Case Name:

British Columbia (Director of Civil Forfeiture) v. Huynh

**Civil Forfeiture Action in Rem Against
$141,317.95 representing the proceeds of the sale
of the Lands and Structures situated at 6066 164A Street,
Surrey, B.C., with a Legal Description of Parcel Identifier
026-246-678 Lot 12 Section 12 Township 2 New Westminster
District Plan BCP16529 and the Fruits or the Proceeds
therefrom (the "Proceeds")
Between
Director of Civil Forfeiture, Plaintiff, and
The Owners and all Others Interested in the Proceeds in
particular Trinh Tu Huynh, Defendant**

[2012] B.C.J. No. 1005

2012 BCSC 740

Docket: S131858

Registry: New Westminster

British Columbia Supreme Court
New Westminster, British Columbia

T.A. Schultes J.

Heard: April 5, 2012.
Oral judgment: April 25, 2012.

(49 paras.)

Civil litigation -- Civil procedure -- Trials -- Severance of issues or parties -- Application by defendant for severance of Charter issues from civil forfeiture proceedings allowed -- Police executed warrant and seized 920-plant marijuana grow operation -- Drug charges were stayed -- Director of Civil Forfeiture initiated civil forfeiture proceedings based on information supplied by police -- Defendant intended to challenge validity of warrant and lawfulness of manner in which search was conducted -- Severance of Charter issues and related limitations on disclosure were in best interests of efficient litigation, as determination of Charter issues had potential to decide outcome of forfeiture proceeding -- British Columbia Supreme Court Civil Rules, Rule 12-5(67).

Criminal law -- Powers of search and seizure -- Search warrants -- Validity -- Seizure -- Forfeiture of items seized -- Application by defendant for severance of Charter issues from civil forfeiture proceedings allowed -- Police executed warrant and seized 920-plant marijuana grow operation -- Drug charges were stayed -- Director of Civil Forfeiture initiated civil forfeiture proceedings based on information supplied by police -- Defendant intended to challenge validity of warrant and lawfulness of manner in which search was conducted -- Severance of Charter issues and related limitations on disclosure were in best interests of efficient litigation, as determination of Charter issues had potential to decide outcome of forfeiture proceeding -- British Columbia Supreme Court Civil Rules, Rule 12-5(67).

Criminal law -- Constitutional issues -- Canadian Charter of Rights and Freedoms -- Procedure -- Application by defendant for severance of Charter issues from civil forfeiture proceedings allowed -- Police executed warrant and seized 920-plant marijuana grow operation -- Drug charges were stayed -- Director of Civil Forfeiture initiated civil forfeiture proceedings based on information supplied by police -- Defendant intended to challenge validity of warrant and lawfulness of manner in which search was conducted -- Severance of Charter issues and related limitations on disclosure were in best interests of efficient litigation, as determination of Charter issues had potential to decide outcome of forfeiture proceeding -- British Columbia Supreme Court Civil Rules, Rule 12-5(67).

Application by the defendant, Huynh, for a trial of her application for Charter remedies in the context of a civil forfeiture case and related relief. The Director of Civil Forfeiture applied for forfeiture of $141,000 representing proceeds of sale of the defendant's former property. The Director contended that the property was used to commit unlawful activities or was purchased or maintained from the proceeds of those activities. In 2007, RCMP executed a warrant at the property and discovered a 920-plant marijuana grow operation. The defendant and two others were charged with drug offences. In 2010, the charges were stayed. The RCMP forwarded information from its investigation to the Director. The defendant opposed forfeiture on the basis that the Information to Obtain (ITO) the search warrant was grossly deficient. The defendant raised issues concerning the timing and measurement of electrical consumption. The defendant further alleged that the dynamic entry into the residence constituted a Charter breach. The defendant gave notice that she intended to seek exclusion of evidence and a stay of proceedings during the civil forfeiture trial. The defendant applied for a trial of her application for Charter remedies and orders restricting discovery to matters relevant to the Charter issues until such issues were determined. The Director argued in favour of a single trial encompassing all issues raised.

HELD: Application allowed. Taken as a whole, the deficiencies in the ITO raised by the defendant presented an arguable case that the warrant was invalid. A serious Charter breach was a proper basis for exclusion of evidence in the civil forfeiture context. The arm's length relationship between the Director and the RCMP and the distinction between the criminal and civil proceedings were not conclusive of weighing the admissibility of evidence flowing from a Charter breach. In any event, as a matter of practicality, it was inevitable that the Charter applications would have to be segregated and resolved at the outset of trial. There was a meaningful possibility that the outcome of the Charter applications would resolve the case. Severance of the Charter issues and the related relief, were in the best interest of efficient litigation.

Statutes, Regulations and Rules Cited:

British Columbia Supreme Court Civil Rules, Rule 7-1(22), Rule 7-2(18), Rule 12-5(67)

Canadian Charter of Rights and Freedoms, 1982, R.S.C. 1985, App. II, No. 44, Schedule B, s. 24(1), s. 24(2)

Controlled Drugs and Substances Act, S.C. 1996, c. 19,

Counsel:

Counsel for the Plaintiff (via teleconference): J.G. Morley.

Counsel for the Defendant: B. Makohn, (A/S for J. Solomon).

Oral Reasons for Judgment

1 **T.A. SCHULTES J.** (orally):-- This is an application by Ms. Huynh, the defendant, to have the trial of the application for *Charter* remedies in this case heard before the other trial issues. She also seeks orders restricting her examination for discovery and her obligation to list and produce documents only to those matters that are relevant to the *Charter* issues, until those issues have been decided.

2 In this action the Director is seeking forfeiture of about $141,000. The money represents the proceeds of the sale of Ms. Huynh's former property. The basis for the application will be that the property was used to commit unlawful activities, or was purchased or maintained from the proceeds of those activities.

3 The action arose as a result of an RCMP investigation under the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 (*"CDSA")* in which a search warrant was executed at the residence on the property on November 22, 2007. A marihuana growing operation involving 920 plants was discovered. Ms. Huynh and two others were charged with offences under the *CDSA*.

4 On December 31, 2007, the Crown obtained a restraint and management order for the property under the *CDSA*. The Crown intended to seek forfeiture of the property pursuant to those provisions in the event of a conviction. However, Crown counsel directed a stay of proceedings on the *CDSA* charges on November 30, 2010. Following the stay of proceedings, in December of 2010, the RCMP forwarded information about their investigation of offences at the property to the Director.

5 Ms. Huynh's counsel has raised concerns about this process. However, absent some constitutional deficiency being found in the legislation that empowers the Director, I can see nothing inherently improper about evidence that has been obtained by police forces but that turns out to be insufficient to support a prosecution being passed onto the Director. Indeed, unless there were parallel criminal and forfeiture investigations, something that might raise its own concerns, it is difficult to conceive of what other sources of information could form the basis of the Director's applications.

6 The Assistant Deputy Director explained in his affidavit that while the Director receives information from the RCMP pursuant to a federal/provincial information sharing agreement, the Director and his delegates reach their decisions about whether or not to initiate forfeiture proceedings independently of the police or the prosecution, based on their own independent legal advice from the Ministry of Attorney General's Legal Services Branch.

7 For these reasons, the manner in which the information about the defendant came to the Civil Forfeiture Office plays no part in my reasoning in this matter.

8 The critical circumstances in this application are the actions of the RCMP in seeking a search warrant and then carrying out a search of Ms. Huynh's home. Constable Kelly of the RCMP swore the information to obtain the search warrant ("ITO").

9 This ITO is alleged by Ms. Huynh's counsel to be grossly deficient. It describes the measurements of electrical consumption at the residence being conducted by a BC Hydro employee about 18 months before the theft of hydro report was made to the RCMP, which if accurate would render the results meaningless in terms of the consumption at the time the warrant was sought. It says that the two electrical measurements that led to this report were made simultaneously, even though they are also described as being taken at times four and a half hours apart. Compounding these deficiencies, Ms. Huynh's counsel submits that it would be physically impossible for a single technician, as

described in the ITO, to have done the measurements simultaneously, given the distance between the two locations at which they were taken.

10 In addition, Ms. Huynh's counsel was told informally by the prosecutor who had conduct of the criminal trial that there were additional problems with the ITO beyond those that counsel was planning to raise.

11 It is also alleged that the actual execution of the warrant constituted a *Charter* breach, because the RCMP made a dynamic entry into the residence, in the absence of any reasonable basis for believing that the customary less forceful approach would pose risks.

12 Based on the various alleged breaches, Ms. Huynh has given notice that she will be seeking remedies in this civil trial pursuant to s. 24(1) of the *Charter*, including the exclusion of the evidence that was obtained in the search, and a stay of proceedings.

13 Her counsel submits that having the central issue in the case resolved first is likely to enhance the efficient use of court resources because, given what he characterizes as the outrageous nature of the breaches, it is quite likely that the evidence will be excluded. There will then no longer be sufficient evidence on which the Director can continue beyond the first hearing.

14 With respect to the request to hold any unrelated discovery or document disclosure in abeyance, Ms. Huynh's counsel submits that it would be unfair to compel her to assist the Director in building a case against herself that can stand separately from what are likely to be inadmissible fruits of the search.

15 Counsel bases his applications on the Court's inherent jurisdiction to control its own processes, on s. 24(1) of the *Charter*, and on Rules 12-5(67) and 7-1(22) of the *Supreme Court Civil Rules*.

16 Counsel for the Director takes the position that these applications can be resolved by reference solely to the *Rules*, and the Court should adhere to the principle that *Charter* remedies should not be considered or utilized where there is a conventional procedural route available to resolve the issue.

17 In general, he emphasizes the strong presumption in our system in favour of a single trial that encompasses all the issues. He also points out the logistical problems that would follow an order for separate trials here, including but certainly not limited to the possibility of an interlocutory appeal of the decision to exclude or admit the evidence at the first hearing.

18 He argues that the way in which a judge in a civil trial should treat the reception of evidence obtained from *Charter* breaches by state agents is anything but clear at this point. In fact, he submits that it is quite likely that the Court in this case would engage in a different analysis than would have taken place in a criminal trial, with exclusion by no means a foregone conclusion.

19 While he was not in a position to assure the Court that this action will continue even if the results of the search were to be excluded, counsel does not concede that exclusion would inevitably end the matter. I gather that it may be possible by reference to electrical consumption and financial records for the Director to put together a circumstantial case that the property was being used to commit or was funded by the commission of criminal acts, outside of the search that revealed the marihuana growing operation.

20 Very fairly, counsel concedes that if I do decide to bifurcate the trial, the orders putting off all discovery and document disclosure that does not relate to the *Charter* issues should necessarily be made as well.

21 Rule 12-5(67) provides:

> The court may order that one or more questions of fact or law arising in an action be tried and

> determined before the others.

22 Rule 7-1(22) provides:

> If the party from whom discovery, inspection or copying of a document is sought objects to that discovery, inspection or copying, the court may, if satisfied that for any reason it is desirable that an issue or question in dispute should be determined before deciding on the right to discovery, inspection or copying, order that the issue or question be determined first and reserve the question of discovery, inspection or copying.

23 There is no equivalent rule dealing with examinations for discovery, but I accept that pursuant to Rule 7-2(18), which provides:

> Unless the court otherwise orders, a person being examined for discovery
>
> (a) must answer any question within his or her knowledge or means of knowledge regarding any matter, not privileged, relating to a matter in question in the action . . .

-- that I could "otherwise order" and restrict the scope of the examination to the *Charter* issues until that application is resolved.

24 With respect to severing the issues in this trial, I adopt the law as it was summarized by Madam Justice Allan in *Bramwell v. Greater Vancouver Transportation Authority*, 2008 BCSC 1180, at paras. 11 and 12:

> [11] There is ample authority for the proposition that an applicant must establish that there exist extraordinary, exceptional or compelling reasons for severance, and not merely that it would be just and convenient to order severance: [citations omitted].
>
> [12] It is true that some recent cases have held that a judge's discretion to sever an issue or issues is not restricted to "extraordinary or exceptional circumstances": [citations omitted]. However, there must be some compelling reasons to order severance, such as a real likelihood of a significant savings in time and expense.
>
> [Emphasis added]

25 It is that last possibility that is in play here. If the resolution of the *Charter* applications at the front end can save time and expense, then hearing it separately first may be appropriate. To determine whether it can, I am required to assess, to a very limited extent and taking care not to embarrass the trial judge in his or her ultimate analysis, the likelihood that the evidence of the search will be excluded and the effect that such exclusion would have on the continuation of the action.

26 On their face, these are potentially serious breaches. The dates of the hydro measurements cannot be correct, because if they were made at that time, they would have told the justice nothing about the consumption of electricity at the time the warrant was applied for and could not constitute an aspect of reasonable grounds. If they were incorrect and merely the results of word processing and proofreading errors, which Director's counsel suggested during argument, then the officer who swore the ITO was extremely careless, and the justice who accepted those representations as part of the grounds may not have made sufficient inquiries to ensure an accurate factual basis for the application.

27 Further, even if the dates of the two measurements were incorrect, the times that they were done on that on that

date are different. This contradicts the subsequent assertion in paragraph 7 of the ITO that they were made simultaneously.

28 However, the argument that simultaneous measurements by a single technician are a physical impossibility, as asserted by counsel for Ms. Huynh, requires evidence about how these measurements are carried out that is not before me, so I cannot give any weight to that alleged shortcoming. Nor can I give any weight to the information from former prosecuting counsel that there were additional concerns with the warrant, over and above what had been included in Ms. Huynh's *Charter* notice. Director's counsel argues that this is hearsay, but we are on an interlocutory application so that is not the bar. The real problem is that we simply do not know what those further concerns were, so I am not able to assign weight to them.

29 However, taken as a whole, these deficiencies present at least an arguable case that no justice acting judicially could have granted a search warrant on this evidence. If that is the conclusion at trial, it will leave the Director in the position of having to justify a warrantless search.

30 As in the case of the impossibility of the simultaneous electrical measurements and the question of what else motivated Crown counsel's conclusion the prosecution could not proceed, I currently lack a sufficient evidentiary basis to assess the viability of the *Charter* arguments based on the dynamic entry of the residence.

31 The next stage is to ask how a trial judge is likely to analyze these potential *Charter* breaches in the civil litigation context.

32 Counsel for the Director relies on the decision of *Director of Civil Forfeiture v. Shoquist*, 2011 BCSC 1199, in which Mr. Justice R. D. Wilson concluded that there was nothing abusive about the Director proceeding with a forfeiture application based on the results of an invalid search warrant obtained by the RCMP, and that under the abuse of process analysis the RCMP's conduct was not so egregious as to disentitle the Director to proceed. I note however that this decision was a ruling on the defendant's application to strike the notice of civil claim as being an abuse in itself. It did not purport to rule on the admissibility of the evidence obtained by the invalid search in a civil proceeding.

33 I have also considered the language in *D.P. v. Wagg* (2004), 239 D.L.R. (4th) 501 (Ont. C.A.), to the effect that it is an error to transplant the analysis of the exclusion of conscriptive evidence following a *Charter* breach in a criminal case directly into civil proceedings, without first having regard to the criminal law's particular focus on avoiding self-incrimination by an accused person.

34 Despite that significant distinction, it is still significant that the court in *Wagg* went on to observe, at para. 69:

> Therefore, whether the *Charter* applies directly through s. 24 or indirectly by infusing the question of the admission of the defendant's statement in the civil case with *Charter* values, it seems to me that one is inevitably bound to consider all the circumstances of the case. It is only then that a court can decide whether admission of the evidence would bring the administration of justice into disrepute. In my view, only the trial judge would be in a position to make that determination. The trial judge would be required to consider, for example, the seriousness of the *Charter* violation that led to the evidence having been obtained. The trial judge would also have to take into account the effect of excluding the evidence on the administration of justice bearing in mind, for example, that the plaintiff played no part in the *Charter* violation and that she may require the evidence to assist her in proving her case.

35 Even giving that last sentence its full potential weight, it is still clear that a serious *Charter* violation by state authorities can be a proper basis for exclusion of evidence in the civil context, and that the separation of the Director from the RCMP in the present case will be only one factor for the Court's consideration.

36 I consider counsel for the Director's argument that a breach will simply be a consideration in deciding whether the

standard for forfeiture has been met to be somewhat too optimistic.

37 Certainly, one of Ms. Huynh's authorities, *Noel v. Botkin* (1995), 5 B.C.L.R. (3d) 317 (S.C.) although not an extensively reasoned decision, shows a *Charter* breach leading to the exclusion of evidence in a civil trial every bit as directly as in a criminal one. A more recent example of such a vigorous approach is the case of *Alberta (Justice and Attorney General) v. Petros*, 2011 ABQB 541. There are also cases holding to the contrary, for example *Byers (Guardian Ad Litem) v. Clancy* (1992), 75 B.C.L.R. (2d) 334 (S.C.), which, while accepting that the remedy of exclusion following a breach was available in a civil trial, nonetheless gave greater weight to the lack of connection between the defendant and the police who had committed the breach, and admitted the evidence.

38 My conclusion is that a trial judge in this case will have full authority to exclude the results of the search if *Charter* breaches are found, and that the Director's arm's-length relationship with the police and the distinct character of the present action, in terms of its empowering legislation and the role played by the Director's office, will be relevant factors but are by no means conclusive in the weighing process.

39 The other practical matter that I find is relevant is that, even if this trial were to proceed on all issues, it seems inevitable, in light of their prominence, that the *Charter* applications would be have segregated from the main trial to some extent and resolved at the outset, in what would be the civil equivalent of a criminal *voir dire*. It is also likely that there would have to be some gap between that process and the rest of the main trial, during which the trial judge arrived at his or her ruling on admissibility, particularly with regard to the factors favouring admission or exclusion under s. 24(2). Other than the facts that the continuation dates might be set sooner in that situation than for a separate second trial and that discovery and document disclosure for all issues in the case would already have been completed, there is little meaningful difference between the two ways of proceeding from a scheduling point of view.

40 I am not dismissing the possibility of an interlocutory appeal of the *Charter* ruling and its potential to delay the second trial, nor do I mean to disparage other potential means of proving the claim if the search evidence is excluded, but at this point, besides what I infer would be evidence of electricity consumption beyond any normal household use, the existence of evidence to even support a second trial is quite speculative and depends in part on documents and discovery answers that have not yet been obtained. Therefore it is not clear that there will be any other viable proceeding that an appeal could delay.

41 As I have mentioned, counsel for the Director was careful not to warrant to the Court that the action will continue regardless of the results of the search. At this point, I feel comfortable in finding that the Director's ability to continue would have to be, at very least, carefully reviewed.

42 Considering all of these factors, I conclude that there is a meaningful possibility that the outcome of the *Charter* applications could resolve this case completely. This is one of those relatively uncommon cases that must have been envisioned by the framers of the rule, in which deciding one issue first offers benefits that significantly outweigh the presumptive inefficiency of litigating in slices.

43 The analogy I draw here is to personal injury cases in which there is a really meaningful possibility that liability will not be found and that therefore that an assessment of damages will never be necessary. I am aware of the difference that, rather than being precluded by an unfavourable finding on the first trial from continuing, the plaintiff's case here will merely be on a form of life support, but I still conclude that severance is in the best interests of efficient litigation.

44 My first order is that, subject always to the discretion of the trial judge, the *Charter* issues relating to the search of Ms. Huynh's residence will be heard first, separately from the remaining issues in the statement of claim. For greater certainty, I should make it clear that these will be two hearings of separate issues, but in the context of a single trial, and that there should be a single trial judge for both.

45 Because I have made this decision based on the application of Rule 12-5(67), it is not necessary for me to consider the alternative grounds of the inherent jurisdiction of the Court or s. 24(1) of the *Charter*. I should say I would not have

been persuaded to grant *Charter* relief in any event, because that would have been begging the question of whether the alleged *Charter* breaches will render it unfair for Ms. Huynh to be compelled to participate in the full discovery and trial process. Those breaches have yet to be proven. I have resolved this solely issue on trial convenience grounds within the *Supreme Court Rules*.

46 That leaves the question of whether Ms. Huynh should be relieved from the requirements of being examined for discovery and listing and disclosing documents in relation to matters beyond the circumstances of the search itself. I consider the concession by counsel for the Director that these orders should follow the making of the severance order sought by Ms. Huynh to be conclusive, but even in the absence of it I would have been satisfied that it is conducive to focused and economical litigation to put aside these inquiries, which can be time consuming and expensive, on matters extraneous to the *Charter* applications, until it is known whether the evidence of the search will be admitted and, if it will not, whether the Director intends to continue without it.

47 Again, I would not grant *Charter* relief here, because there is normally nothing inherently unfair or contrary to basic trial principles for a litigant to continue to attempt to buttress its case through the procedures for ascertaining facts after the action has been started. It is just that in this case I find it would be more efficient not to engage in those procedures until they are required.

48 Therefore my second order is that until the ruling on the alleged *Charter* breaches arising from the search of the defendant's home has been made, the defendant's obligation to answer questions on examination for discovery and to list and to disclose documents is restricted to matters that are relevant to the search itself.

49 Costs will be to the defendant in the cause, meaning that if she is successful at the conclusion of the entire litigation, she will receive her costs of this application.

T.A. SCHULTES J.

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