasis in original.] [Underlining added.]

[31] The s. 462.42 application process is not a hearing on sentence. Both provisions allow hearing of third party claims at different stages. Neither contemplate that the third party faces jeopardy other than an unsuccessful application regarding the property in issue. The rights afforded to an accused person and the Stinchcombe standard of disclosure cannot be expanded into this context.

[32] It is helpful to revisit the much-cited disclosure principle stated in Stinchcombe at 341:

The trial judge on a review should be guided by the general principle that information ought not to be withheld if there is a reasonable possibility that the withholding of information will impair the right of the accused to make full answer and defence.

[33] The applicants submit that they all face jeopardy, and unlike an accused person, are unaware of the nature and scope of that jeopardy. Without disclosure they will not be able to make an informed election as to what evidence to marshal. They say that that decision crucially affects their rights in a fundamental way in relation to their interests in the BC Properties. Further, Ms. Mulholland submits that the need for disclosure is amplified due to her husband's criminal conviction in the United States.

[34] However, on the evidence, it is only the applicant third parties' property or economic and civil rights that are at stake. That is determinative. As stated in *Villeneuve v. Canada*, 140 C.C.C. (3d) 564 at 574, 1999 CanLII 13333 (Que. C.A.):

Although the provision is found in the Criminal Code, it is not a question of determining criminal liability of any nature whatsoever. This is why the presumption of innocence does not apply to the present matter. It is rather a question of determining the economic and civil rights of a third party who claims to have a right with respect to assets which have been declared proceeds of criminal offences and forfeited for the benefit of the Crown.

[35] That the s. 462.42 proceedings incorporated into the Act serve a criminal law purpose is an oversimplification of the issues. The issues to be decided are not akin to a domestic criminal prosecution. The applicants are not entitled to the rights, including those of disclosure, afforded to persons accused in criminal prosecutions.

[36] With regard to the civil rights characterisation, and the balance of probabilities standard of proof applicable, the applicants submit that, at a minimum, the disclosure provisions in Rule 7-1 of the British Columbia Supreme Court Civil Rules B.C. Reg. 168/2009 [Rules] ought to apply. However, the Rules only apply to proceedings as defined in the Rules. This is not such a proceeding.

[37] The application for disclosure is therefore dismissed.

[38] The parties are directed to arrange a CMC through Supreme Court Scheduling at the earliest possible date to determine the next steps.

"The Honourable Madam Justice Watchuk"

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