CITATION: Attorney General of Ontario v. CDN. $46,078.46 , 2010 ONSC 3819
COURT FILE NO.: CV-10-404140
DATE: 20100705

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Attorney General of Ontario, Applicant

AND:

$46,078.46 in Canadian Currency (*In rem*), Respondent

BEFORE: D. M. Brown J.

COUNSEL: M. Young, for the Applicant (on *ex parte* application)

HEARD: June 16, 2010; with subsequent written submissions.

REASONS FOR DECISION

I. Overview

[1] The Attorney General of Ontario ("AGO") moves *ex parte* under the *Civil Remedies Act, 2001*[1] for an interlocutory order preserving $46,078.46, the balance left from $74,980 seized by the Ontario Provincial Police on October 16, 2009 from Mr. Remus Petran.

[2] The motion came on in the Toronto Region Motions Scheduling Court on an urgent basis, as is the practice of AGO counsel in Toronto. After indicating that I would reserve my decision, Ms. Young filed further written submissions with my office.

[3] For the reasons set out below, I dismiss the motion.

II. Events surrounding the seizure of the cash

A. The October 16, 2009 seizure

[1] S.O. 2001, c. 28.

[4] Officer Paul Barkley of the OPP deposed that just after midnight on October 16, 2009, he observed a 2000 Mazda travelling west on Highway 401 near Morrisburg, Ontario. Since the car was going below the posted speed limit and weather conditions were good, Officer Barkley decided to initiate a traffic stop to determine the sobriety of the driver.

[5] Mr. Petran, a Toronto resident, was driving the car. When stopped, he produced his driver's licence and a registration showing that the car was owned by Mr. Paul Nita. In response to Officer Barkley's questions, Mr. Petran stated that he was returning from a visit of a "couple of days" with his grandparents in Montreal, although the officer did not see any luggage in the car. Officer Barkley performed a CPIC search on Mr. Petran which revealed some 2007 charges on credit card offences, all of which had been stayed.

[6] According to the officer Mr. Petran consented to a search of the car. A gym bag was located in the trunk; it contained Thai boxing gear. When Mr. Petran opened a knapsack, Officer Barkley observed a white plastic bag containing bundled currency, including a bundle of $50 bills near the top of the bag. Mr. Petran stated that he had $70,000 in the bag, explaining that he worked in construction and was paid in cash.

[7] Officer Barkley arrested Mr. Petran for possession of property obtained by crime and took him to the OPP Morrisburg detachment. The car was towed to the detachment for a further search, which disclosed numerous personal documents of Mr. Petran.

[8] Later that morning, after Mr. Petran had talked with legal counsel, Officer Barkley conducted a videotaped interview of him. Mr. Petran stated that the people he had visited in Montreal were not his blood relatives, but persons whom he referred to as his grandparents. He also stated that he had only visited them for a few hours the previous day.

[9] Following the interview Mr. Petran was released unconditionally without any criminal charges and the car was released. The OPP detained the seized currency, pending further investigation.

[10] A week later, on October 22, 2009, Officer Barkley completed a report to a justice pursuant to section 489.1 of the *Criminal Code* and obtained an Order of Detention for the seized cash pursuant to section 490(1) of the *Criminal Code*. The Detention Order stated that it would expire three months from the date of seizure – i.e. by January 16, 2010 – unless charges had been laid before that date.

B. Evidence of reasonable belief regarding proceeds or instrument of unlawful activity

[11] In his affidavit Officer Barkley did not express any personal view as to whether reasonable grounds existed to believe that the seized cash was the proceeds, or instrument, of unlawful activity.

[12] Detective Constable Richard Weekes of the OPP's Asset Forfeiture Unit, Organized Crime Enforcement Bureau, deposed that in the early morning of October 16, 2009, he examined and counted the cash seized from Mr. Petran. The cash consisted of eight bundles, mostly of $20

bills, with one bundle of $50 bills. The cash totaled $74,980. Detective Weekes deposed that based on his experience in investigating drug and other profit-motivated unlawful activities, he formed the belief that the bundling and packaging of the large amount of cash suggested that:

> [I]t was money associated with drug trafficking or some other profit-motivated unlawful activity and that, on the night of October 16, 2009, Remus Petran was acting as a courier engaged in profit-motivated criminal enterprise.

III. Events following the seizure and ordered detention of the cash

[13] No criminal charges were laid against Mr. Petran.

[14] The Detention Order expired in accordance with its terms on January 16, 2010. No application for further detention of the cash was made.

[15] On December 3, 2009, before the Detention Order had expired, Detective Weekes informed the Canada Revenue Agency of the seizure of cash from Mr. Petran. Thereafter Detective Weekes received two demand letters from the Canada Revenue Agency – one dated March 29, 2010, and the other April 16, 2010 - requesting that the OPP forward $16,924.56, later revised to $28,901.54, of the cash seized from Mr. Petran to the Canada Revenue Agency. The AGO did not include in its supporting materials the communication from Detective Weekes to the Canada Revenue Agency, or either of the demand letters.

[16] On April 29, 2010, over three months following the expiration of the Detention Order, Detective Weekes forwarded $28,901.54 of the seized cash to the Canada Revenue Agency.

[17] According to Detective Weeks, no one ever contacted the OPP to seek the return of the seized cash. Detective Weekes further deposed:

> On March 30, 2010, based on my belief that the property seized from Remus Petran is a proceed of crime contrary to section 354(1)(a) of the *Criminal Code* and is proceeds and/or instruments of unlawful activity as defined by the *Civil Remedies Act*, I made a submission to the Attorney General of Ontario, pursuant to the *Civil Remedies Act*, asking the Attorney General to consider commencing civil forfeiture proceedings in relation to $46,078.46 of the money seized by the OPP from Remus Petran on October 16, 2009.

IV. Proceedings taken by the Attorney General of Ontario

[18] By motion record filed with the court at Motions Scheduling Court on June 16, 2010, the AGO sought an *ex parte* interlocutory preservation order pursuant to sections 4 and 9 of the *Civil Remedies Act* in respect of the $46,078.46 which remained in the hands of the OPP. The supporting affidavits of the OPP officers were sworn on June 1 and 11, 2010.

V. Analysis

A. The general scheme of the *Civil Remedies Act*

[19] Sections 3 and 8 of the *CRA* enable the AGO to apply to this court for orders forfeiting property in Ontario to the Crown in right of Ontario if the court finds that the property is proceeds of, or an instrument of, unlawful activity. Sections 4 and 9 of the *CRA* create a process by which the AGO may move for interlocutory orders for the preservation, management or disposition of any property that is the subject of a proceeding, or intended proceeding, under sections 3 or 8 of the Act. The *CRA* permits motions for such interlocutory orders to be brought without notice: "An order made under subsection (1) may be made on motion without notice for a period not exceeding 30 days": *CRA*, ss. 4(3) and 9(3).

[20] A court is required to make an interlocutory order if the court is satisfied that there are reasonable grounds to believe that the property is proceeds of, or an instrument of, unlawful activity "except where it would clearly not be in the interests of justice": *CRA*, ss. 4(2) and 9(2). To satisfy this statutory test, the AGO is not required to prove any particular offence against any particular offender.[2] The *CRA* provides that an offence may be found to have been committed even if no person has been charged with the offence or, if a person was charged, the charge was withdrawn or stayed, or the person acquitted.[3]

[21] The structure of the CRA contemplates that in the event the court grants an interlocutory preservation order, the AGO will proceed to a hearing of its main application for forfeiture of the property. If, on the main application, the court finds that the property is proceeds of, or an instrument of, unlawful activity, the *CRA* requires the court to protect the interest in the property of a legitimate or responsible owner: *CRA*, ss. 3(3) and 8(3). The case law places the onus on an interested party to establish that he is a legitimate or responsible owner.[4]

B. Application of general principles to this motion

[22] On the evidence filed, I would be inclined to conclude that reasonable grounds exist to believe that the cash seized by the OPP constituted either the proceeds of, or an instrument of, unlawful activity – the amount of the cash found, its mode of packaging, the inconsistent explanations given by Mr. Petran for the purpose and duration of his visit to Montreal would all support such a conclusion. However, two aspects of this case lead me to find that it would clearly not be in the interests of justice to grant the *ex parte* interlocutory preservation order sought by the AGO.

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[2] *Chatterjee v. Ontario (Attorney General)*, [2009] S.C.J. No. 19, at para. 21.
[3] *CRA*, s. 17(2).
[4] *Ontario (Attorney General) v. Chow*, [2003] O.J. No. 5387, at

The delay in commencing this motion

[23] First, I am troubled by the five month delay in bringing this motion for an interlocutory preservation order following the expiration of the Detention Order on January 16, 2010. Section 490(6) of the *Criminal Code* provides that where the period of detention provided for in an order has expired and proceedings have not been instituted in which the thing detained may be required, "the prosecutor, peace officer or other person shall apply to a judge or justice…for an order in respect of property under subsection (9) or (9.1)." Applications brought under section 490(9) or (9.1) can result in (i) the return of the property to the person from whom it was seized, (ii) its return to its lawful owner, (iii) its forfeiture to Her Majesty, or (iv) its continued detention. No application was brought to extend the Detention Order or to seek an order under sections 490(9) or (9.1) of the Code.

[24] According to the affidavit of Detective Weekes, over two months passed after the expiration of the Detention Order until the OPP decided to request that the AGO commence forfeiture proceedings under the *CRA* in respect of the seized cash. A further two and half months passed until the AGO commenced those proceedings. In sum, close to five months went by following the expiry of the Detention Order before this interlocutory motion was brought by the AGO.

[25] In *Attorney General of Ontario v. 615 Stanley Street* I wrote:

> [8] I do share the concern voiced by Corbett J. in his decision [in *Ontario (Attorney General) v. Cole-Watson*, [2007] O.J. No. 1742 (S.C.J.)] about the need for the Crown to move expeditiously for an interlocutory preservation order against property which is released under a section 490(9) order…While I agree that if the Crown wishes to retain property ordered released beyond the 30 day appeal period it should either appeal the release order or seek its extension, I query whether a subsequent application under the *CRA* must be brought within the 30 day appeal period prescribed by the *Criminal Code*. The remedy available to the Crown under the *CRA* is quite distinct from the regime governing seized materials established by section 490 of the *Criminal Code*. I doubt that the failure of the Crown to appeal a release order would preclude bringing a later motion for an interlocutory preservation order under the *CRA*. In any event, that issue does not need to be resolved on this motion given the language of the Release Order in this case.
>
> [9] That said, I do agree completely with Corbett J. that the Crown must comply with a release order and, absent an appeal or a request for an extension, the Crown must release the property and cannot "hang onto" it simply for the purpose of buying time to prepare a motion for a preservation order under the *CRA*. To so disregard the clear terms of a court order would show great disrespect towards the administration of justice and could well operate as a factor leading a court to conclude that "it would clearly not be in

the interests of justice" to grant a preservation order under sections 4(2) or 9(2) of the *CRA*.[5]

[26] Five months elapsed between the expiration of the Detention Order and the commencement of these proceedings under the *CRA*. According to the chronology contained in the affidavit of Detective Weekes, over half the delay occurred after the OPP had requested the AGO to commence *CRA* proceedings. Section 490(6) of the *Criminal Code* required a prosecutor or peace officer to apply for an order under section 490(9) or (9.1) if the period of detention had expired and proceedings had not been instituted in which the thing detained might be required. No such application was brought. Nor did the AGO move with reasonable dispatch to initiate proceedings under the *CRA*. I find that delay troubling. No explanation for the delay was offered in the supporting affidavits.

[27] The *Criminal Code* creates a regime for the detention of seized property. The *CRA* establishes a civil regime to deal with property, including seized property, that is the proceeds of, or an instrument of, unlawful activity. These regimes enable prosecutors, peace officers or the AGO to apply for the continued detention or the interlocutory preservation of seized property. However, they do not permit those government actors to detain seized property without some form of legal authorization. Even allowing for the inevitable delays associated with inter-agency communication between the OPP and the AGO, or delays involved in preparing materials for court, I regard the unexplained and unreasonable delay of five months displayed in this case between the expiry of the Detention Order and the initiation of these *CRA* proceedings as a factor in concluding that it would clearly not be in the interests of justice to grant a preservation order sought by the AGO.

The OPP's distribution of some seized cash to the Canada Revenue Agency

[28] Even more troubling is what the OPP did with the seized money. Prior to the expiration of the Detention Order the OPP notified the Canada Revenue Agency that it had seized money from Mr. Petran. Copies of that communication and the resulting demand letters from the Canada Revenue Agency were not included in the supporting affidavit material. They should have been. On an *ex parte* motion the court is entitled to receive full and complete disclosure of all relevant materials from the moving party. The omission of those communications from the motion record was a material one.

[29] The evidence filed by the AGO did not disclose or explain the legal basis upon which the OPP advised the Canada Revenue Agency that it possessed the seized cash. Nor did the record explain the legal basis upon which the OPP, following the expiration of the Detention Order, released to another government agency money that it did not own, without notice to the person from whom the cash was seized or a court order. Would Mr. Petran, as taxpayer, have enjoyed a

[5] 2010 ONSC 1229 (CanLII).

basis to resist payment of a demand from the Canada Revenue Agency? One cannot tell because the materials are silent on the point.

[30] For one government agency to distribute to another property it did not own, without notice to the purported owner of the property or without the sanction of a court order, may strike those agencies as an efficient, uncluttered way in which to collect tax. But the AGO should understand that such conduct, absent adequate explanatory evidence, will raise questions in the mind of a court about the propriety and legality of such conduct. Does some statutory basis exist to justify such conduct? I cannot tell, again because the materials are silent on the point.

[31] In her further written submissions counsel for the AGO argued that the police are a separate arm of the government from the AGO. Therefore, she contended, any conduct by the police with the seized property could not affect the remedy sought by the AGO under the *CRA*. I do not think that such a broad proposition can be teased from the language of sections 4(2) and 9(2) of the *CRA*. Under those sections a court must grant an interlocutory preservation order if it is satisfied that reasonable grounds exist to believe the property is the proceeds of, or an instrument of, unlawful activity "except where it would clearly not be in the interests of justice." In my view, the phrase, "except where it would clearly not be in the interests of justice", entitles the court on an interlocutory motion to review all events relating to the property following its seizure and initial detention. To limit the review of state conduct in respect of the property to that following the assumption of the matter by the Civil Remedies Office of the AGO could require a court to ignore prior unlawful conduct by a government actor regarding the property. That would constitute a very curious notion of "the interests of justice".

[32] The AGO submitted that the phrase, "in the interests of justice", as used in the *CRA* should be understood as referring simply to the purposes of the *CRA* as expressed in section 1 of that Act. I do not agree. First, were that the legislative intent, one would expect to see the legislative draftsman use a phrase such as "except where it would clearly not be in accordance with the purposes of this Act." That phrase was not used, which leads me to conclude that the notion of "the interests of justice" in the *CRA* is a far broader one than simply the purposes of that Act.

[33] Second, the jurisprudence dealing with forfeiture applications under the *CRA* has not so limited the meaning of the concept. In *Ontario (Attorney General) v. 746064 Township Road #4*,[6] Rady J. held that the interests of justice are fundamentally concerned with proportionality. Pomerance J., in *Ontario (Attorney General) v. 1140 Aubin Road, Windsor*,[7] agreed with Rady J. that the ultimate question is whether forfeiture of property is a proportionate remedy, and she saw the standard of "interests of justice" as one that would evolve on a case-by-case basis.[8] She also concluded that "the interests of justice test set out in the Civil Remedies Act is similar to the

[6] [2008] O.J. No. 446 (S.C.J.)
[7] [2008] O.J. No. 5209 (S.C.J.). Under appeal.
[8] *Ibid.*, para. 25.

discretion vested in judges asked to issue search warrants."[9] Kiteley J, in *Ontario (Attorney General) v. $9,616.98*,[10] concurred with the analysis of Pomerance J.

[34] In any event, those three cases concerned the hearing of the application for forfeiture by the AGO. The case before me involves an *ex parte* motion for an interlocutory preservation order. On such a motion the AGO, like any other litigant, must make full and fair disclosure to the court of all material facts and law relating to the subject-matter of the motion and the relief sought. Like any party moving *ex parte* the AGO must not only disclose the facts and law supporting his motion, but also identify and explain any weaknesses in the case – i.e. in effect put before the court arguments that the responding party might advance if he had been given notice of the motion. Such a requirement is standard fare on *ex parte* motions, such as those for certificates of pending litigation. The AGO should not operate under any lesser obligation on *ex parte* motions under sections 4 and 9 of the *CRA*.

[9] *Ibid*., para. 30.
[10] 2010 ONSC 244. Under appeal.

VI. Conclusion

[35] On the present *ex parte* motion two significant evidentiary gaps exist in respect of material issues: (i) no explanation was given by the AGO for the delay in bringing this motion following the expiration of the Detention Order, and (ii) no justification was offered for the basis on which the OPP notified the Canada Revenue Agency about the cash seized and subsequently distributed some of the seized funds to that agency without the consent of Mr. Petran or a court order. Notwithstanding my inclination that the evidence established reasonable grounds to believe that the property was the proceeds of, or an instrument of, unlawful activity, in view of those evidentiary gaps I conclude that the AGO has failed to make full and fair disclosure of material facts on this *ex parte* motion. That failure operates as a very significant factor leading me to conclude that "it would clearly not be in the interests of justice" to grant the interlocutory *ex parte* preservation order sought by the AGO.

[36] I considered whether, in light of that conclusion, the appropriate disposition of the motion should be to dismiss it, without prejudice to the AGO moving again on better materials for an interlocutory *ex parte* order. I have decided not to adopt such a course. I have commented previously on the need for courts to scrutinize interlocutory motions by the AGO under the *CRA* with great care to ensure that he discharges the evidentiary burden imposed by the Act,[11] as well as the need for the AGO to file proper materials in support of *ex parte* orders under the Act.[12] The requirement to make full and fair disclosure on *ex parte* motions should be well known to the AGO. Having concluded that the AGO has failed to meet that standard for disclosure on this *ex parte* motion, the appropriate course is to dismiss the motion.

[37] For the reasons given above, I dismiss this motion, and I order the AGO to serve a copy of these Reasons on Mr. Petran within 15 days.

D. M. Brown J.

Date: July 5, 2010

[11] *Ontario (Attorney General) v. 615 Stanley Street*, 2010 ONSC 1229 (CanLII)
[12] *Ontario (Attorney General) v. $17,247.10*, 2009 CanLII 43642 (ON S.C.).