IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *British Columbia (Director of Civil Forfeiture) v. Rai,* 2011 BCSC 186

Date: 20110216
Docket: S093495
Registry: Vancouver

An Action under the *Civil Forfeiture Act In Rem* Against

The Land and Structures located at 5035 Boundary Road, Vancouver, British Columbia, and having a legal description of Parcel Identifier: 009-656-227, Lot 3 South ½ of Block 110 District Lots 36 and 51, Plan 3715 (the "5035 Boundary Property") (*In Rem*);

The Land and Structures located at 5045 Boundary Road, Vancouver, British Columbia, and having a legal description of Parcel Identifier: 012-262-731, Lot 4, Except the East 33 Feet Now Road, south ½ of Block 110 District Lots 36 and 51, Plan 3715 (the "5035 Boundary Property") (*In Rem*);

And

The Land and Structures located at 5053 Boundary Road, Vancouver, British Columbia, and having a legal description of Parcel Identifier: 002-555-166, Lot 10, Blocks 62 and 111 District Lots 36 and 51, Plan 7708 (the "5053 Boundary Property") (*In Rem*);

Between:

Director of Civil Forfeiture

Plaintiff

And

Sarban Singh Rai

Defendant

Before: The Honourable Mr. Justice Silverman

Reasons for Judgment

Counsel for the Plaintiff:	J. Gareth Morley & Johnny Van Camp
Counsel for the Defendant:	Jay I. Soloman
Place and Date of Trial:	Vancouver, B.C. November 22-25, 2010
Place and Date of Judgment:	Vancouver, B.C. February 16, 2011

INTRODUCTION

[1] This trial and judgment deal with an action under the *Civil Forfeiture Act*, S.B.C. 2005, c. 29 [*Act*] against three residential real properties in Vancouver (the "Subject Properties"), owned by the defendant.

[2] Counsel advise me that this has been the first trial in British Columbia under the *Act*. There have been other actions commenced, but those have resulted in settlements, or summary trials. This is the first traditional trial. I am also advised that there are a number of issues which must be addressed in this action which are issues of first instance in British Columbia. I am offered guidance from judgments with respect to various interim matters under the *Act* in other actions, with respect to trial judgments from the Ontario courts dealing with similar legislation, and to the extent that they may be applicable, decisions under the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 [*CDSA*].

[3] The *Act* creates an *in rem* cause of action by the Director of Civil Forfeiture (the "Director") against property or an interest in property in British Columbia that is either:

1. "proceeds of unlawful activity" ("proceeds"); or
2. an "instrument of unlawful activity" ("instrument").

[4] The Director seeks forfeiture of the Subject Properties owned by the defendant. He asserts that forfeiture should be granted using either (or both) analysis, that is, the proceeds analysis or the instrument analysis.

[5] It is common ground that all three Subject Properties were used to house marijuana grow operations ("grow-ops" or "grow-op").

[6] The statement of claim asserts that the Subject Properties were all "acquired, maintained, improved, and/or had the debt obligation with respect to each property decreased" by profits derived from unlawful activity and each, or a portion of each, are therefore the proceeds of unlawful activity as defined in the *Act*.

[7] The statement of claim further asserts that these grow-ops "have resulted in the defendant's indirect acquisition of property or an interest in property, namely marijuana, cash and other property". It asserts, therefore, that all three properties are instruments of unlawful activity as defined in the *Act*.

[8] Finally, the statement of claim seeks "forfeiture of the whole, or a portion" of the Subject Properties.

[9] The statement of defence, and the bases upon which the trial proceeded, acknowledges that the Subject Properties were instruments of unlawful activity, but seeks relief from forfeiture pursuant to the applicable portions of the *Act*.

OVERVIEW OF THE *ACT*

[10] Section 5 of the *Act* indicates that, where proceedings have been commenced, the court *must* (subject only to the defences available under the *Act*) make a forfeiture order:

1. of property found to be proceeds, and
2. of property found to be an instrument.

[11] Section 5 is as follows:

> (1) Subject to section 6, if proceedings are commenced under section 3(1), the court must make an order forfeiting to the government the whole or the portion of an interest in property that the court finds is proceeds of unlawful activity.
>
> (2) Subject to section 6 and section 13 (1), if proceedings are commenced under section 3 (2), the court must make an order forfeiting to the government property that the court finds is an instrument of unlawful activity.

[12] Section 1(1) of the *Act* defines the word "property" as follows:

> **"property"** means a parcel of real property or tangible or intangible personal property and, for greater certainty, includes cash;

[13] An unlawful activity may be found to have occurred even if a person has been acquitted of related criminal charges, or never charged at all: s. 18 of the *Act*.

[14] There is a general defence to forfeiture on either theory of liability if the defendant can show forfeiture is "clearly not in the interests of justice": s. 6(1) of the *Act*. In addition, each type of liability has a defence specific to it. Section 6(2) sets out a defence to proceeds liability for *bona fide* purchasers for value who did not know and could not reasonably have known that what they were acquiring was proceeds. Section 13 sets out a defence to instrument liability for owners who did not directly or indirectly engage in the unlawful activity ("uninvolved interest holders").

[15] These are civil proceedings. The standard of proof is the ordinary civil standard of balance of probabilities: *Civil Forfeiture Act*, s. 16 of the *Act*; *British Columbia (Director of Civil Forfeiture) v. Wolff*, 2010 BCSC 774 at para. 40, citing *F.H. v. McDougall*, 2008 SCC 54, [2008] 3 S.C.R. 41.

[16] The onus of proving that property is proceeds or an instrument is on the Director. The onus of proving defences is on the defendant.

[17] Certain sections of the *Act* were amended, in a material way, after the circumstances occurred which gave rise to this action. Which version of the *Act* is applicable may be relevant, and is discussed later in this judgment under the heading “Interests of Justice”. All references to the *Act* in this judgment prior to that point will involve the amended version of the *Act*, unless expressly stated otherwise.

BACKGROUND

General

[18] The evidence at trial consisted of the following:

1. Numerous admissions of fact.
2. Carlene Robbins, an Administrator in the By-law branch of the City of Vancouver.
3. Chi Lan Ho Leung (a.k.a. “Gigi”) - the defendant’s rental assistant for the Subject Properties.
4. The defendant’s own testimony.

Chronology

Approximately 2005 -	The defendant meets Gigi
August 28, 2006 -	The defendant purchases 5053 Boundary Road (“House #1”)
September 29, 2006 -	The defendant purchases 5035 Boundary Road (“House #2”)
November 28, 2007 -	The defendant purchases 5045 Boundary Road (“House #3”)
May 1, 2007 -	House #1 is rented, with Gigi’s assistance, to a person not known to the defendant
July 1, 2007 -	House #2 is rented, with Gigi’s assistance, to a person not known to the defendant
December 2007 -	House #3 is rented, with Gigi’s assistance, to a person not known to the defendant
May 1, 2008 -	Search of House #3
May 8, 2008 -	Search of House #1
May 15, 2008 -	Search of House #2
June 30, 2008 -	Commencement of this action

Evidence Not in Dispute

[19] Houses #1, #2, and #3 are the “Subject Properties”.

[20] The defendant purchased House #1 on August 28, 2006 for approximately $510,000, which included a $380,000 mortgage. The balance was paid by the defendant. The seller remained as a tenant in the house until the end of April 2007.

[21] The defendant purchased House #2 on September 29, 2006, for a price of $477,000, which included a mortgage of $357,750. The balance was paid by the defendant. The seller remained as a tenant in the house until the end of June 2007.

[22] The defendant purchased House #3 on November 28, 2007 for approximately $427,000, which included a mortgage of $320,000. The balance was paid by the defendant.

[23] Houses #1 and #2 were purchased before there was a grow-op in any of the Subject Properties.

[24] House #3 was searched by police on May 1, 2008. The house was unoccupied. The whole house had been turned into a grow-op with sophisticated and potentially dangerous equipment. In particular, a gas stove was continuously burning to provide carbon dioxide to two grow rooms through vent hoses. The smell of marijuana was evident immediately upon entry. The house was damaged in a number of readily apparent ways. In total, 465 marijuana plants were discovered.

[25] House #1 was searched May 8, 2008. It too was unoccupied, and had been entirely converted into a grow-op, including a hydro by-pass, for the purpose of stealing electricity. A total of 920 marijuana plants were found in this property.

[26] House #2 was searched May 15, 2008. The front door was fortified by a 2'x 4' board of wood. Again, there was a complex grow operation with plants at multiple stages of development. Over $2,000 in electricity was stolen from this property. A total of 869 marijuana plants were found.

[27] All three properties had major modifications made to the houses, which would have been immediately visible to anyone attending there.

[28] There is no issue about the lawfulness of any of the searches. It is not disputed that all three grow-ops were commercial operations. The total number of plants found in the three houses was 2,254.

[29] The parties agree that the average yield per plant in the Vancouver area in 2008 was two ounces and the bulk sale price at the time was between $1,000 and $1,800 per pound. That leads to a total potential value range, taking into account the findings at all three houses, of between $282,000 and $507,000.

[30] There was no evidence about whether or not there had been any earlier grow periods and/or harvests at any of the houses, whether any marijuana from any of the houses had actually been sold, or about how many grow periods and/or harvests were possible in any given period of time.

[31] There was no evidence indicating that any firearm had been found in any of the three houses at any material time.

[32] The defendant was never charged with a crime, or even contacted by the police, concerning any of the grow-ops on the Subject Properties.

[33] The assessed values of the Subject Properties, based on 2008 Property Assessments are as follows:

(a) House #1	$ 569,900
(b) House #2	$ 528,600
(c) House #3	$ 427,300
TOTAL:	$1,525,800

The Evidence of Carlene Robbins

[34] The evidence of Carlene Robbins was credible in the sense that she told me the truth to the best of her ability. She acknowledged that her memory of details was limited, to a large extent, by what was in her notes of a meeting on June 23, 2008. She acknowledged that those notes were not intended to be detailed in their scope.

[35] From her evidence, I am satisfied of the following:

1. From 1997 to 2007, she was the Manager of By-laws for the City of Vancouver. In that capacity, she was responsible for the City's Grow Busters Program, established in 2000. She also assisted in creating procedures and policies surrounding the

City's interest in ensuring that discovered grow-ops are inspected, identified, and shut down to ensure the safety of the occupants and the surrounding community.

2. Since 2007, she has been Manager of the branch concerned with enforcing by-laws relating to private property. Of particular concern are problem premises involving multiple by-law violations or those that cannot be used legally, such as where there are grow-ops.

3. Under the Grow Busters Program, inspectors coordinate with the police and BC Hydro to inspect and dismantle grow-ops. The objective is to ensure "life safety". Grow-ops are a safety risk and inherently dangerous. Electrical wiring is always tampered with. They frequently contain redirected vents from the furnace to ensure that the plants grow better.

4. She gave evidence of the various procedures involved, on the part of the City, when a grow-op has been discovered, dismantled and the property considered subsequently unsafe to occupy.

5. These procedures involve sending a follow-up notice to the registered owners about the grow-op, and informing of appropriate steps that must be taken to gain a re-occupancy permit.

6. The re-occupancy process is significant. The owner must have the building(s) inspected, brought up to code, and pay fines for by-law violations. Only after all of that has occurred will the owner be in a position to obtain a re-occupancy permit and seek a new tenant. The process involves considerable inconvenience and expense.

7. With respect to the Subject Properties, the defendant was sent the usual notices.

[36] Ms. Robbins also testified about what she believed to be three prior grow-ops at three prior properties owned by the defendant (the "prior properties"). These were discovered in 2004, 2005 and 2006. Ms. Robbins testified that the above-noted procedures were also followed with respect to these properties, and the defendant was sent the relevant, appropriate notices. She testified, all from a review of her files relating to the defendant, that rather than go through the City's re-occupancy process, he arranged for them to be sold or demolished. With respect to the evidentiary value of this evidence:

1. There was no independent evidence that there were actually grow-ops on these properties; there is only the hearsay evidence from Ms. Robbins.
2. While she apparently received her information from her notes and City files, these were not tendered as business records.
3. However, the defendant subsequently attended a meeting with Ms. Robbins where he admitted to receiving the relevant notices and to understanding at the time that they related to apparent grow-ops on the three prior properties.

[37] Ms. Robbins invited the defendant to attend a meeting with her to review his history of six properties involving grow-ops (the three prior properties and the three Subject Properties). He attended that meeting on June 23, 2008, where Ms. Robbins testified that the following occurred:

1. She expressed her concern about the six grow-ops.
2. She discussed his renting practices, and he admitted that he did not, prior to receiving the notices, inspect any of the six properties, nor did he have any rental agreements with the tenants. He said he did not know how to screen tenants, and did not have a business licence for renting residential units.
3. He said his wife rented out the three Subject Properties, and that the tenants paid their rent in cash; that his wife either picked up the rent, or the tenants dropped it off. He did not say where they dropped it off, although Ms. Robbins assumed that it was at the defendant's home.
4. She outlined the City's expectations of landlords, including having a business license, screening tenants, getting background checks, signing rental agreements, arranging for regular inspections, ensuring rent payments are not by post-dated cheque, and having no by-law violations. The defendant said he had done none of those things in any of the six properties in question.
5. She told him of continuing complaints from neighbouring residents about the Subject Properties. He told her he would address them.
6. He acknowledged that he had received the notices sent to him about grow-ops on the three prior properties.

[38] Ms. Robbins also testified that approximately 300 to 400 marijuana grow operations were found in Vancouver in 2006-2007, but that the numbers had decreased in the last several years.

The Evidence of Gigi

[39] Gigi gave evidence as follows:

1. Chi Lan Ho Leung, aka Gigi, owns and operates Gigi's Hair Studio in Vancouver. She gave evidence through a Cantonese interpreter.
2. She stated that she met the defendant approximately four or five years ago and learned that he was a builder. She saw some of his work and was interested in purchasing property from him, although this never came to pass.
3. She ultimately assisted the defendant in renting the three Subject Properties.
4. She describes that at some point in 2006, she was visiting him at a building site when he received a phone call. He handed her the phone and asked if she would mind translating for him. She complied. The person's name was "Andy". He spoke Mandarin and was asking to rent a property apparently owned by the defendant. He had apparently seen a "For Rent" sign on the property. She told the defendant that Andy was interested in renting. The defendant agreed and these arrangements were made. This was House #1.
5. Later on, Andy visited Gigi at her studio and informed her that he had a friend, "Alex", interested in renting an adjacent property (House #2). Gigi asked the defendant if he would rent to him. The defendant agreed.
6. A similar arrangement was later made in respect to House #3.
7. All property tenants were friends with Andy. Gigi knew none of them before they began renting from the defendant.
8. During this period, Gigi said she was helping the defendant as an interpreter and with rent collections. Specifically, she stated the defendant rented out each property for $1,000 per month. Each month Andy would call to arrange delivery of the rent in cash to Gigi's Hair Studio in an envelope. Gigi would call the defendant and he, sometimes with his wife, would come pick it up, leaving Gigi with $100 - $200 per property. The defendant said this was for her to have coffee or a meal for assisting him.

9. There were no lease agreements, written communications, cheques, or receipts issued between the defendant and Gigi, between Gigi and the tenants, or the defendant and the tenants.

10. The only time Gigi ever saw one of the properties was when she delivered the key to Andy for the first rental. Even on that occasion, she did not go inside. For the other rentals, the defendant dropped the keys off at Gigi's Hair Studio. Gigi then called Andy and he came with his friends to pick the keys up.

The Evidence of the Defendant

[40] The defendant's own testimony included the following:

1. He is married with five children, four of whom live with him and his wife in the home which he owns in Vancouver. His eldest child is married and lives across the street.

2. He works full-time as a longshoreman. He earns approximately $100,000 per year in wages.

3. He is also a property developer. He has built duplexes, townhouses, and a recently completed multiplex in Vancouver in April of 2009. He developed his first project in 1993, and estimates that he has developed between 25 and 30 duplexes, townhouses, or homes. In addition to his full-time work as a longshoreman, he works full-time as the general contractor and foreman of his development projects. Family members also help on the sites. When a project is underway, he does not sleep much, as he simultaneously maintains full-time work as a longshoreman.

4. He owned and controlled a company which was involved in many aspects of his business dealings.

5. In addition to his work, he devotes time to charitable endeavours at the Temple where he worships.

6. From May 2005 to November 2007, the defendant purchased four properties on Boundary Road. These include the three Subject Properties at issue in this case, and an earlier one that was purchased in 2005, and subsequently sold (the "other Boundary property"). That earlier one is not alleged to have housed a grow-op. He purchased the four properties because the land had the potential for the building of an apartment complex. That has remained his hope and intention throughout, and that is still the case.

7. In addition to his work developing property, he is a landlord and has been for many years. For portions of the period from 2003

to 2008, he had owned a total of 12 properties, including the three Subject Properties, and the three prior properties. He testified that during this period he had never inspected any of the properties that were later found to house grow-ops.

8. He agreed he is a sophisticated businessman, and that his developments involve transactions totalling millions of dollars a year. He admitted that he knows the importance of obtaining the names of contractors, and other employees.

9. When he purchased House #1 in August of 2006, the seller remained in the premises as a tenant, until the end of April 2007, paying rent to the defendant of $1,000 a month by cheque. There is no allegation of a grow-op on the premises during that period.

10. When he purchased House #2 in September of 2006, the seller remained in the premises as a tenant, until the end of June 2007, paying rent to the defendant of $1,200 a month by cheque. There is no allegation of a grow-op on the premises during that time.

11. With respect to House #3, purchased in November 2007, the seller did not remain in the premises as a tenant.

12. Since the searches in May of 2008, there have been no tenants in any of the Subject Properties, and the defendant has been receiving no rent. There have been no steps to remedy any of the physical damage. However, the defendant has continued to make the mortgage payments with respect to all three properties, in the hope that they will be returned to him at the end of these proceedings, and that he can continue with his development plans.

[41] With respect to Gigi, the defendant testified as follows:

1. She was visiting the site of a development project in May of 2007 when he received a phone call from someone who did not speak English well. He believed that Gigi would be able to understand him and he handed her the phone and asked her to help. She hung up and informed the defendant that the caller wanted to rent House #1, which had a rental sign on the property. The caller was “Andy”.

2. Prior to the phone call at his work site where he handed the phone to Gigi, there had been no prior discussion between them about her assisting in renting properties.

3. At that time, he did not know Gigi’s real name.

4. He did not ask Gigi to be his agent or to negotiate rental terms on his behalf. Nor did he give her any authorization to do anything with the properties. He simply told her that he wanted $800 rent from each of the properties, and that if she could get more, she could keep the balance.

5. She later informed him that the tenant was willing to pay $1,000. The defendant testified that he was satisfied with that as all he wanted was $800 per month. He was content to have Gigi continue to keep the extra $200 per month for herself.

6. A couple of days later, Gigi informed him that the house had been rented. He never asked who was renting it.

7. Some months later, he told Gigi that House #2 would be coming available. A similar conversation occurred as with House #1 with similar consequences. He would receive $800 per month, and Gigi could keep the additional $200.

8. This occurred one further time with respect to House #3.

9. At no relevant time did he know Gigi's full name, or inquire about her rental experience, if any.

10. In each case, the rent was paid in cash, and apparently delivered to Gigi's hair salon. During the entire period, the defendant, his wife, or both would go to Gigi's hair salon to pick up the rent from the three properties.

11. The houses were in poor condition. Nevertheless, he considered the $800 a month per house to be less than he might otherwise be able to get. It was clear that Gigi was actually getting $1,000 per month and keeping $200. However, this was acceptable to him because he wanted no responsibility for maintaining and repairing the properties, which clearly were in need of repair services. At no time did he discuss with Gigi, or any of the tenants, that repair or maintenance would be their responsibility. He did not think that it would ever be Gigi's responsibility. His reason for having the rent delivered to Gigi's hair salon is that he was too busy to pick up the rent directly from the properties. However, he did often pick it up from Gigi's.

12. At no time, did the defendant ask Gigi any questions about the identity of the tenants, nor did he have any communication with them.

13. He never met or spoke to any of the tenants. No written contract or lease was entered into. There are no cheques, invoices, receipts, or anything in writing. He never asked who the tenants were. He never inspected the properties, nor did he go to any of them. Neither did any of his family members.

14. He was more diligent with respect to his other rental properties, learning at least the first names of tenants and basic employment information about them. While most of the rent for those properties was paid by cheque, some was paid by cash.

15. He denied receiving any payments with respect to any of the Subject Properties other than the $800 per month rent.

16. He admitted that in his meeting with Ms. Robbins, he did not tell her that Gigi, or any third person (other than his wife), had assisted in making the rental arrangements or receiving the rent.

[42] With respect to the other Boundary property, he testified as follows:

1. He purchased it in 2005.

2. His wife rented out that property and collected the rent from someone named “Michael” until sometime in 2008. This was also paid in cash. The defendant did not know how or where his wife picked up the rent.

3. Gigi had no involvement with this property.

4. There was no grow-op associated with this property.

5. It was sold by the defendant before the searches of the Subject Properties.

[43] With respect to the three prior properties, he testified as follows:

1. He would either pick up the rent from the properties directly, or meet the tenants somewhere. However, he did not go inside.

2. Rent from all three was paid in cash.

3. He did not know the name of the tenant at the first prior property. Therefore, after that grow-op was discovered, he took additional steps to learn the identity of tenants. That step was to ask the tenant (of what was to become the second prior grow-op) what his name was. He later learned the name was false so he quit asking from that point on.

4. He did not know the name of any of the other tenants.

5. He was not interviewed by the police after any of the searches. He learned that there had apparently been one arrest with respect to one of those grow-ops, but no arrests at the other two.

6. He acknowledged that he knew that he had the right to inspect those properties, but chose not to do so.

7. He denied any knowledge of these grow-ops before being informed of them by the City.

8. He acknowledged that the City had informed him about these three grow-ops. He testified that he had no independent memory of receiving written notices, but agreed that he must have received them. He attended at the sites as a result of learning of the grow-ops and observed notices indicating that the City had taken action and declared the sites unsafe.

9. He acknowledged that he had been prohibited from re-renting the properties unless and until he took steps to remedy them according to the City's specifications. As a result, he made a business decision to sell the properties.

10. He acknowledged being aware, as a result, that there were consequences, including inconvenience and expense, when grow-ops were discovered on rental properties.

[44] He acknowledged that he had made numerous cash deposits to a particular line of credit/bank account (the "Line of Credit"). He gave the following details:

1. The ultimate source of those cash deposits was cash rent from several of his properties, and cash gifts, largely related to wedding presents that his daughter received, but of which he was the ultimate recipient because he and his wife had paid for the wedding.

2. He said that the cash from the rent from all of his properties was given to his wife. She would hang on to it and do with it as she pleased. When he needed cash to cover expenses or the overdraft in his Line of Credit, he would ask her for it and it would be deposited into the account.

3. He acknowledged that the cash rents do not appear to be reported in his tax returns. However, he said that he provided his accountant with all the necessary information, and full documentation. At no time did he intend to not report income, including cash, and he did not know why the information was not present in his tax returns.

4. None of the cash deposits were income from any marijuana grow-op, or any other unlawful activity. Further, he received no cash or payment at any time from any such unlawful activity. If the rent from the Subject Properties can be said to be from unlawful activity, he was not aware of that at the time.

[45] Numerous financial documents relating to the defendant, and his development company were entered as exhibits. The defendant also gave evidence about many of them. The totality of the evidence includes the following:

1. Documents showing his (and his company's) property ownership, many of which were rented. These also include rent on a property in the name of his daughter. The total effect is to support the notion that the defendant had a business of buying, developing, selling and renting real estate with revenues and expenses in the millions of dollars every year.
2. The Line of Credit was the recipient of large transfers from accounts in the names of various family members. It appears to have been used for both business and personal income and expenses. It was also used to finance a major development in Vancouver, and the acquisition of properties.
3. The documents show that the Rai family finances were complex, but they do not appear to have been particularly well organized from a bookkeeping point of view.
4. Cash deposits were irregular in interval, at times a number of individual transactions happening within weeks of each other. At other times, many months went by without any cash deposits.
5. Income tax returns for the years 2006, 2007 and 2008 report no cash rent received. He testified that he could not explain why the rent was not reported, as he had given his accountant the necessary and appropriate information and instructions.

[46] The defendant's wife did not testify; nor did his accountant.

[47] The defendant was the only witness for the defence.

PROCEEDS ANALYSIS

[48] Section 3(1) of the *Act* provides as follows:

> 3(1) The director may apply to the court for an order forfeiting to the government
>
> (a) the whole of an interest in property that is proceeds of unlawful activity, or
>
> (b) the portion of an interest in property that is proceeds of unlawful activity.

[49] "Proceeds" is defined in s. 1(1) of the *Act*:

> **"proceeds of unlawful activity"** means any of the following:
>
> (a) the whole or a portion of an interest in property if the whole or the portion of the interest, as the case may be, is *acquired directly or indirectly as a result of unlawful activity*;
>
> (b) the whole or a portion of an interest in property that is equivalent in value to the amount of an increase in value of the whole or the portion of the interest in property if the increase in value *results directly or indirectly from unlawful activity*;
>
> (c) the whole or a portion of an interest in property that is equivalent in value to the amount of a decrease in a debt obligation secured against the interest or the portion of the interest in property, if the decrease in debt obligation *results directly or indirectly from unlawful activity*;
>
> (d) property that is realized from the disposition of the whole or a portion of an interest in property described in paragraph (a), (b) or (c) under an order of the court under section 8 (3) (d) [*interim preservation order*].
>
> [Emphasis added.]

[50] Section 19 of the *Act* is as follows:

> **19** In an application for forfeiture made under section 3 (1), proof that a person
>
> (a) participated in an unlawful activity that resulted in or is likely to have resulted in the person receiving a financial benefit, and
>
> (b) subsequently did one or more of the following:
>
> (i) acquired the whole or the portion of an interest in property that is the subject of the application;
>
> (ii) caused an increase in the value of the interest or the portion of the interest in property that is the subject of the application;
>
> (iii) caused a decrease of a debt obligation secured against the interest or the portion of the interest in property that is the subject of the application,
>
> is proof, in absence of evidence to the contrary, that the whole or the portion of the interest in property that is the subject of the application is proceeds of unlawful activity as a result of the unlawful activity referred to in paragraph (a).

[51] There are three potential "defences" raised in this case:

1. Did the Defendant Obtain "Proceeds"?
2. Relief from Forfeiture: s. 6(2) of the *Act*.

3. Interests of Justice: s. 6(1) of the *Act*.

1. *Did the Defendant Obtain Proceeds?*

[52] It is common ground that establishing that the property is the "proceeds" of unlawful activity must be proven on a balance of probabilities by the Director. The onus is on him.

[53] The concept of "proceeds" is not dependent upon any knowledge or involvement with the unlawful activity. It is not necessary for that person to be culpable in any way in order to be liable to return proceeds. Even a charity can be so liable if it has unwittingly received proceeds from a donor who obtained them from unlawful activity: *Chatterjee v. Ontario (Attorney General)*, 2009 SCC 19, [2009] 1 S.C.R. 624 [*Chatterjee*] at para. 46.

[54] The Director argues as follows:

1. The three Subject Properties are "proceeds" by virtue of a combination of the definition in s. 1(1) (a), (b), or (c) and s. 19 of the *Act*.
2. Section 1(1) (c) includes in the definition of "proceeds" an interest in property that is "equivalent in value to the amount of a decrease in a debt obligation secured against the ... property". In this case, the debt obligation which was decreased refers to the reduction of debt by virtue of mortgage payments made during the period when the grow-ops were being conducted.
3. Section 19 makes it unnecessary for there to be any evidence that the defendant received any financial benefit. It is sufficient if the defendant participated in an unlawful activity likely to have resulted in a financial benefit, and caused a decrease in his debt, by reducing the mortgage. If those are proven, then "proceeds" liability has been proven.
4. However, the Director argues, in the alternative, that it is not necessary for s. 19 to be relied upon. The evidence is sufficient to prove that the defendant received "proceeds", relying solely on the s. 1(1) definition. Section 1(1) (a), (b) and (c) require only that the interest in property result or be acquired "directly or indirectly from unlawful activity".

5. In this case, the rent and other unexplained cash were acquired directly; alternatively, they were acquired indirectly. Either is sufficient for liability to follow.

6. The Director argues that the amount of "proceeds" acquired is equal to:

   (a) the amount of rent received during the relevant period; and/or,

   (b) the total amount of unlawful cash received by the defendant during the relevant period; and/or,

   (c) the amount of decrease in the mortgage security against the property; and/or,

   (d) the amount of increase in the value of the property.

[55] The defendant argues:

1. In this case, in addition to the defences available under s. 6, with the exception of the actual rent paid for the Subject Properties, the evidence does not establish that any of the cash attributed to the defendant is the proceeds of unlawful activity.

2. Section 19 of the *Act* is inapplicable because 19(a) requires proof that the defendant is a "participant". The evidence does not lead to that conclusion.

3. It is conceded that, by definition, the rent paid on the three houses from the time the Subject Properties had grow-ops, would be the proceeds of unlawful activity, if it were known that any of the grow-ops had resulted in any sales or profit, or at least if it were known when any of the grow-ops commenced.

4. However, it is argued that it is impossible to know when those grow-ops commenced. All that can be said with certainty is that they commenced at some time before the police searches.

5. While the Director purports to offer an alternative explanation (that the balance of the cash is the proceeds of the grow-ops), there is no evidence of that at all. It amounts to speculation.

6. No expert opinion evidence was led suggesting that any plants had ever been harvested from any of these properties.

7. No evidence was led suggesting that any marijuana grown in any of these grow-ops had ever been sold.

8. No evidence was led suggesting that any plants from any of these grow-ops resulted in any unlawful proceeds to any person.

9. There is no evidence of any score sheets, scales, packaging materials, or harvested bud.

10. With respect to the remainder of the cash attributed to the defendant, beyond the amount of rent paid, he has given an explanation. It is the only explanation in the evidence, and there is no reason to reject it.

2. *Relief from Forfeiture: s. 6(2) of the Act*

[56] Section 6(2) of the *Act* provides a "defence" in the sense that it allows for relief from forfeiture, in certain circumstances, where "proceeds" has been established on the evidence. The onus then shifts to the defence to establish the defence.

[57] This defence is only available on the proceeds analysis. It is not available where the Director relies only upon instrument liability.

[58] Section 6(2) was not part of the *Act* at the time of the incidents in question; rather, it was added by amendment at a later time. This is discussed in more detail later in this judgment under the heading "Interests of Justice". Because of the decision related there with respect to which version of the *Act* is applicable, it is appropriate to discuss s. 6(2) of the *Act* here.

[59] Section 6(2) of the current *Act* is as follows:

> (2) In the case of property that is proceeds of unlawful activity, the court may grant relief from forfeiture under subsection (1) if a party to the proceedings commenced under section 3 (1) proves both of the following:
>
> (a) she or he did not, directly or indirectly, acquire the property as a result of unlawful activity committed by the party;
>
> (b) she or he
>
> (i) was the rightful owner of the property before the unlawful activity occurred and was deprived of possession or control of the property by means of the unlawful activity,
>
> (ii) acquired the property for fair value after the unlawful activity occurred and did not know and could not reasonably have known at the time of the acquisition that the property was proceeds of unlawful activity, or
>
> (iii) acquired the property from

> (A) a person who was the rightful owner of the property before the unlawful activity occurred and who was deprived of possession or control of the property by means of the unlawful activity, or
>
> (B) a person who acquired the property for fair value after the unlawful activity occurred and did not know and could not reasonably have known at the time of the acquisition that the property was proceeds of unlawful activity.

[60] It will be seen from a reading of the section that the defence is a discretionary sub-set of s. 6(1).

[61] Neither party seriously argued that s. 6(2) is applicable in this case.

[62] Rather, this case proceeded on the basis that any aspects that may require a consideration of s. 6(2) will be more appropriate for consideration, in the particular circumstances of this case, when considering s. 6(1) later in this judgment.

3. *Interests of Justice: s. 6(1) of the Act*

[63] The defence provided for under s. 6 of the *Act* is also applicable to the Instrument Analysis, and consequently, I will deal with that section of the *Act* later in this judgment, after completing my discussion of both the proceeds analysis and the instrument analysis.

INSTRUMENT ANALYSIS

[64] Section 3(2) of the *Act* provides as follows:

> **3** (2) The director may apply to the court for an order forfeiting to the government property that is an instrument of unlawful activity.

[65] “Instrument ” is defined in s. 1(1) of the *Act*:

> **"instrument of unlawful activity"** means any of the following:
>
> (a) property that has been used to engage in unlawful activity that, in turn,
>
> (i) resulted in or was likely to result in the acquisition of property or an interest in property, or
>
> (ii) caused or was likely to cause serious bodily harm to a person;

> (b) property that is likely to be used to engage in unlawful activity that may
>
> (i) result in the acquisition of property or an interest in property, or
>
> (ii) cause serious bodily harm to a person;
>
> (c) property that is realized from the disposition of property described in paragraph (a) or (b) under an order of the court under section 8 (3) (d) [*interim preservation order*].

[66] There are three potential "defences" raised:

1. Is the Subject Property an Instrument?
2. Is the Defendant an Uninvolved Interest Holder: s. 12 and 13 of the *Act*?
3. Interests of Justice: s. 6(1) of the *Act*.

1. *Is the Subject Property an Instrument?*

[67] It is common ground that establishing that the property is an instrument of unlawful activity must be proven on a balance of probabilities by the Director. The onus is on him.

[68] The question of knowledge or involvement in the criminal activity is irrelevant to the instrument analysis. Rather, those topics become relevant if there is a finding of instrument liability, when considering the issue of "uninvolved interest holder".

[69] It is not in issue in this case that the Subject Properties are instruments of unlawful activity, since they were used as grow-ops.

2. *Is the Defendant an Uninvolved Interest Holder: s. 12 and 13 of the Act?*

[70] Section 5(2) of the *Act* is as follows:

> (2) Subject to section 6 and section 13 (1), if proceedings are commenced under section 3 (2), the court must make an order forfeiting to the government property that the court finds is an instrument of unlawful activity.

[71] Section 13 of the *Act* is as follows:

> **13** (1) Subject to subsection (3), if a court finds

> (a) that property is an instrument of unlawful activity, and
>
> (b) that a person is an uninvolved interest holder with respect to that property,
>
> the court must make the orders necessary to protect the interest in the property held by the uninvolved interest holder.
>
> (2) A protection order issued with respect to property that is subject to a forfeiture order has effect from the date that the forfeiture order is effective or is deemed to be effective, unless the court orders otherwise.
>
> (3) A court may refuse to issue a protection order if the issuance is clearly not in the interests of justice.

[72] "Uninvolved interest holder" is defined in s. 12 of the *Act*:

> **12** (1) In this Division and in section 22.1, "uninvolved interest holder" means a person who
>
> (a) owns, at the time of application for an order under section 3, the whole or a portion of an interest in property that is an instrument of unlawful activity, and
>
> (b) *did not directly or indirectly engage in the unlawful activity* that is the basis of the application referred to in paragraph (a).
>
> (2) A person who indirectly engaged in the unlawful activity that is the basis of the application referred to in subsection (1) (a) includes, without limitation, a person who had knowledge of the unlawful activity and received a financial benefit from the unlawful activity.
>
> [Emphasis added.]

[73] Once it has been established that the Subject Property is an instrument of unlawful activity, the onus then falls on the defendant to establish that he is an uninvolved interest holder.

[74] The defendant argues that the evidence establishes that he is an uninvolved interest holder, as defined in s. 12, because he "did not directly or indirectly engage in the unlawful activity". He argues as follows:

1. He had no knowledge of the grow-ops.
2. No evidence was led suggesting that any marijuana from any of these grow-ops resulted in any unlawful proceeds to any person.
3. The following evidence suggests that the defendant did not have knowledge and/or complicity in the unlawful activity:

(a) He was never charged with any offence relating to the three grow-ops. In fact, he was never even questioned by the police.

(b) With respect to the prior properties, while it is not disputed that he received notice about them, there is no evidence at all that they were actually grow-ops. Even if they were, there is no evidence with respect to whether they were small or large, or something in between. There is no evidence as to whether they were commercial or private. There is certainly no evidence that the defendant ever attended at those premises, or knew anything about the grow-ops, before the police searches.

(c) The effect of Ms. Robbins' evidence is that it is not terribly uncommon for landlords to be the unknowing victims of grow-ops. This is not something unique, or almost unique, to the defendant.

(d) The defendant was, and is, actually a developer. These three properties are side by side. This is completely consistent with them being acquired for development purposes, as the defendant testified.

(e) While the electricity was apparently tampered with in all three houses, it was not in the name of the defendant. This is consistent with the evidence of the defendant that he had absolutely nothing to do with the property other than that he owned it.

(f) There is no evidence at all as to when the grow-ops started on the Subject Properties. The evidence does indicate when the tenants moved in, but that is not necessarily the same as when the grow-ops started. All the evidence establishes with certainty is that they started sometime before the dates of the police searches.

(g) While there is evidence about how much certain weights of marijuana might produce in dollars, there is no evidence at all about whether any of the Subject Properties ever had a successful harvest, or whether any of the marijuana had ever been sold.

(h) The evidence of Gigi is consistent with that of the defendant, including:

> (i) she says she did not know about the grow-ops;
>
> (ii) she confirms his evidence that he did not know.

(i) The defendant has provided an explanation for why he was satisfied with $800 rent. It is a perfectly reasonable explanation.

(j) He also gave evidence with respect to the sources of cash that are seen to be going into his Line of Credit. It is a perfectly reasonable explanation.

(k) The evidence of Ms. Robbins about what the defendant said at her meeting with him is perfectly consistent with his evidence about his being poorly organized, and about his having no knowledge of the grow-ops.

(l) The state of the financial records is also consistent with his evidence about his being poorly organized.

4. Perhaps the defendant should have known, or even could have known, of the unlawful activity, but he did not in fact know, nor was he wilfully blind in the legal sense of that phrase.

3. *Interests of Justice: s. 6(1) of the Act*

[75] The defence provided for under s. 6 of the *Act* is also applicable to the Proceeds Analysis, and consequently, I will deal with that section of the *Act* later in this judgment, after completing my discussion of both the proceeds analysis and the instrument analysis.

FINDINGS

Credibility

[76] I find the evidence of Carlene Robbins to be credible. Her reliance on notes to refresh her memory has no impact on any contentious factual issues in this case.

[77] Gigi's evidence causes me to be sceptical about whether she has been completely forthcoming with respect to her dealings involving the defendant; and about whether she has been completely forthcoming about her own lack of knowledge concerning the grow-ops.

[78] For the reasons that follow, I find that the evidence of the defendant was less than forthcoming:

1. His dealings with Gigi, including:

(a) that he allowed her to assist, as she apparently did, without knowing her full name, or whether she had any previous rental experience.

(b) the manner in which her assistance began, where she happened to just be standing there when he needed a translator;

(c) that she was paid $600 for all three houses, per month on a continuing basis with no foreseeable end;

(d) that there was no written arrangement between the defendant and Gigi;

(e) that he never asked her to obtain for him or to provide for him any information about the tenants;

(f) that he never asked her to report to him about, or to check on, the condition of any of the houses;

(g) the evidence of the defendant and Gigi differed with respect to the loose arrangement which did exist between them - Gigi said that the rent was $1,000 per month per house and that the defendant would tell her to keep $100 or $200 for coffee or a meal; the defendant testified that the rent was $800 and she was entitled to keep $200 out of the $1,000 that she received.

2. The fact that he never mentioned Gigi to Ms. Robbins when he went with her to discuss the manner in which he dealt with the tenants. Rather, he told her that his wife was the one who had arranged for and dealt with the tenants.

3. The fact that he had no direct information whatsoever about the tenants, including their names, or work. Nor, apparently, did he care. There was no written agreement between them. He never telephoned there. He never attended there for any reason, nor did anyone on his behalf. Nor did he seek any information about them from Gigi.

4. The fact that the original sellers of House #1 and House #2 remained as tenants and paid more rent than $800 per month. It was only after these sellers had vacated, that the defendant seems to have become satisfied with receiving $800.

5. The fact that his wife dealt with the tenant and collected the rent with respect to the other Boundary property.

6. The fact that he had notice of apparent grow-ops at three prior properties which made him aware of the potential consequences of not taking proper steps to determine who his tenants were, and the need for inspections.

7. The defendant was an experienced and sophisticated land owner and landlord.

8. The evidence that he gave his accountant all the necessary cash and rental information for income tax purposes, but is

> unable to explain why these were not reported on his income tax return.

[79] Measured against the totality of the evidence, I am not satisfied with the credibility of the defendant with respect to what he actually knew, or suspected.

Findings of Fact

[80] In addition to the findings previously made in this judgment, I make the following findings of fact, and draw the following inferences:

1. Houses #1 and #2 were purchased by the defendant for legitimate business reasons at the time of the purchases. The defendant intended to demolish them and construct a larger project for resale and/or rent.
2. The grow-ops commenced almost immediately after the tenants moved in on May 1, July 1 and December 1, 2007, respectively. It is probable that immediately after those dates the grow-ops began. It is also probable that, after those dates but prior to the searches, there were previous marijuana harvests, sales, and profits. Even if there were not, the grow-ops were always of a commercial nature and scale, and were intended to be so.
3. The defendant did not purchase House #3 until after the marijuana grow-ops had begun in House #1 and House #2.
4. The defendant had no personal or direct involvement in any of the grow-ops.
5. The defendant did not know the names of the tenants, never met them, had no direct involvement in renting to them, and never attended to the Subject Properties for any purpose after they were rented to these persons.
6. The Subject Properties were modified in such a way that the alterations would have been impossible to miss if he had attended.
7. It would have also been impossible, if the defendant had ever attended at any of the Subject Properties, to miss that all three houses were unoccupied.
8. The defendant was an experienced landlord who knew the proper and sensible steps that needed to be taken when renting to tenants. His actions and inactions cannot be attributed to naivety or inexperience.

9. The defendant dealt with most of his other rental properties on a different basis, that is, by knowing the names of most of the tenants, and by himself or his wife actually attending at the other properties to collect rent, including the other Boundary property.

10. The defendant was aware of the risks and consequences of not being diligent with respect to who he was renting to, and ensuring that inspections were taking place. He had previously been notified by the City of apparent grow-ops in three prior properties, and had suffered negative consequences as a result.

11. The defendant knew that one of those risks was that the Subject Properties would be used as grow-ops, with negative consequences and risks for him.

12. The defendant deliberately chose to distance himself from the Subject Properties and the tenants by using Gigi as an intermediary, and by avoiding the acquisition of any personal knowledge about the tenants or what was occurring on the Subject Properties.

13. The defendant was aware of the need for some inquiry, and declined to make the inquiry because he did not wish to know the truth. He preferred to remain ignorant because it was to his advantage to do so. He suspected the obvious and he realized its probability, but he refrained from obtaining the confirmation of it because he wanted to be able to deny knowledge.

14. The total amount of down-payments made on the three properties was:

(a) House #1	$130,000
(b) House #2	$119,250
(c) House #3	$107,000
TOTAL:	$356,250

15. I am unable to determine, on the basis of the evidence, the precise amounts owing on the three mortgages, and the current amounts of the mortgage payments.

16. I am satisfied that there has been a decrease in the mortgage debt, but I am not able to determine how large that decrease is.

17. It is not possible to determine the amount of increase in the value of the Subject Properties since the date of purchase. Even if one could rely on the simplistic approach of subtracting the original purchase prices from the 2008 assessment values, this approach would fail to account for what portion of the increase occurred after the purchase but before the date when

the grow-ops began. I am satisfied that there has been an increase in value since the grow-ops began, but the evidence does not enable me to determine what the amount of that increase is.

18. The tenancies all ended after the searches in May of 2008. The tenancy in House #1 had lasted 13 months; in House #2, 11 months; and in House #3, six months. The total rent, therefore was as follows:

House #1	13 months x $800 =	$10,400
House #2	11 months x $800 =	$ 8,800
House #3	6 months x $800 =	$ 4,800
Total:		$24,000

19. The rent was used, indirectly, to reduce the defendant's mortgage debt on the Subject Properties.

20. The quantity of marijuana found in the searches of the three Subject Properties had a total value of between $282,000 and $507,000.

21. Other than the rent received by the defendant, the cash received by the defendant from various sources was not derived from the grow-ops or the Subject Properties.

[81] My conclusion that cash (other than rent) was not derived from the grow-ops is based upon the following:

1. The defendant gave an explanation for the otherwise unexplained cash in his wife's hands, and being paid into his Line of Credit. While that explanation is less than satisfactory, considered with the other evidence, I am unable to conclude that the cash was paid from the grow-ops merely because there is not a wholly satisfactory explanation for it.

2. It is unlikely that the defendant was receiving cash, other than the rents, from these Subject Properties because he had taken steps to use Gigi as an intermediary in order to receive the cash rent, but apparently not to receive any additional cash. How would he then be collecting it? It does not make sense to conclude that he used Gigi to collect the cash rent, but he, or his wife, would receive the other cash directly. If he was going to be doing this, then surely he would simply receive the rent in the same way and wouldn't bother with the facade of an intermediary.

3. The evidence does not enable me to conclude that the cash was obtained from any unlawful activity at all.

Conclusion with Respect to the Proceeds Analysis

1. *Did the Defendant Obtain Proceeds?*

[82] I conclude that he did obtain Proceeds. My reasons are as follows:

1. Section 19 does not assist the Director's analysis. The evidence falls short of establishing "participation" on the part of the defendant. Nevertheless, even without reliance upon s. 19, I am satisfied that the amount of rent which was received from the subject properties was "acquired directly or indirectly as a result of unlawful activity".
2. There has been an increase in the value of Houses #1 and #2, and a reduction of the mortgage debt in all three houses which are the direct or indirect result of the unlawful activity. I am not able to determine the amount of the increases or decreases.
3. This would be so, even if I were satisfied that the defendant was utterly without knowledge of the unlawful activity. The concept of "proceeds" is not dependent upon any knowledge or culpability on the part of a defendant: *Chatterjee*.
4. Rather, the concepts of knowledge and culpability, when discussing "proceeds" are more properly discussed under the issue of "Interests of Justice".
5. Nevertheless, to the extent that the concept of knowledge may be applicable here, I am satisfied that the defendant was wilfully blind to what was happening at the subject properties, a finding which is equivalent to knowledge. I am satisfied that this finding of "wilful blindness" supports the notion that the interest in property was obtained either directly or indirectly.
6. The concept of "wilful blindness" has been explained in numerous cases in a criminal context. In *R. v. Sansregret*, [1985] 1 S.C.R. 570 [*Sansregret*], the court says this:

> Wilful blindness is distinct from recklessness because, while recklessness involves knowledge of a danger or risk and persistence in a course of conduct which creates a risk that the prohibited result will occur, wilful blindness arises where a person who has become aware of the need for some inquiry declines to make the inquiry because he does not wish to know the truth. He would prefer to remain ignorant. The culpability in recklessness is justified by consciousness of the risk and by proceeding in the face of it, while in wilful blindness it is justified by the accused's

> fault in deliberately failing to inquire when he knows there is reason for inquiry. ...
>
> The textwriters have also dealt with the subject, particularly Glanville Williams (*Criminal Law: The General Part*, 2nd ed., 1961, at pp. 157 160). He says, at p. 157:
>
> Knowledge, then, means either personal knowledge or (in the licence cases) imputed knowledge. In either event there is someone with actual knowledge. To the requirement of actual knowledge there is one strictly limited exception. Men readily regard their suspicions as unworthy of them when it is to their advantage to do so. To meet this, the rule is that if a party has his suspicion aroused but then deliberately omits to make further enquiries, because he wishes to remain in ignorance, he is deemed to have knowledge.
>
> ...
>
> Glanville Williams, however, warns that the rule of deliberate blindness has its dangers and is of narrow application. He says, at p. 159:
>
> The rule that wilful blindness is equivalent to knowledge is essential, and is found throughout the criminal law. It is, at the same time, an unstable rule, because judges are apt to forget its very limited scope. A court can properly find wilful blindness only where it can almost be said that the defendant actually knew. He suspected the fact; he realized its probability; but he refrained from obtaining the final confirmation because he wanted in the event to be able to deny knowledge. This, and this alone, is wilful blindness. It requires in effect a finding that the defendant intended to cheat the administration of justice. Any wider definition would make the doctrine of wilful blindness indistinguishable from the civil doctrine of negligence in not obtaining knowledge.

7. *Sansregret* has been followed in our Court of Appeal as recently as 2010: *R. v. Laronde*, 2010 BCCA 430 [*Laronde*].

8. The test is not whether the appellant should have known or could have known; rather, the test is whether he, himself, was in fact suspicious and deliberately decided not to make inquiries so that he could remain ignorant as to the truth: *R. v. Comtois Barbeau* (1996), 50 C.R. (4th) 357 at para. 85; *R. v. Malfara* (2006), 211 O.A.C. 200 (C.A.) and *Laronde*. I am satisfied that this aptly describes the defendant's degree of knowledge and his direct (or alternatively, indirect) involvement.

9. The notion of wilful blindness as discussed in the foregoing cases is not restricted to a criminal context. It has been expressly adopted in a number of cases in a civil context, including: *Bartin Pipe & Piling Supply Ltd. v. Epscan Industries Ltd.*, 2004 ABCA 52, leave to appeal to SCC refused, [2004]

S.C.C.A. No. 203; *Microsoft Corp. v. 9038-3746 Quebec Inc.*, 2006 FC 1509; and *Cowans v. Motors Insurance Corp.,* [2010] O.F.S.C.D. No. 119.

2. *Relief from Forfeiture: s. 6(2) of the Act*

[83] The parties are agreed that the topics which might, in other circumstances, be applicable under s. 6(2) will be more appropriately considered under the question of the Interests of Justice.

3. *Interests of Justice: s. 6(1) of the Act*

[84] This analysis will be dealt with in the Interests of Justice section later in this judgment.

Conclusion with Respect to the Instrument Analysis

1. *Is the Subject Property an Instrument?*

[85] I am satisfied that the Subject Properties are instruments.

2. *Is the Defendant an Uninvolved Interest Holder: s. 12 and 13 of the Act?*

[86] I am satisfied that the defendant is not an uninvolved interest holder, for the following reasons:

1. Section 12(1)(b) excludes from the definition of "uninvolved interest holder" a person who "directly or indirectly" engaged in the unlawful activity.
2. The defendant was "directly" engaged by virtue of his wilful blindness about the grow-ops, amounting to knowledge. Alternatively, if his wilful blindness is not "direct" engagement, then surely it amounts to "indirect" engagement.
3. Section 12(2) of the *Act* notes that indirect engagement "includes ... a person who had knowledge ...". Since wilful blindness amounts to knowledge, this section captures the defendant's involvement: *Sansregret*; *Laronde*.

4. The question is what the Legislature meant by the phrase "indirectly engage". Clearly, the statute is not intended to create absolute or strict liability. A reasonably diligent person whose property was used for unlawful activity, or even an individual who made an error in judgment, is protected by s. 12.

5. The scheme and object of the *Civil Forfeiture Act* has been explained by the Supreme Court of Canada in *Chatterjee* and by our Court of Appeal in *British Columbia (Director of Civil Forfeiture) v. Onn*, 2009 BCCA 402 at para. 14 . The scheme is civil and proprietary liability. The object is removing the profits of illegal activity (disgorgement rationale), compensation of its individual and collective victims (compensation rationale), and prevention of future harm by removing the means of illegal activity (preventative rationale).

6. Disgorgement is the primary rationale for proceeds liability. The compensatory rationale and the preventative rationale are the primary rationales for instrument liability, and so should be used to frame the scope of the defence specific to instrument liability – namely the "uninvolved interest holder" defence.

7. These rationales support removing those who indirectly engage in unlawful activity through culpably negligent conduct from the scope of the "uninvolved interest holder" defence.

8. Note that if a person establishes he or she is an "uninvolved interest holder" a protection order "must" issue: s. 13(1). Surely, that kind of absolute protection should not necessarily be available to those who are wilfully blind.

9. Importantly, the *Civil Forfeiture Act i*s not criminal legislation. Unlike criminal punishment, including criminal forfeiture, it is not intended to be denunciatory, retributive or punitive.

10. In this case, the defendant's wilful blindness is at the extreme end. It is inexplicable and incomprehensible. The defendant rented uninhabitable houses to people he did not know through a person who he barely knew. He had suffered consequences as the result of similar conduct on three prior properties. If ever there was wilful blindness amounting to bad faith, this was it.

11. It follows that he is not an uninvolved interest holder as defined in s. 12 of the *Act*.

3. *Interests of Justice: s. 6(1) of the Act*

[87] This analysis will also be dealt in the Interests of Justice section later in this judgment.

CONCLUSIONS WITH RESPECT TO WHAT THE DIRECTOR MUST PROVE

[88] Section 5 places the onus on the Director to prove the following:

1. What property, if any, is proceeds of unlawful activity?
2. What property, if any, is an instrument of unlawful activity?

[89] With regard to the foregoing, I am satisfied that the Director has proven on a balance of probabilities the following:

1. The rents received from the Subject Properties are the proceeds of unlawful activity. The amount of these proceeds is $24,000. These were used, by analysis of the relevant sections in the *Act*, to decrease the mortgage on the properties. The result is that an interest in the Subject Properties in the amount of $24,000 is the proceeds of unlawful activity.
2. The three Subject Properties are instruments of unlawful activity.

[90] The Director has failed to satisfy the onus of establishing that any other cash or payments, other than the $24,000 rent received, was the proceeds of unlawful activity or resulted in any interest in the Subject Properties being the proceeds of unlawful activity.

[91] The Director has failed to satisfy the onus of establishing the amount of any increase in the value of the property or the amount of any decrease in the mortgage obligation as the result of unlawful activity.

CONSEQUENCES

[92] Where a court has found that a portion of an interest in property is “proceeds”, then forfeiture of that portion is mandatory (subject only to s. 6 of the *Act*): s. 5(1) of the *Act*.

[93] Where a court has found that property is an “instrument”, forfeiture is mandatory (subject only to s. 6 of the *Act*): s. 5(2) of the *Act*.

[94] It follows, that with respect to proceeds, an interest in the Subject Properties equal to $24,000 must be forfeited, subject to s. 6.

[95] It follows that with respect to the “instrument” analysis, the entirety of the Subject Properties must be forfeited, subject to s. 6.

[96] I turn now to a consideration of s. 6 of the *Act*.

INTERESTS OF JUSTICE

[97] Under s. 6(1), the defendant may try to show that forfeiture or, alternatively, total forfeiture is "clearly not in the interests of justice". If the court agrees, it may refuse to issue a forfeiture order, limit the application of the forfeiture order or put conditions on the forfeiture order.

[98] Section 6(1) of the *Act* is as follows:

> 6 (1) If a court determines that the forfeiture of property or the whole or a portion of an interest in property under this Act is clearly not in the interests of justice, the court may do any of the following:
>
> (a) refuse to issue a forfeiture order,
>
> (b) limit the application of the forfeiture order;
>
> (c) put conditions on the forfeiture order.

[99] The section is available as a defence with respect to both the proceeds analysis and the instrument analysis.

[100] Once liability has been proven, the onus is on the defendant to establish that the defence is applicable. Even then, it remains a discretionary option for the court to allow, depending upon the circumstances.

[101] Section 6 of the current version of the *Act* was created by amendment in June of 2010, that is, after the alleged “unlawful activity” and after this action was commenced. It may be important to determine which *Act* is applicable to these proceedings.

Which Version of the *Act* is Applicable?

[102] There are two differences between the prior version of s. 6 (which was in force at the time of the "unlawful activity") and the current version. In the prior version:

1. Section 6(1) did not contain the word "clearly" in the phrase "[clearly] not in the interests of justice"; and
2. Section 6 consisted only of subsection 1, and did not contain subsection 2 at all.

[103] The prior version of s. 6 was as follows:

> If a court determines that the forfeiture of property or the whole or a portion of an interest in property under this Act is not in the interests of justice, the court may
>
> (a) refuse to issue a forfeiture order,
>
> (b) limit the application of the forfeiture order, or
>
> (c) put conditions on the forfeiture order.

[104] The defendant argues that the *Act* in force at the time of the unlawful activity is the applicable *Act*:

1. While it is generally acknowledged that procedural legislation may have retroactive or retrospective application, this is not so for substantive legislation; especially, substantive legislation which minimizes an available defence at the time of the alleged wrongful activity.
2. Defences to liability are not procedural, but substantive.
3. The addition of the word "clearly" in subsection 1 is a substantive change which minimizes the available defence.
4. The relevant time frame for a civil statute creating a cause of action is the time the act or omission giving rise to the cause of action occurred: *Dikranian v. Quebec (Attorney General)*, 2005 SCC 73 at para. 40.

[105] I am satisfied that the current version of the *Act* is the applicable one. My reasons are as follows:

1. There is no dispute that legislation is generally presumed not to have retroactive or retrospective application. The exceptions are

procedural provisions, provisions that confer a benefit or provisions that benefit the public interest. As a presumption, the "rule" against retroactive or retrospective application can be rebutted by clear statutory words. Ruth Sullivan, *Driedger on the Construction of Statutes*, 3d ed. (Toronto, Ont.: Butterworths, 1994) at 508.

2. In the absence of express statutory provision, the current s. 6 would apply only to acts and omissions occurring after June 2010.

3. However, in the *Act*, the Legislature has chosen to rebut the presumption with express statutory provision.

4. Section 2(1) states: "This Act applies to an unlawful activity occurring before, on or after the date this section comes into force."

5. If the argument of the defendant were correct, it would mean that this *Act* would not apply to unlawful activity occurring before 2005 (when the *Act* first came into force). However, this court has previously recognized that s. 2(1) provides for retrospective application and consequently rebuts the ordinary presumption that legislation does not have retroactive or retrospective application: *British Columbia (Director of Civil Forfeiture) v. Angel Acres Recreation and Festival Property Ltd.*, 2007 BCSC 1648 at para. 23.

6. Finally, it is clear that this legislation is not criminal legislation, nor is its purpose to administer punishment or seek retribution.

[106] In any event, because of the decision which I have come to with respect to this matter, the addition of the word "clearly" would have no bearing on my decision in this case. In other words, because of my assessment of the evidence, my decision would be unchanged even if the word "clearly" was not in the section under consideration.

Applicability of Section 6(1)

[107] There are no decided cases in British Columbia dealing with the interpretation of s. 6. However, I am referred to several Ontario decisions for guidance. The B.C. *Act* is modeled on the Ontario legislation with some differences. The "interests of justice" test in Ontario includes the word "clearly".

[108] The Director argues as follows:

1. The phrase “interests of justice” has never before been applied in this province in the context of a civil forfeiture proceeding. While it is obviously open ended, it must be applied in a principled way. It allows the court to develop an open ended set of categories based on generally recognized legal principles to excuse property from forfeiture when forfeiture would be unjust.
2. One such principle would be that a wrongdoer should not be allowed to keep the proceeds of his wrong. By analogy, this principle has found expression in the defence of “juristic reason” in the cause of action in unjust enrichment, as set out in *Garland v. Consumers’ Gas Co.*, 2004 SCC 25.
3. Another such principle would be *de minimus* (if forfeiture was grossly disproportionate to the harm of the offence).
4. Another principle is that civil forfeiture cannot be punitive and should be rejected if it would not promote the purposes of disgorgement, reasonable compensation and prevention of future harm.
5. These were enormously sophisticated grow operations, posing serious safety concerns to the community. Huge amounts of money were at stake. Prevention is clearly in order in light of the defendant’s involvement with grow-ops on three prior properties.
6. The properties are not personal residences. They are investment properties that the defendant always intended to tear down.
7. Where there has been knowledge or imputed knowledge by wilful blindness in return for compensation, then there should be a complete forfeiture of the Subject Properties. Relief, or even partial relief, is “clearly not in the interests of justice”.

[109] The defendant argues as follows:

1. The Ontario approach provides useful guidance. Reference is made to: *Ontario (Attorney General) v. 1140 Aubin Road, Windsor and 3142 Halpin Road, Windsor (In Rem*), [2008] O.J. No. 5209 (Ont. S.C.J.); *Ontario (Attorney General) v. Nock*, 2008 CanLII 4256, *(sub nom. Ontario (Attorney General) v. 746064 Township Road #4 Blandford-Blenheim Township R.R. #5 Woodstock, Ontario (PIN: 00266-0080 (R) (In Rem)* [2008] O.J. No. 446 (Ont. S.C.J.).
2. Principles enunciated in forfeiture cases decided under the *CDSA* may provide guidance here. While those cases must be viewed in the context of having been made under a section which is worded differently than the one under consideration

here, the factors required to be considered, as determined in those cases, are strikingly similar to those factors which have emerged from the Ontario cases already referred to.

3. Reference is made to a number of *CDSA* cases, including *R. v. Craig*, 2009 SCC 23; *R. v. La*, 2008 ABPC 217, *R. v. Erjo Investments Ltd.*, 2005 SKPC 14; *R. v. To*, 2005 ONCJ 463.
4. The defendant notes that s. 19.1(3) of the *CDSA* allows for the possibility of relief from forfeiture where it would be "disproportionate to the nature and gravity of the offence, the circumstances surrounding the commission of the offence and the criminal record" of the person in question.
5. Where the "proceeds" amount to $24,000, forfeiture of all three houses which comprise the Subject Properties would be out of all proportion, on any consideration of the interests of justice.

[110] The following principles emerge from a consideration of the foregoing noted Ontario cases and *CDSA* cases. I am satisfied that these principles will also be applicable when conducting an Interests of Justice analysis under the British Columbia *Act*:

1. It is not possible or desirable to prepare an exhaustive list of factors bearing on the "interests of justice".
2. The appropriate factors to be considered in each case, must be determined on a case-by-case basis.
3. The weight of the appropriate factors to be applied must be determined on a case-by-case basis.
4. The interrelationship of relevant factors in any given case must be determined on a case-by-case basis.
5. The legislation must not be used as a means of avoiding the criminal standard of proof.
6. Punishment is not a factor.

[111] A non-exhaustive list of relevant factors to be considered in cases of this kind includes the following:

1. proportionality;
2. fairness;
3. the degree of culpability, complicity, knowledge, acquiescence, or negligence;

4. the extent of the problem in the community of the sort of unlawful activity in question;
5. the need to remove profit motive;
6. the need for disgorgement of wrongfully obtained profits;
7. the need for compensation;
8. prevention of future harm;
9. general deterrence.

[112] The degree of culpability, complicity, knowledge, acquiescence, or negligence is not relevant to any consideration of a punitive remedy. However, where the degree of those factors is minimal or reduced, their consideration may be relevant to the question of whether the interests of justice call for some relief from forfeiture.

[113] Proportionality and fairness will always be the dominant considerations. They are necessarily related and will often include a consideration of the following:

1. A balancing of the impact of a forfeiture order on, and a balancing of the interests of, the state, the defendant, and other affected parties, such as innocent victims, and/or innocent spouses or children of the defendant.
2. Where the extent of forfeiture of real property is under consideration, the following questions become relevant:

    (a) how much equity is there in the property?

    (b) how much was the defendant's legitimate investment in the property before criminal activity commenced?

    (c) how much equity has built up as a result of market conditions?

    (d) how much equity has built up since an interim preservation order was granted under the *Act*?

3. Would forfeiture require a drastic lifestyle change for the defendant and/or for innocent family members?
4. Would forfeiture affect employment opportunities?
5. The magnitude of the unlawful activity and/or of its profits, or potential profits.

[114] A purely mathematical analysis will rarely, if ever, be the most suitable approach.

[115] The evidence in this case which suggests that complete forfeiture is appropriate, and no relief from justice should be granted, includes the following:

1. The Rai family does not live in any of the Subject Properties, and therefore, will not be dispossessed from their home.
2. Complete forfeiture will not make the defendant, or his family, impecunious.
3. There were three properties and houses with grow-ops, not merely one.
4. The properties were unoccupied. Their sole and complete function was to serve as grow-ops, and nothing else.
5. The defendant had previously received notice about apparent grow-ops in three homes which he previously owned.
6. By the time he bought House #3, the grow-ops in House #1 and #2 were completely underway.

[116] The evidence in this case which suggests that complete forfeiture is "clearly not in the interests of justice", and that relief, either full or partial, should be granted, includes the following:

1. The defendant appears to be a decent, and very hard working family man.
2. With respect to House #1 and House #2 at the time they were purchased, they were completely without the aura of unlawful activity. Those two houses were bought for legitimate business reasons. The down-payments on those two houses totalled $249,250.
3. The defendant agrees, through his counsel, that the evidence establishes he lacked diligence and should have been more responsible. It follows, he submits, that some sort of forfeiture may be appropriate, but it should be something less than full forfeiture.
4. The defendant made down-payments on the Subject Properties totalling $356,250.
5. The equity in the properties is likely greater than $356,250 although exactly how much greater is unclear. It is clear that the defendant has made regular mortgage payments from the time of purchase to the present.

6. Since the searches, he has apparently changed his practices in terms of screening tenants, having appropriate paperwork, and arranging for inspections.

[117] The defendant argues that "proportionality" should be the dominant factor to be considered here. He argues that, since the defendant's "profit" does not exceed $24,000, it will be vastly out of proportion for the remedy in this case to involve forfeiture of the entirety of the equity in the properties. Even without considering the question of any increase in equity, the disproportionality of such a result is striking if one only takes into account that the plaintiff made down-payments totalling $356,250.

[118] While I accept that argument as worthy of consideration, I also note that it ignores the following:

1. The question of proportionality requires a consideration of factors beyond the financial consequences for the defendant, including the consequences for the state.
2. This approach also ignores the fact that this analysis involves more than a simple mathematical evaluation of potential financial gain, and potential financial consequences.
3. The question of the financial consequences for the defendant is only one part of the financial issues to be considered. In addition, consideration must be given to the fact that the value of the marijuana in the three houses at the time of the searches was between $282,000 and $507,000.
4. This approach ignores the fact that, while he personally was apparently not receiving the full benefit of those funds, other criminals were receiving them, or were intended to receive them.
5. This approach also ignores the fact that liability has been found not only on the "proceeds" analysis (which would restrict the forfeiture to an interest in property equal to $24,000), but that liability has also been found on the basis of the instrument analysis.
6. This approach also ignores the fact that there has been an increase in the value of the property, and a decrease in the debt reduction, although I have not been able to determine the amounts.

[119] Considering all of the foregoing, I am satisfied that full forfeiture is "clearly not in the interests of justice". Some relief is called for. It is impossible to determine the amount of relief by any mathematical formula, although I am satisfied that it should be for considerably less than 50 percent of the amount to be forfeited.

[120] The amount of relief that I consider appropriate is approximated by the value of one of the houses, based on the 2008 assessments. Rather than order a sale of all three houses with a direction that a portion of the sale funds be returned to the defendant, I intend to grant relief by exempting one of the three houses from forfeiture. That house is House #2. I have chosen House #2 because its value (based on the 2008 assessments) best approximates the amount of relief that I consider appropriate. Furthermore, as the most recent property assessment values before me are from 2008, I am unable to determine both the precise value of and the equity in the properties, as of 2011.

[121] While it is impossible, on the evidence, to determine the amount of equity currently in the Subject Properties, this relief will return to the defendant a house assessed in 2008 at $528,600. Houses #1 and #3 will be forfeited. Their total assessed value in 2008 was $997,200.

[122] I would have granted greater relief from forfeiture, under s. 6(1) if:

1. Only one house was involved and the defendant and his family lived in the house being forfeited.
2. The forfeiture of Houses #1 and #3 would result in a serious economic disadvantage for the defendant's wife or children.
3. The grow-ops included a much smaller number of plants intended for personal use.

[123] I would have provided less relief from forfeiture if:

1. The evidence indicated that there had been firearms found by the police during the searches, or associated with any of the houses at any time after the grow-ops commenced.
2. The evidence indicated that organized crime had some association with the Subject Properties or with the defendant.

3. The defendant had any direct personal and active involvement in the production or distribution of the marijuana at any time since the Subject Properties were purchased.

4. The evidence established that the defendant had obtained proceeds greater than the $24,000 rent previously referred to.

[124] I exercise my discretion under s. 6(1)(b) to limit the application of the forfeiture order, in the above-noted way.

[125] I have come to the foregoing conclusion on the basis that the current version of s. 6(1) is applicable, that is, the version that contains the words “clearly not in the interests of justice”. Having said that, I am satisfied that if the word “clearly” was not included in the section, I would have arrived at the same conclusion. In the circumstances of this case, applying the standards “not in the interests of justice” would have led me to the same result as the phrase “clearly not in the interests of justice”. It follows that, if I am wrong in determining that the current version of the *Act* is applicable, my decision would have been the same, even under the prior version of the *Act*.

REMEDY

[126] I make the following orders pursuant to s. 14 of the *Act*:

1. With respect to House #1 and House #3, they are hereby forfeited in full to, and will be transmitted to, the Director, subject to the following conditions:

   (a) subject to all legal and legitimate prior encumbrances;

   (b) the Director may deal with the property and/or dispose of them in such manner as he considers appropriate, in accordance with the law;

   (c) the defendant shall retain no interest of any kind in the properties, or to any proceeds that the Director may acquire as a result of dealing with them; and

   (d) the defendant shall deliver full vacant possession forthwith to the Director.

2. With respect to House #2, I refuse to issue a forfeiture order. It shall be returned to the defendant, as soon as practicable,

subject to any other legal and legitimate encumbrances or interests which may exist.

3. If the parties are unable to resolve the question of costs, they may arrange a convenient time to appear before me.

"Silverman J."

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The Honourable Mr. Justice Silverman